



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

FROM
THE BUSINESS
HISTORICAL
SOCIETY, INC.



IN MEMORY OF
CHARLES A. MOORE
FOUNDER AND FIRST PRESIDENT OF MANNING,
MAXWELL & MOORE, INC.

GIFT OF
MARY CAMPBELL MOORE
CHARLES A. MOORE, JR.
EUGENE M. MOORE

In RD
LB

STREET =

RAILWAY REPORTS

ANNOTATED

(Cited St. Ry. Rep.)

REPORTING THE

Electric Railway and Street Railway Decisions

OF THE

FEDERAL AND STATE COURTS

IN THE

UNITED STATES,

With Combined Index to Notes and Index Digest of Cases in Volumes 1 to 8 inclusive.

EDITED BY

AUSTIN B. GRIFFIN, OF THE ALBANY BAR,
AND

ARTHUR F. CURTIS, OF THE DELHI BAR.

VOL. VIII.



ALBANY, N. Y.
MATTHEW BENDER & COMPANY
1913

VSE
S915
v.8

July 13, 1934

11513-S

COPYRIGHT, 1913
BY MATTHEW BENDER & COMPANY.

759

HAMILTON PRINTING COMPANY,
ALBANY, N. Y.

GIFT OF
O. A. MOORE

TABLE OF CASES REPORTED.

	PAGE
Ahern v. Boston Elevated Ry. Co. (Mass.)	582
Alabama City, G. & A. R. Co. v. Heald (Ala.)	194
Albrecht v. Rochester, S. & E. R. R. Co. (N. Y.)	321
Alexander v. New Orleans Ry. & Light Co. (La.)	454
Altwein v. Metropolitan St. Ry. Co. (Kan.)	609
Ambridge Borough v. Pittsburgh & B. St. Ry. Co. (Pa.)	704
Angelary v. Springfield St. Ry. Co. (Mass.)	512
Baltimore & O. S. R. Co. v. Cincinnati, L. & A. Electric St. R. Co. (Ind.)	
Bennett v. Columbia Electric St. Ry., L. & P. Co. (S. C.)	684
Birmingham Ry., L. & P. Co. v. Barrett (Ala.)	676
Birmingham Ry., L. & P. Co. v. Green (Ala.)	797'
Birmingham Ry., L. & P. Co. v. Leach (Ala.)	699
Birmingham Ry., L. & P. Co. v. McDaniel (Ala.)	697
Birmingham Ry., L. & P. Co. v. Saxon (Ala.)	803
Blair v. Seattle Electric Co. (Wash.)	25
Bodin v. Duluth St. Ry. Co. (Minn.)	406
Boldt v. San Antonio Traction Co. (Texas)	52
Braffett v. Brooklyn, Queens County and Suburban Railroad Company (N. Y.)	106
Breen v. Boston Elevated Ry. Co. (Mass.)	737
Brown v. Met. St. Ry. Co. (Mo. App.)	49
Bryant v. Boston Elevated Ry. (Mass.)	647
Byrnes v. Brooklyn Heights R. R. Co. (N. Y.)	764
Camden, City of, v. Public Service Ry. Co. (N. J.)	
Campbell v. Boston Elevated Ry. Co. (Me.)	620
Caughell v. Indianapolis Traction & Terminal Co. (Ind. App.)	402
Central Kentucky Traction Co. v. Miller (Ky.)	256
Central Kentucky Traction Co. v. Smedley (Ky.)	823
Champlin v. Pawcatuck Valley St. Ry. Co. (R. I.)	521
Clark v. Detroit United Ry. (Mich.)	663
Cleveland v. Boston Elevated Ry. Co. (Mass.)	743
Coeke v. Des Moines City Ry. Co. (Ia.)	845
Commonwealth v. Boston & N. St. Ry. Co. (Mass.)	564
Coneton v. Old Colony St. Ry. Co. (Mass.)	740
Conway v. Metropolitan St. Ry. Co. (Mo.)	656
Covington, City of, v. South Covington & C. St. Ry. Co. (Ky.)	716
Craft v. Boston Elevated Ry. Co. (Mass.)	66

	PAGE
Craig v. Augusta-Aiken Ry. Co. (S. Car.)	855
Culbert v. Wilmington & P. Traction Co. (Del.)	68
Denver City Tramway Co. v. Armstrong (Colo.)	515
Detroit, City of, v. Detroit United Ry. (Mich.)	818
Di Benedetto v. Milwaukee Electric Ry. & Light Co. (Wis.)	387
Donovan v. Connecticut Co. (Conn.)	688
Doyle v. La Crosse City Ry. Co. (Wis.)	178
Drouillard v. Detroit United Ry. (Mich.)	734
East St. Louis & Suburban Ry. Co. v. City of Belleville (Ill.)	547
Elliott v. Seattle, R. & S. Ry. Co. (Wash.)	62
Ervin v. Burke, (N. J.)	666
Ervin v. Philadelphia Rapid Transit Co. (Pa.)	813
Evans v. Blue Ridge Ry. Co. (S. C.)	687
Evansville & S. I. Traction Co. v. Johnson (Ind.)	619
Evansville & S. Traction Co. v. Montgomery (Ind.)	38
Evansville S. & N. Ry. Co. v. Evansville & E. Electric Ry. (Ind.)	326
Farnsworth v. Tampa Electric Co. (Fla.)	352
Fitzgerald v. New Orleans Ry. & Light Co. (La.)	643
Flack v. Metropolitan St. Ry. Co. (Mo.)	96
Flynn v. Metropolitan St. Ry. Co. (Mo.)	457
Flynn v. Pittsburgh Rys. Co. (Pa.)	736
Friedel v. Brooklyn Heights R. Co. (N. Y.)	713
Fults v. Metropolitan St. Ry. Co. (Mo.)	733
Funk v. Hummelstown & Campbellstown St. Ry. Co. (Pa.)	770
Gaedis v. Metropolitan St. Ry. Co. (Mo.)	396
Galloway v. Detroit United Ry. (Mich.)	135
Garland v. Boston Elevated Ry. Co. (Mass.)	654
Geiger v. Pittsburgh Rys. Co. (Pa.)	741
Gerlach v. Detroit United Ry. (Mich.)	228
Gilcher v. Seattle Electric Co. (Wash.)	205
Glawwe v. St. Paul City Ry. Co. (Minn.)	862
Godfrey v. Meridian Ry. & Light Co. (Miss.)	648
Goldberg v. Boston Elevated Ry. Co. (Mass.)	320
Gradyzewski v. Detroit United Ry. (Mich.)	815
Grant v. Bangor Ry. & Electric Co. (Me.)	301
Green v. Muskegon Traction & Lighting Co. (Mich.)	853
Green v. United Rys. Co. of St. Louis (Mo.)	463
Gribbins v. Kentucky Terminal & Traction Co. (Ky.)	863
Gurrie v. New York & North Shore Traction Co. (N. Y.)	292
Harlan v. Joline (N. Y.)	779
Hennessey v. Boston Elevated Ry. Co. (Mass.)	746
Hibbler v. Detroit United Ry. (Mich.)	774
Hickey, Kaplan & Witzek v. Brooklyn H. R. R. Co. (N. Y.)	113

TABLE OF CASES REPORTED.

v

	PAGE
Hollow v. Brooklyn Heights R. R. Co. (N. Y.)	727
Hotenbrink v. Boston. Elevated Ry. Co. (Mass.)	290
Hymareh's Administrator v. Paducah Traction Co. (Ky.)	485
Indiana Union Traction Co. v. Downey (Ind.)	707
Indiana Union Traction Co. v. Love (Ind.)	784
Indianapolis Traction & Terminal Co. v. Matthews (Ind.)	145
International Lumber Co. v. American Suburbs Co. (Minn.)	588
Jeuree v. Met. St. Ry. Co. (Kan.)	282
Jones v. Rapid Transit Ry. Co. (Tex.)	542
Kalver v. Metropolitan St. Ry. Co. (Mo.)	272
Kent v. Jamestown St. Ry. Co. (N. Y.)	348
Keyes v. Metropolitan St. Ry. Co. (Mo.)	791
Kirkpatrick v. Metropolitan St. Ry. Co. (Mo.)	252
Kneeshaw v. Detroit United Ry. (Mich.)	615
Knuekey v. Butte Electric Ry. Co. (Mont.)	32
Koukle v. St. Paul City Ry. Co. (Minn.)	762
Konyonnyan v. Boston Elevated Ry. Co. (Mass.)	739
Lacey v. Minneapolis St. Ry. Co. (Minn.)	210
Lang v. Boston Elevated Ry. Co. (Mass.)	646
Langdon v. Minneapolis St. Ry. Co. (Minn.)	414
Larson v. Boston Elevated Ry. Co. (Mass.)	779
Leary v. Houghton County Traction Co. (Mich.)	223
Lennon v. Brooklyn Heights R. R. Co. (N. Y.)	782
Lerner v. Public Service Ry. Co. (N. J.)	411
Lewis' Administrator v. Bowling Green Ry. Co. (Ky.)	844
Logre v. Galveston Electric Co. (Tex.)	729
Louisville & N. R. Co. v. Central Kentucky Traction Co. (Ky.)	839
Louisville & S. I. Traction Co. v. Walker (Ind.)	798
Love v. Detroit, J. & C. R. Co. (Mich.)	378
Luby v. Morris County Traction Co. (N. J.)	162
Lunderkin v. Boston Elevated Ry. Co. (Mass.)	661
Lynch v. Public Service Corporation (N. J.)	314
Macon Ry. & Light Co. v. Castopulon (Ga.)	221
Mahoning & S. Ry. & Light Co. v. City of New Castle (Pa.)	43
Markoff v. Detroit United Ry. (Mich.)	794
Martin v. Old Colony St. Ry. Co. (Mass.)	318
Maryland Electric Rys. Co. v. Beasley (Md.)	236
Mather v. Metropolitan St. Ry. Co. (Mo.)	477
Mayne v. Nassau Electric Railroad Co. (N. Y.)	726
McCoy v. Minneapolis St. P. R. & D. Electric Traction Co. (Minn.)	184
McFadden v. Metropolitan St. Ry. Co. (Mo.)	535
McGeehan v. Eastern Pennsylvania Rys. Co. (Pa.)	765
Metropolitan Ry. Co. v. Fonville (Okla.)	203
Michael v. Kansas City Western Ry. Co. (Mo.)	597

	PAGE
Miller v. Buffalo & Lake Erie Traction Co. (N. Y.)	89
Miller v. Louisville Ry. Co. (Ky.)	850
Moeller v. United Rys. Co. (Mo.)	215
Moore v. Rochester Ry. Co. (N. Y.)	561
Moriarty v. Connecticut Valley St. Ry. Co. (Mass.)	754
Morris v. Seattle R. & S. Ry. Co. (Wash.)	602
Morrissey v. Boston Elevated Ry. Co. (Mass.)	653
Mullen v. Chester Traction Co. (Pa.)	766
Munster v. New Orleans Ry. & Light Co. (La.)	644
Murray v. Rhode Island Co. (R. I.)	703
Nehring v. Connecticut Co. (Conn.)	489
Nichols v. Connecticut Co. (Conn.)	664
Niehau v. United Rys. Co. of St. Louis (Mo.)	551
Norfolk & Atlantic Terminal Co. v. Rotolo (U. S.)	569
Ohio Electric Ry. Co. v. Village of Ottawa (Ohio)	370
O'Keefe v. Kansas City Western Ry. Co. (Kan.)	679
Oklahoma Ry. Co. v. Powell (Okla.)	428
Oklahoma Ry. Co. v. St. Joseph's Parochial School (Okla.)	441
Oklahoma Ry. Co. v. State (Okla.)	438
O'Leary v. Metropolitan St. Ry. Co. (Kan.)	446
Osteen v. Dallas Consol. Electric St. Ry. Co. (Tex.)	789
O'Toole v. Boston Elevated Ry. Co. (Mass.)	738
Otto v. Milwaukee Northern Ry. Co. (Wis.)	138
Owensboro City Ry. Co. v. Tucker (Ky.)	682
Paducah Traction Co. v. Barkadale (Ky.)	846
Palmer v. Portland Ry. L. & P. Co. (Ore.)	199
Pennsylvania Steel Co. v. New York City Ry. Co. (U. S.)	711
Pfohl v. International Railway Co. (N. Y.)	728
Provost v. International Ry. Co. (N. Y.)	277
Public Service Com. v. Westchester St. R. R. Co. (N. Y.)	421
Purcell v. Boston Elevated Ry. Co. (Mass.)	287
Quatfasel v. New York & Queens County Railway Co. (N. Y.)	772
Raasch v. Milwaukee Electric Ry. & Light Co. (Wis.)	762
Reading, City of, v. United Traction Co. (Pa.)	755
Riccio v. People's Ry. Co. (Del.)	76
Richmond v. Tacoma Ry. & Power Co. (Wash.)	12
Rist v. Philadelphia Rapid Transit Co. (Pa.)	773
Robinson v. Springfield St. Ry. Co. (Mass.)	744
San Antonio Traction Co. v. Hauskins (Texas)	670
Sawin v. Connecticut Valley St. Ry. Co. (Mass.)	244
Schlender v. Chicago & Southern Traction Co. (Ill.)	470
Schliesleder v. Milwaukee Electric Ry. & L. Co. (Wis.)	128
Scully v. Manchester St. Ry. (N. H.)	667

TABLE OF CASES REPORTED.

vii

	PAGE.
Severino v. Philadelphia Rapid Transit Co. (Pa.)	760
Shellman v. Louisville Ry. Co. (Ky.)	720
Shelly v. Boston Elevated Ry. Co. (Mass.)	645
Sherzer v. Lincoln Traction Co. (Neb.)	188
Sigl v. Green Bay Traction Co. (Wis.)	662
Silva v. City of Newport (Ky.)	747
Silvey v. Georgia Ry. & Electric Co. (Ga.)	56
Small v. San Antonio Traction Co. (Texas)	722
Smeltzer v. Metropolitan St. Ry. Co. (Mo.)	375
Snowden v. Philadelphia Rapid Transit Co. (Pa.)	769
South Covington & C. St. Ry. Co. v. Barr (Ky.)	836
South Covington & C. St. Ry. Co. v. Burns (Ky.)	751
South Covington & C. R. Co. v. City of Covington (Ky.)	575
Southern Bitulithic Co. v. Algiers Ry. & Lighting Co. (La.)	652
Spootea v. Berkshire St. Ry. Co. (Mass.)	643
State v. St. Paul City Ry. Co. (Minn.)	506
State <i>ex rel.</i> Ford v. Superior Court (Wash.)	656
State <i>ex rel.</i> Tyrrell, Co. Atty., v. Lincoln Traction Co. (Neb.)	117
Stone v. Boston Elevated Ry. Co. (Mass.)	660
Strauss v. Metropolitan St. Ry. Co. (Mo.)	731
Syracuse L. S. & N. R. Co. v. Carrier (N. Y.)	92
Tacoma Ry. & Power Co. v. Turner (U. S.)	668
Taylor v. Metropolitan St. Ry. Co. (Mo.)	674
Tolleman v. Sheboygan L. P. & Ry. Co. (Wis.)	173
Trouzzo v. Sutherland (N. Y.)	714
Trumbower v. Lehigh Valley Transit Co. (Pa.)	700
Underwood v. Okaloosa Traction & Light Co. (Iowa)	392
United Rys. & Electric Co. v. Dean (Md.)	692
United Rys. & Electric Co. of Baltimore v. Durham (Md.)	309
Valdosta St. Ry. Co. v. Fenn (Ga.)	419
Velthusen v. Union Railway Co. (N. Y.)	503
Vine v. Berkshire St. Ry. Co. (Mass.)	501
Ward v. International Ry. Co. (N. Y.)	1
Waterbury, City of, v. Connecticut Ry. & Lighting Co. (Conn.)	830
Watts v. Montgomery Traction Co. (Ala.)	269
Wayle v. Michigan United Rys. Co. (Mich.)	164
Webber v. Old Colony St. Ry. Co. (Mass.)	585
White v. South Covington & C. St. Ry. Co. (Ky.)	362
Williams Bros. & Co. v. Connecticut Co. (Conn.)	665
Winn v. Union R. Co. (R. I.)	559
Zucker v. Whitridge (N. Y.)	336

INDEX TO SPECIAL NOTES
STREET RAILWAY REPORTS

VOLUMES 1 TO 8 INCLUSIVE.

(For General Index to Volumes 1-8 inclusive, see page 867.)

INDEX TO SPECIAL NOTES

STREET RAILWAY MAPS

VOLUME I TO A. B. C.

THE STREET RAILWAY MAPS OF THE CITY OF NEW YORK

INDEX TO SPECIAL NOTES

STREET RAILWAY REPORTS.

Volumes 1 to 8 (inclusive).

ABUTTING OWNERS.

(See *Additional Servitude; Consent; Elevated Railroads; Eminent Domain; Interurban Railway; Nuisance; Steam Railroad; Streets; Tracks.*)

determination of damages; competency of witnesses.....	vol. 1, p. 714
rights generally.....	vol. 2, p. 48; vol. 3, p. 278; vol. 6, p. 364
right to compensation.....	vol. 3, p. 649
measure of damages.....	vol. 3, p. 279
rights of, as to location of poles, etc.....	vol. 4, p. 779
rights of, in streets.....	vol. 5, p. 42
discharge of surface waters upon adjacent land by construction of railway.....	vol. 5, pp. 308-310
liability of railway for injury to adjacent land by failure to construct sluices and culverts over water courses.....	vol. 5, pp. 310-312
conditions annexed to consents of.....	vol. 7, p. 232

ACCOMMODATIONS FOR PASSENGERS.

adequate accommodations, in general.....	vol. 5, p. 111
municipal ordinance affecting car service.....	vol. 5, pp. 156-158
mandamus to compel resumption of service.....	vol. 5, p. 157

ACTS IN EMERGENCIES.

(See *Passengers.*)

reasonable apprehension of danger.....	vol. 3, p. 928
from collision.....	vol. 3, p. 928
from collision between street car and train.....	vol. 3, p. 929
from runaway.....	vol. 3, p. 929
from derailment.....	vol. 3, p. 929
from overturning of vehicle.....	vol. 3, p. 930
from explosion on car.....	vol. 3, p. 930
miscellaneous cases.....	vol. 3, p. 930
what does not constitute reasonable apprehension.....	vol. 3, p. 930
where there is no actual danger.....	vol. 3, p. 930
question of sufficiency of danger for jury.....	vol. 3, p. 931
evidence.....	vol. 3, p. 931
instructions.....	vol. 3, p. 931
jumping from car to avoid accident.....	vol. 2, p. 840

ADDITIONAL SERVITUDE.(See *Abutting Owners; Interurban Railway.*)

- street surface railroad as additional servitude upon abutting property.....vol. 1, p. 311; vol. 4, p. 372
 in case of horse railways.....vol. 1, p. 311
 where motive power is steam.....vol. 1, p. 313
 use of electric motors.....vol. 1, p. 314
 rule in New York.....vol. 1, p. 317
 damages for actual injuries.....vol. 1, p. 319
 street railroads in narrow streets.....vol. 1, p. 320
 interurban railways as additional servitude upon highways and streets.....vol. 3, p. 182; vol. 4, p. 1077
 what constitutes additional servitude.....vol. 3, p. 182
 damages for change of grade of highway by construction of railway.....vol. 5, pp. 415-417

ADVERTISING IN CARS.

- right of railway as to.....vol. 5, p. 524

AGED, INFIRM AND HELPLESS PASSENGERS.(See *Contributory Negligence; Passengers.*)

- duty of company toward helpless passengers.....vol. 2, p. 946
 toward persons assisting the helpless.....vol. 2, p. 952
 necessity of notice of infirmity.....vol. 2, p. 952
 duty on ejecting helpless persons.....vol. 2, p. 953
 right to refuse passage.....vol. 2, p. 955

ALIGHTING FROM CAR.(See *Invitation to Alight; Passengers; Signal to Start; Starting and Stopping Car.*)

- passengers injured while alighting.....vol. 2, pp. 988-997
 in general....vol. 2, p. 988; vol. 3, p. 37; vol. 4, p. 364; vol. 5, p. 380
 reasonable time for alighting.....vol. 2, p. 990; vol. 4, p. 419
 vol. 6, p. 350
 passenger to notify employee of intention to alight....
 vol. 2, pp. 441, 991
 start of car while passenger is in act of alighting.....vol. 1, p. 773
 vol. 2, p. 992; vol. 3, p. 474; vol. 6, p. 206
 passenger alighting while car is in motion.....vol. 2, p. 994
 vol. 3, p. 453
 taking position on running-board or steps preparatory to alighting.....vol. 1, p. 694; vol. 2, p. 995
 effect of failure of employee to stop car.....vol. 2, p. 996
 effect of ordinance to stop at street crossing.....vol. 2, p. 997
 safe place for alighting.....vol. 1, p. 255; vol. 2, pp. 221, 997
 vol. 3, p. 267; vol. 4, pp. 220, 419
 obvious defectsvol. 1, p. 256
 passenger alighting from car at other than usual stopping placevol. 1, p. 282

ALIGHTING FROM CAR — (*Continued*).

passenger carried beyond destination.....	vol. 2, p. 548; vol. 4, p. 220
duty of passenger to remain seated until car stops.....	vol. 1, p. 743
injury to passenger by stepping into open space between car and platform while alighting.....	vol. 4, p. 439
failure of passenger to look for approaching car while alighting.....	vol. 3, p. 259
injury to passengers after alighting from car.....	vol. 5, pp. 58-63
effect upon character as passenger of temporary departure from car without intent to abandon transportation..	vol. 5, pp. 713-716
duty of employee to assist passenger to alight.....	vol. 7, p. 365

ANIMALS.

(See *Motorman; Horses.*)

injury to, by street railway company.....	vol. 1, p. 380
	vol. 2, p. 14; vol. 5, p. 522
on track.....	vol. 3, p. 426; vol. 4, p. 35

APPLIANCES.

(See *Defective Cars, Tracks and Appliances; Electricity; Fenders; Footboard; Gong; Headlight; Municipal Ordinances; Platforms; Poles; Running-board; Stations; Switches; Tracks; Trestles.*)

for protection of passengers.....	vol. 1, p. 20; vol. 3, p. 880
degree of care in selection of.....	vol. 1, p. 331
degree of care in use of.....	vol. 3, p. 6
injury to passenger by swinging door.....	vol. 3, p. 388
unsafe or defective appliances in streets.....	vol. 6, p. 1

ARREST.

(See *Passengers.*)

unlawful arrest of passenger.....	vol. 2, p. 592; vol. 4, p. 419
	vol. 5, pp. 22, 536

ASSAULT.

(see *Ejection of Passengers; Passengers.*)

assault upon passenger.....	vol. 4, pp. 567-580
by employee; in general.....	vol. 1, p. 1; vol. 2, p. 5
	vol. 3, pp. 499, 737; vol. 4, pp. 419, 482, 568
	vol. 5, p. 133; vol. 6, p. 148
scope of employment.....	vol. 1, p. 2; vol. 4, p. 570
justification of.....	vol. 1, p. 4; vol. 2, p. 6; vol. 3, p. 737
	vol. 4, p. 573
by fellow passengers or third persons.....	vol. 4, p. 576
damages; in general.....	vol. 4, p. 577
punitive damages.....	vol. 4, p. 578; vol. 8, p. 362
provocation as mitigation of.....	vol. 4, p. 579
amount of damages.....	vol. 4, p. 579
assault on boy stealing ride.....	vol. 3, p. 514
wanton injury of trespasser.....	vol. 2, p. 417; vol. 3, pp. 114, 515
protection of passenger from violence and insult.....	vol. 1, p. 772
	vol. 3, pp. 694, 906; vol. 4, p. 240

ASSUMPTION OF RISK.

(See *Crowded Cars; Defective Cars, Tracks and Appliances; Employees; News-boy; Platform; Running-board.*)

- passenger assuming unsafe position.....vol. 1, p. 630; vol. 3, p. 6
- passenger riding upon running-board.....vol. 8, p. 1
- duty of passenger to remain seated until car stops.....vol. 1, p. 743
- passenger injured by standing in dangerous place when permitted by employee.....vol. 3, p. 164

AUTOMOBILES.

- collisions withvol. 6, p. 130
- contributory negligence of passenger.....vol. 7, p. 323
- imputation of negligence of driver to passenger.....vol. 8, p. 615

BAGGAGE AND PARCELS IN STREET CARS.

- in generalvol. 5, p. 64
- injury to passenger by baggage of others.....vol. 5, p. 66
- rules respecting baggage, etc.....vol. 5, p. 65
- care of parcels, etc., left in car.....vol. 5, p. 68

BICYCLISTS.

(See *Contributory Negligence; Motorman.*)

- suddenly riding on track.....vol. 3, p. 751
- collision with bicyclist.....vol. 2, p. 22
- duty to look and listen.....vol. 7, pp. 38, 39

BOARDING CAR.

(See *Crowded Cars; Invitation to Board Car; Obstacles Near Track; Signal to Start.*)

- starting car before passenger is seated.....vol. 2, p. 332; vol. 4, p. 325
- injuries to passenger in attempting to board car.....vol. 3, p. 249
-vol. 4, p. 339
- passenger boarding moving car.....vol. 3, p. 766
- duty to protect passenger in act of boarding car.....vol. 3, p. 763
- passenger injured by sudden start of car while attempting to board car.....vol. 3, p. 654
- injury to passenger waiting to board car by being pushed under car by crowd.....vol. 4, p. 500

BRAKES.

(See *Defective Cars, Tracks and Appliances.*)

- municipal regulation as to safety brakes.....vol. 8, p. 43

BRIDGES.

- maintenance and repair of.....vol. 8, p. 244

BUMPERS.

- standing on bumper of crowded car.....vol. 5, p. 110

BURDEN OF PROOF.

- as to negligence; in general.....vol. 4, p. 45
- where presumption of negligence arises.....vol. 4, p. 47
- as to contributory negligence.....vol. 4, p. 49
- in jurisdiction where plaintiff must show freedom
- from itvol. 4, p. 49
- presumption of want of contributory negligence.....vol. 4, p. 51
- in jurisdiction where contributory negligence is matter
- of defensevol. 4, p. 52
- in generalvol. 4, p. 54

CABLE ROAD.

- maintenance ofvol. 6, p. 8
- liability for injuries caused by wheels dropping into cable
- slotvol. 6, p. 8
- presumption of negligence from sudden jerk of car.....vol. 6, p. 695

CARE, DEGREE OF.

(See *Aged, Infirm, etc., Passengers; Appliances; Children; Dangerous Crossing; Deaf Person; Defective Cars, Tracks and Appliances; Electricity; Intoxication; Protection of Passenger.*)

CARS.

(See *Appliances; Control of Car; Crowded Cars; Defective Cars, Tracks and Appliances; Stopping Car; Municipal Ordinances; Streets.*)

throwing missiles at.....vol. 7, p. 617

CHAINS, GATES, ETC.

(See *Defective Cars, Tracks and Appliances.*)

CHILDREN.

(See *Assault; Contributory Negligence; Crowded Cars; Imputed Negligence; Look and Listen; Motorman; Newsboy.*)

- degree of care required of.....vol. 1, p. 326; vol. 3, p. 59; vol. 4, p. 63
- riding on street cars without permission.....vol. 2, p. 312
- riding upon invitation of employee.....vol. 2, p. 312
- injuries to children trespassing on cars.....vol. 6, p. 21
- riding on car as trespasser; wanton injury.....vol. 2, p. 417
- falling on track; proximate cause.....vol. 2, p. 597
- collision with, on or near track.....vol. 2, p. 668; vol. 6, p. 303
- negligence of company must be proved.....vol. 2, p. 670
- exercise of best judgment by motorman.....vol. 2, p. 671
- passengers, degree of care to protect.....vol. 2, p. 947
- degree of care required toward infants.....vol. 4, p. 63
- precautions to prevent intrusion of children upon premises
- and to protect them from injury.....vol. 4, p. 99
- injuries to, in general.....vol. 5, p. 83

CITY.

(See *Municipal Ordinances.*)

COLLISION.

(See *Acts in Emergencies; Animals; Automobiles; Bicyclists; Children; Crossing Track; Dangerous Crossing; Fire Apparatus; Horses; Look and Listen; Motorman; Obstacles near Track; Obstructions to View; Pedestrian; Street Cleaners; Vehicle.*)

- at street intersection.....vol. 1, p. 575; vol. 3, p. 301
- with persons and vehicles on or near track....vol. 2, p. 24; vol. 3, p. 274
- negligence inferred from circumstances of collision.....vol. 2, p. 237
- injury to passenger by collision of car with vehicle.....vol. 2, p. 407
vol. 3, p. 373
- by collision with fire apparatus.....vol. 6, p. 299

CONDEMNATION PROCEEDINGS.

(See *Eminent Domain.*)

CONDUCTOR.

(See *Employee.*)

- to see that passenger has alighted before starting car.....vol. 1, p. 773
- duty as to giving signal to start.....vol. 1, p. 780
- duty to assist passenger to alight.....vol. 7, p. 365

CONSENTS.

- of abutting owners for construction of street railway.....vol. 1, p. 528
- requisites of consents.....vol. 1, p. 529
- grant of franchises by municipality dependent upon consents.....vol. 1, p. 530
- execution of consents.....vol. 1, p. 531
- defectively executed consents.....vol. 1, p. 532
- when consents are required.....vol. 1, p. 533
- conditional consents.....vol. 1, p. 533; vol. 7, p. 232
- effect of consents.....vol. 1, p. 534
- consents of local authorities.....vol. 2, p. 262; vol. 3, p. 647

CONSTITUTIONAL LAW.

(See *Franchise.*)

- in general.....vol. 4, p. 295

CONSTRUCTION OF RAILWAY.

(See *Abutting Owners; Additional Servitude; Consent; Crossing Other Railroads; Defects in Streets; Elevated Railroads; Eminent Domain; Extension of Lines; Franchise; Interurban Railway; Nuisance; Pavement; Streets; Tracks.*)

- construction of branches and switches.....vol. 2, p. 49
- remedies for unauthorized or defective construction.....vol. 2, p. 50
- method.....vol. 2, p. 101
- discharge of surface water upon adjacent land by construction of interurban railway.....vol. 5, pp. 308-310
- duty of railway to construct sluices and culverts over water courses.....vol. 5, pp. 310-312
- damages for change of grade of highway by construction of railway.....vol. 5, pp. 415-417

CONTRACTS.

monopolistic between street railway companies.....vol. 8, p. 326

CONTRIBUTORY NEGLIGENCE.

(See *Horses; Intoxication; Self-preservation, Instincts of; Speed; Workman on Street.*)

when injury was wanton.....vol. 2, p. 416; vol. 3, p. 116
 in driving on track in front of approaching car.....vol. 2, p. 562
 of bicyclist.....vol. 1, p. 72; vol. 3, p. 152
 of children.....vol. 3, p. 59; vol. 4, p. 102
 burden of proof as to contributory negligence.....vol. 4, p. 49
 of aged, infirm and helpless passengers.....vol. 2, p. 956
 liability of railway notwithstanding contributory negligence

where injury was avoidable.....vol. 4, p. 685; vol. 5, p. 241
 vol. 6, pp. 33, 451, 514-527
 of employee in violating rule of company.....vol. 5, p. 408
 of employee in obeying order in face of apparent danger....

vol. 5, pp. 844-846
 of persons approaching or standing near tracks intending to
 become passengers.....vol. 6, pp. 341-348
 of person stepping from behind one car in front of an-
 other.....vol. 7, p. 224
 of driver of vehicle.....vol. 6, p. 460
 of passenger of automobile.....vol. 7, p. 323
 of passenger riding on steps.....vol. 7, p. 542
 of passenger riding upon running-board.....vol. 8, p. 1
 of pedestrian struck by car rounding curve.....vol. 6, p. 533
 in failing to look and listen before crossing track.....vol. 7, p. 1

CONTROL OF CAR.

(See *Motorman.*)

at street intersection.....vol. 2, p. 706

CORPULENT PERSONS.

as passengers, duty to aid.....vol. 2, p. 951

CRIPPLES.

duty to aid, as passengers.....vol. 2, p. 948

CROSSING OTHER RAILROADS.

(See *Railroad Crossing.*)

street railways, statutory authority.....vol. 1, p. 141
 constitutional provision.....vol. 1, p. 141
 crossing steam railroads in streets.....vol. 1, p. 141
 crossing railroads not in the highway, in general.....vol. 1, p. 145
 condemnation proceedings.....vol. 1, p. 146
 crossing steam railroad at grade.....vol. 1, p. 148
 in general.....vol. 4, p. 213

CROSSING TRACK.

(See *Collision*; *Deaf Persons*; *Obstructions to View*; *Pedestrian*; *Vehicle*.)

in front of approaching car.....vol. 1, p. 435; vol. 5, p. 240
negligence question for jury.....vol. 1, p. 437

CROWDED CARS.

(See *Passengers; Stations.*)

liability of passenger boarding crowded car.....	vol. 1, p. 158
liability of street railway company for overcrowding cars...	vol. 1, p. 159
	vol. 6, p. 680
injuries to passengers riding on crowded cars.....	vol. 5, pp. 98-112
in general	vol. 5, p. 98
standing in crowded car	vol. 5, p. 101
standing on platforms of crowded cars.....	vol. 5, p. 102
standing on front platforms.....	vol. 5, p. 102
standing on rear platforms.....	vol. 5, p. 104
consent express or implied to presence on plat-	
forms	vol. 5, p. 105
assumption of risk incident to position.....	vol. 5, p. 106
duty toward children on platform.....	vol. 5, p. 107
position assumed on platform bearing on question	
of negligence	vol. 5, p. 107
standing on steps of crowded car.....	vol. 5, p. 108
standing on running-board of crowded car.....	vol. 5, p. 109
standing on bumpers of crowded car.....	vol. 5, p. 110

CULVERTS.

maintenance and repair.....vol. 8, p. 244

DAMAGES.

(See *Abutting Owners*; *Additional Servitude*; *Assault*; *Ejection of Passenger*; *Release*; *Transfers*.)

generally considered	vol. 3, p. 54; vol. 4, p. 375
punitive.....	vol. 3, p. 622; vol. 5, p. 22; vol. 8, p. 362
for wanton or willful negligence.....	vol. 3, p. 117
loss of services of wife as.....	vol. 3, p. 54
special damages	vol. 4, p. 243

DANGER, APPREHENSION OF.

(See *Acts in Emergencies.*)

DANGEROUS CROSSING.

(See *Crossing Tracks*.)

extra precautionsvol. 2, p. 351

DEAF PERSON.

care required of, in crossing street.....vol. 1, p. 449

DECLARATIONS.

(See *Evidence.*)

admissibility of declaration of street railway employees.....	vol. 1, p. 15
	vol. 4, p. 266; vol. 6, p. 706
by bystanders	vol. 3, p. 151; vol. 6, p. 706
rule as to declarations of employees.....	vol. 3, p. 153
of employee as part of <i>res gestæ</i>	vol. 3, p. 153
as to cause of accident.....	vol. 3, p. 153
lapse of time after occurrence of accident.....	vol. 3, p. 154
character of	vol. 3, p. 156
narration of past event.....	vol. 3, p. 157
by third parties.....	vol. 3, p. 158

DEFECTIVE CARS, TRACKS AND APPLIANCES.

(See *Appliances; Passengers, Presumption of Negligence; Stations; Switches.*)

injuries to employees, due to defective cars, tracks and ap- pliances ..	vol. 3, pp. 202-218
allegations as to defects.....	vol. 3, p. 202
as to use of defective appliances.....	vol. 3, p. 203
rule as to furnishing safe place and appliances.....	vol. 3, p. 205
appliances or places in control or owned by third parties ..	vol. 3, p. 207
particular appliances	vol. 3, p. 207
latent and patent defects.....	vol. 3, p. 209
repairs and alterations.....	vol. 3, p. 210
assumption of risk.....	vol. 3, p. 210
compliance with commands or threats.....	vol. 3, p. 215
risks outside scope of employment.....	vol. 3, p. 216
effect of statutes relating to employer's liability.....	vol. 3, p. 217
injury to linesman by defective pole and cross-arms.....	vol. 3, p. 379
injury to employee by defective brakes and other appliances. vol. 3, p. 598; vol. 4, p. 378	
knowledge of employee of defects in appliances.....	vol. 1, p. 350
injuries to passengers by defects in cars and appliances.... vol. 4, pp. 306-316	
degree of care in selecting.....	vol. 4, p. 306
continuation of use when not obviously dangerous.....	vol. 4, p. 307
care required as to inspection.....	vol. 4, p. 308; vol. 6, p. 503
duty of passengers.....	vol. 4, p. 309
in general	vol. 4, p. 419
brakes	vol. 4, p. 309
platforms and steps.....	vol. 4, p. 310
electrical apparatus	vol. 4, p. 311
trolley poles, wires, etc.....	vol. 4, p. 313
guardrails, chains, gates, etc.....	vol. 4, p. 313
stations	vol. 4, p. 314
miscellaneous	vol. 4, p. 315; vol. 5, p. 428
injuries by defective appliances.....	vol. 3, p. 264
injury by swinging door.....	vol. 3, p. 388

construction and maintenance of tracks.....vol. 6, p. 1
stringing and maintenance of wires.....vol. 6, p. 642

(See *Pavement*; *Streets*.)

- | | |
|--|-------------------------------|
| liability of street railway company for..... | vol. 1, p. 47; vol. 3, p. 384 |
| liability independent of statute or ordinance..... | vol. 1, p. 124 |
| caused by street railway repairs, liability of municipality..... | vol. 1, p. 122 |
| caused by improper construction of railway..... | vol. 1, p. 788 |
| general rule as to liability of street railway for defects in..... | vol. 4, p. 1 |
| rules governing its duty..... | vol. 4, p. 2 |
| effect of contract with city..... | vol. 1, p. 47; vol. 4, p. 3 |
| presumption of negligence from existence of defects..... | vol. 1, p. 791 |
| | vol. 4, p. 5; vol. 6, p. 13 |
| presumption that street is safe..... | vol. 4, p. 5 |
| liability for injuries due to excavations..... | vol. 4, p. 6 |
| defects caused by third persons..... | vol. 1, p. 125; vol. 4, p. 6 |
| miscellaneous cases | vol. 4, p. 9 |

(See *Acts in Emergencies*; *Presumption of Negligence*; *Switches*.)

- injury to passenger caused by.....vol. 2, p. 962; vol. 4, pp. 171, 688
vol. 5, p. 429

(See *Ejection of Passengers.*)

(See *Assault; Evidence; Passengers; Transfers.*)

- | | |
|--|--|
| reasonable time to pay fare or produce ticket..... | vol. 1, p. 593 |
| right of passenger to resist..... | vol. 1, p. 270 |
| ejection of passengers..... | vol. 4, pp. 230-239; vol. 6, p. 123 |
| ejection for failure or refusal to pay fare..... | vol. 4, p. 230 |
| of intoxicated passengers..... | vol. 4, p. 232 |
| of disorderly passengers..... | vol. 4, p. 233 |
| for violation of reasonable rules of company..... | vol. 4, p. 234 |
| defective or invalid transfers..... | vol. 1, p. 270; vol. 2, p. 916 |
| | vol. 4, p. 234 |
| manner of ejection..... | vol. 4, p. 236 |
| place of ejection..... | vol. 4, p. 237 |
| damages..... | vol. 1, p. 270; vol. 4, p. 237; vol. 5, p. 317; vol. 8, p. 362 |
| evidence..... | vol. 4, p. 238 |
| miscellaneous cases..... | vol. 2, p. 75; vol. 3, pp. 270, 902; vol. 4, p. 239 |
| | vol. 5, pp. 4, 22, 536 |

(See *Defective Cars, Tracks and Appliances; Electricity.*)

ELECTRICITY.

(See *Acts in Emergencies; Additional Servitude; Appliances; Defective Cars, Tracks and Appliances; Employee.*)

injuries to passengers caused by.....	vol. 1, p. 332
duty of company as to use.....	vol. 1, p. 639
injury to employee of another company.....	vol. 1, p. 640
maintenance of wire over railroad track.....	vol. 8, p. 188
use of appliance to prevent injuries.....	vol. 1, p. 642
application of maxim <i>res ipsa loquitur</i>	vol. 1, p. 642
injury to trespassers.....	vol. 1, p. 642
shock from electric wires in street.....	vol. 2, p. 758; vol. 3, p. 255 vol. 4, p. 162
injuries by.....	vol. 3, pp. 254, 860
electric wires.....	vol. 3, p. 870; vol. 6, p. 642
degree of care by company where wire is broken and fallen in street.....	vol. 3, p. 257
injury to employee by.....	vol. 1, p. 369; vol. 3, p. 432
explosion in car.....	vol. 4, pp. 44, 165

ELEVATED RAILROADS.

rights of abutting owners, upon construction and operation of.....	vol. 1, p. 78
deemed street railroad.....	vol. 2, p. 297

EMINENT DOMAIN.

(See *Abutting Owners; Additional Servitude; Crossing Other Railroads; Extension.*)

condemning railroad's right of way.....	vol. 3, p. 93
condemnation of land not connected with right of way for erection of power plant.....	vol. 6, p. 192
condemnation of additional land for right of way.....	vol. 3, p. 865
right as applied to street railways.....	vol. 2, pp. 193-197
exercise of right.....	vol. 2, p. 194
necessity of appropriation.....	vol. 2, p. 194
effect of location of line.....	vol. 2, p. 195
exercise of power by <i>de facto</i> corporation.....	vol. 2, p. 195
determination of right to acquire by condemnation.....	vol. 2, p. 196
injunction to prevent condemnation.....	vol. 2, p. 197
in general.....	vol. 4, p. 754

EMPLOYEE.

(See *Aged, etc., Passengers; Assault; Conductor; Declarations; Defective Cars, Tracks and Appliances; Electricity; Evidence; Fellow Servants; Motorman; Municipal Ordinances.*)

injury to, while not on duty.....	vol. 1, p. 340
while being transported by employer.....	vol. 1, p. 340
from failure to promulgate rules.....	vol. 1, p. 350
from employment of incompetent servants.....	vol. 1, p. 352
liability of master for negligence of servant.....	vol. 2, p. 120

EMPLOYEE — (Continued).

- liability of master for negligence of driver of his horses.....vol. 2, p. 120
- allegations in complaint in action for negligence.....vol. 2, p. 207
- injury by contact with obstruction at side of track.....vol. 2, p. 336
- of one company injured by shock from electric wires of
another.....vol. 2, p. 362; vol. 4, p. 413
- injury to, in general.....vol. 3, p. 86; vol. 4, p. 491; vol. 5, p. 72
- assumption of risk.....vol. 3, p. 378
- duty to protect passenger in act of boarding car.....vol. 3, p. 763
- permitting passenger to stand in dangerous place.....vol. 3, p. 164
- liability of company for insulting language to passenger by.....vol. 3, p. 694
- malicious procurement of discharge.....vol. 3, p. 742
- injury to employee of contractor.....vol. 4, p. 407
- contributory negligence of employee in violating rule of
company.....vol. 5, p. 408
- contributory negligence of employee in obeying order in face
of apparent danger.....vol. 5, pp. 844-846
- injury to employee of others, while working on or near rail-
way premises, in general.....vol. 5, p. 527

EMPLOYER'S LIABILITY ACT.....vol. 3, p. 678**EVIDENCE.**

(See *Abutting Owners; Acts in Emergencies; Burden of Proof; Declarations; Ejection of Passengers.*)

- admissibility of declaration of employee or third person in
action for ejection of passenger.....vol. 1, p. 17; vol. 2, p. 75
- res gestæ*.....vol. 7, p. 698
- statement of motorman as.....vol. 8, p. 521
- regulations of company as.....vol. 1, p. 273; vol. 6, p. 299
- as to conditions existing after accident.....vol. 2, p. 435
- as to subsequent precautions.....vol. 2, p. 437
- conflict of.....vol. 3, pp. 37, 758
- as to similar acts.....vol. 3, p. 7
- as to similar accidents.....vol. 3, p. 778; vol. 4, p. 241
- admission of ordinances as.....vol. 3, p. 234; vol. 6, pp. 299, 322
- competency of motorman as expert.....vol. 3, p. 521
- opinion as to cause of accident.....vol. 3, p. 659
- as to injury to horse.....vol. 3, p. 65
- production of report of accident.....vol. 4, p. 120
- testimony of employee.....vol. 3, p. 758
- opinion evidence as to speed of cars.....vol. 1, p. 638; vol. 2, pp. 654-657
- who may testify as to speed of car.....vol. 2, p. 654
- speed not subject of expert testimony.....vol. 2, p. 655
- passengers riding on street car.....vol. 2, p. 656
- purpose and effect of testimony.....vol. 2, p. 656
- opinion as to speed based on sound.....vol. 2, p. 657
- facts upon which opinion is based.....vol. 2, p. 657

EVIDENCE — (*Continued*).

- expert opinion as to distance within which car can be
stoppedvol. 7, p. 291
- as to grades, cuts and curvesvol. 6, p. 697
- violation of speed ordinance as evidence of negligencevol. 7, p. 50

EXCAVATIONS.

(*See Defects in Streets.*)

EXPRESS BUSINESS.

- right of railway to limit its express business to a single ex-
press companyvol. 5, pp. 363-366

EXTENSION.

- of street railway linesvol. 2 p. 263

FARE.

(*See Ejection of Passenger; Municipal Ordinances; Passengers.*)

- power of Legislature to regulatevol. 3, p. 351
- payment of, when required to make person a passengervol. 3, p. 394
- effect of change of boundaries of municipality uponvol. 8, p. 106
- reasonable time to pay farevol. 1, p. 593
- authority of town to limit rate ofvol. 2, p. 450
- regulations of company as to payment and collection of
faresvol. 5, pp. 1-5
- duty of passenger when extra fare is wrongfully demanded . .
vol. 5, pp. 318-323, 536
- regulation of rate of, in generalvol. 5, pp. 718-719
- regulation of street railway as to denominations of bills
which will be changedvol. 5, p. 837; vol. 6, p. 447
- payment of, by worn coinvol. 7, p. 114

FELLOW PASSENGERS.

(*See Assault; Passengers.*)

FELLOW SERVANTS.

(*See Employee.*)

- rule as applied to street railway employeesvol. 2, pp. 156-162, 206
vol. 5, p. 72
- who are fellow servants, in generalvol. 2, p. 156
- employees engaged in same general businessvol. 2, p. 157
- duties bringing servants into relation with each othervol. 2, p. 158
- cases pertaining to street railway employeesvol. 2, p. 158
- motormen of different carsvol. 7, p. 72
- negligence of vice-principalvol. 2, p. 160
- liability for injuries from defects caused by negligence of
fellow servantvol. 2, p. 161
- effect of statutes modifying common-law rule as to employer's
liabilityvol. 2, p. 162
- injury to employee while being transportedvol. 2, p. 207

effect upon fellow-servant rule of retaining incompetent fellow servant upon demand of plaintiff's union.....vol. 5, pp. 504-506
allegations as to incompetency of fellow servant.....vol. 2, p. 207
allegations as to want of knowledge of defects.....vol. 2, p. 208
non-applicability of fellow-servant rule where company demands excessive hours of service.....vol. 5, pp. 250-252

use ofvol. 1, p. 649; vol. 4, p. 227; vol. 6, p. 20; vol. 7, p. 150

collision with.....vol. 1, p. 581; vol. 5, p. 296; vol. 6, p. 290
relative right, etc., of street car companies and fire depart-
mentsvol. 6, pp. 290-301

extension of franchise.....	vol. 2, p. 260
resolution granting	vol. 2, p. 261
in nature of contract.....	vol. 2, p. 738
exclusive, not to be granted.....	vol. 2, p. 808
rights of prior grantee.....	vol. 2, p. 809
in general.....	vol. 3, p. 856; vol. 4, pp. 176, 266; vol. 5, p. 281
assignability	vol. 3, p. 31
for use of streets.....	vol. 3, p. 440
obligations of lessee or purchaser.....	vol. 3, p. 32
alteration of franchise as impairing obligation of contract..	vol. 4, p. 295; vol. 5, pp. 282-287

transportation of freight by street railroads.....vol. 4, p. 254

failure to sound.....vol. 2, p. 318; vol. 3, p. 522; vol. 4, pp. 84, 266
duty to sound.....vol. 2, p. 521

(See *Defective Cars, Tracks and Appliances.*)

HEADLIGHTS.

(See *Appliances.*)

- effect of absence, upon question of negligence.....vol. 1, p. 587
duty of company to maintain.....vol. 8, p. 145

HIGHWAYS.

(See *Streets and Highways.*)

HORSE RAILWAYS.

(See *Additional Servitude.*)

HORSES.

(See *Animals; Evidence.*)

- horses frightened by negligent operation of street car.....
vol. 2, pp. 642-649; vol. 6, pp. 139, 373
general rulevol. 2, p. 642
fright caused by sound of gong.....vol. 2, p. 643
when sounding gong is not negligence.....vol. 2, p. 643
duty where fright of horse is observed.....vol. 2, p. 644
fright caused by approaching car.....vol. 2, p. 645
when failure to stop or lessen speed is not negli-
gencevol. 2, p. 645
failure to stop when fright of horse is observed....vol. 2, p. 646
negligence in driving fractious horse near street car...
vol. 2, pp. 1, 648
fright caused by unusual noises connected with car, or
unusual appearance thereof.....vol. 2, p. 648
rule where fright caused by operation of steam rail-
roadsvol. 2, p. 648
fright of horses by excessive rate of speed of cars.....vol. 3, p. 420
collision between car and wagon attached to unmanageable
horsevol. 3, p. 287
fright of horses by negligent operation of car..vol. 3, p. 11; vol. 4, p. 374
horses unhitched in street; contributory negligence.....vol. 2, p. 59
negligence of drivers of horses causing injury.....vol. 2, p. 120

HUMANITARIAN DOCTRINE.

(See *Last Clear Chance.*)

HUSBAND.

(See *Imputed Negligence.*)

IMPUTED NEGLIGENCE.

- negligence of street railway employee imputed to passenger..vol. 2, p. 392
negligence of driver of vehicle imputed to occupant.....vol. 2, p. 393
vol. 3, pp. 23, 174, 375, 483
competency of driver.....vol. 2, p. 394
qualification of rule; care to be exercised by occupant..vol. 2, p. 395
negligence of driver of fire truck.....vol. 2, p. 396; vol. 6, p. 296
negligence of driver of automobile.....vol. 8, p. 615
persons engaged in common enterprise.....vol. 2, p. 396
negligence of driver of hired vehicle.....vol. 2, p. 396

IMPUTED NEGLIGENCE — (Continued).

- | | |
|--|--------------------------------|
| negligence of husband imputed to wife..... | vol. 2, p. 397 |
| negligence of parents, guardians or other custodians im-
puted to children..... | vol. 2, p. 398; vol. 4, p. 128 |
| general rule | vol. 2, p. 398 |
| action for death of child..... | vol. 2, p. 400 |
| action by parent..... | vol. 2, p. 401 |
| exercise of care by child..... | vol. 2, p. 401 |
| negligence in permitting child to go on street..... | vol. 2, p. 401 |
| negligence in failing to avoid injury to child..... | vol. 2, p. 403 |
| in general | vol. 4, p. 69 |

INFANTS.

(See *Children*.)

INSPECTION.

(See *Defective Cars, Tracks and Appliances.*)

INSTRUCTIONS TO JURY.

(See *Acts in Emergencies.*)

- | | |
|---|----------------|
| in general | vol. 3, p. 70 |
| as to duty to look and listen | vol. 3, p. 71 |
| as to wanton and wilful negligence | vol. 3, p. 111 |
| as to degree of care of motorman to avoid collision | vol. 2, p. 410 |

INSULT.

(See *Assault; Passengers.*)

- duty of company to protect passenger from insult.....vol. 1, p. 772
vol. 3, pp. 694, 906; vol. 4, p. 240

INTERURBAN RAILWAY.

(See *Additional Servitude; Construction of Railway.*)

- | | |
|--|-----------------|
| deemed street railway..... | vol. 2, p. 297 |
| defined..... | vol. 3, p. 240 |
| as additional servitude upon streets and highways..... | vol. 3, p. 182 |
| | vol. 4, p. 1077 |
| method of dispatching trains..... | vol. 6, p. 698 |

INTOXICATION.

(See *Aged, Infirm and Helpless Passengers; Ejection of Passengers; Pedestrians.*)

- | | |
|---|--------------------------------|
| duty of street railway company to accept intoxicated passengers | vol. 6, p. 628 |
| as evidence of contributory negligence | vol. 2, p. 921; vol. 6, p. 628 |
| degree of care to protect passengers under | vol. 2, p. 947; vol. 6, p. 628 |
| duty to protect passengers against injury by acts of intoxicated fellow passengers or third persons | vol. 3, pp. 787, 793 |
| | vol. 5, pp. 6-11 |
| in general | vol. 3, p. 796 |

INVITATION TO ALIGHT.

(See *Alighting from Car.*)

acts constituting	vol. 3, p. 840
while in motion	vol. 3, p. 840
in a dangerous spot	vol. 3, p. 843
when car stops	vol. 3, p. 843
under employee's directions	vol. 3, p. 845
when station is called	vol. 3, p. 846

INVITATION TO BOARD CAR.

(See *Boarding Car.*)

in general	vol. 3, p. 608
rule in respect to steam railroads	vol. 3, p. 913
as effecting commencement of relation of carrier and pas- senger	vol. 3, p. 914
while in motion	vol. 3, p. 915
lessening of speed as	vol. 3, p. 916; vol. 6, p. 283

LAST CLEAR CHANCE.

doctrine of	vol. 4, p. 685; vol. 5, p. 192; vol. 6, pp. 33, 451, 514-527
application to case of collision with vehicle driven along the track in same direction as car	vol. 8, p. 477

LESSEE.

liability of lessor for negligent operation by lessee	vol. 2, p. 341
	vol. 5 p. 784

LIGHT.

(See *Headlight.*)

LOOK AND LISTEN.

(See *Deaf Person; Instructions to Jury; Self-preservation, Instinct of.*)

duty of driver of vehicle along street car track	vol. 1, p. 103
	vol. 7, pp. 28-33
rule as applied to steam railroads	vol. 1, p. 667; vol. 7, pp. 2-7
application of rule to street railways	vol. 1, pp. 668-678; vol. 7, pp. 1-39
failure to look and listen negligence <i>per se</i>	
	vol. 1, p. 670; vol. 6, p. 357
contrary rule as to negligence <i>per se</i> ; question of negli- gence is one for jury	vol. 1, p. 673
pedestrians crossing track at street intersections	vol. 1, p. 676
attempted crossing at place other than street intersec- tion	vol. 1, p. 677
rule as applied to children	vol. 2, p. 515
duty of pedestrian to	vol. 3, p. 666; vol. 6, p. 492; vol. 7, pp. 35-38
in general	vol. 2, p. 172; vol. 4, p. 345; vol. 5, p. 239; vol. 7, pp. 1-39

MAIL CLERK.

relation of, to carriers	vol. 4, p. 292
--------------------------------	----------------

MISSILES.

- throwing at street cars.....vol. 7, p. 617

MONOPOLY.

- contracts between street railway companies creating.....vol. 8, p. 326

MOTORMAN.

(See *Children; Dangerous Crossing; Evidence; Gong; Last Clear Chance; Place of Stopping; Workman on Street.*)

- duty of upon observing bicyclist upon track.....vol. 1, p. 73
duty as to control of street car.....vol. 8, p. 292
duty as to vehicle driven along track.....vol. 1, p. 101
duty to stop when pedestrian is in position of danger..vol. 1, pp. 450, 460
error in judgment.....vol. 1, p. 687
control of car at street intersection.....vol. 2, p. 706; vol. 8, p. 292
duty of, to avoid collision.....vol. 2, pp. 23, 138; vol. 4, pp. 13, 108, 685
vol. 5, p. 241; vol. 8, p. 292
inexperienced motorman.....vol. 4, p. 38
vigilance to avoid collision with children.....vol. 2, p. 514
duty to keep lookout for animals on or near track.....vol. 2, p. 15
duty after discovering persons, animals or vehicles on or near
tracks.....vol. 6, p. 470; vol. 8, p. 292
duty during storm or fog.....vol. 6, p. 484
statements of as *res gestæ*.....vol. 8, p. 521

MUNICIPAL ORDINANCES.

(See *Defects in Streets*; *Evidence*; *Speed*; *Streets*.)

- municipal control of street railways.....vol. 2, pp. 460-469
conditions imposed by franchise.....vol. 2, p. 460
general power of municipality to regulate operation...vol. 2, p. 462
municipal control under reservation contained in fran-
chise.....vol. 2, p. 463
reasonableness of regulations; presumption.....vol. 2, p. 463
test as to reasonableness.....vol. 2, p. 463
subjects of regulation; speed of cars....vol. 2, p. 464; vol. 6, p. 142
requiring car to stop before crossing intersecting
street.....vol. 2, p. 465
vigilant watch ordinances.....vol. 2, p. 465; vol. 5, p. 549
ordinance requiring cars to run at certain times....vol. 2, p. 466
as to equipment of cars.....vol. 2, p. 466
safety brakes.....vol. 8, p. 43
as to rails and tracks.....vol. 7, p. 642
as to use of fenders.....vol. 6, p. 320; vol. 7, p. 150
use of salt or sand on tracks.....vol. 2, p. 467
removal of snow and ice.....vol. 2, p. 467
regulation of rates of fare.....vol. 2, p. 468
requirements as to employees.....vol. 2, p. 469

MUNICIPAL ORDINANCES — (*Continued*).

- municipal ordinances as to operation of cars.....vol. 3, pp. 810-823
vol. 6, p. 605
- right of municipalities to regulate operation.....vol. 3, p. 811
- reasonableness of ordinance.....vol. 3, p. 811
- effect and application of ordinances.....vol. 3, p. 812
- effect of acceptance or non-acceptance by company.....vol. 3, p. 814
- violations of municipal ordinances; in general.....vol. 3, p. 815
- as negligence *per se*.....vol. 3, p. 816
- as evidence of negligence.....vol. 3, p. 810; vol. 7, p. 50
- as to right of way of fire apparatus.....vol. 6, p. 290
- municipal ordinance affecting accommodations for pas-
sengers.....vol. 5, p. 156
- mandamus to compel resumption of service required by
ordinance.....vol. 5, p. 157
- ordinance affecting employees on cars.....vol. 5, p. 158
- municipal regulation of wires of electric railway in streets..vol. 5, p. 229

NEGLIGENCE.

(See *Burden of Proof; Children; Collision; Crossing Track; Imputed Negligence; Speed; Wanton or Wilful Injury.*)

NEWSBOY.

(See *Children.*)

- jumping on street car, assumption of risk.....vol. 1, p. 116
- injury to, while selling papers on street car..vol. 3, p. 833; vol. 6, p. 21

NOTICE.

- to passenger of regulations.....vol. 1, p. 282
- of injury.....vol. 3, p. 51
- waiver of.....vol. 3, p. 51
- to company of defects in tracks.....vol. 6, p. 11

NUISANCE.

- rights of abutting owners to enjoin unlawful construction of
railway as public nuisance.....vol. 2, p. 50; vol. 4, p. 56
vol. 5, pp. 12-16

OBSTACLES NEAR TRACK.

- collision with, causing injury to passenger...vol. 2, p. 278; vol. 3, p. 631
vol. 5, p. 725
- stepping in front of an approaching car, from behind.....vol. 3, p. 496
- passenger attempting to board car injured by.....vol. 3, pp. 631, 654
vol. 4, p. 162
- injury to employee by contact with.....vol. 2, p. 336
- projection of body beyond side of moving car and coming in
contact with.....vol. 3, p. 245; vol. 4, p. 160

OBSTRUCTIONS TO VIEW.

on crossing tracks.....	vol. 3, p. 933
general rule regarding crossing of car tracks.....	vol. 3, p. 933
application of rule where there are.....	vol. 3, p. 935
vehicle crossing tracks.....	vol. 3, p. 935
pedestrians crossing street.....	vol. 3, p. 938
driving in covered wagon.....	vol. 3, p. 939

PARTIES.

joining party defendant in action for joint negligence.....	vol. 4, p. 83
---	---------------

PASSENGERS.

(See *Accommodations for Passengers; Acts in Emergencies; Aged, etc., Passengers; Alighting from Car; Appliances; Arrest; Assault; Assumption of Risk; Baggage and Parcels in Cars; Collision; Contributory Negligence; Corpulent Persons; Cripples; Crowded Cars; Defective Cars, Tracks and Appliances; Derailment; Ejection of Passenger; Electricity; Employee; Evidence; Fare; Invitation to Alight; Invitation to Board Car; Obstacles Near Track; Passes; Place of Stopping; Platforms; Presumption of Negligence; Protection of Passenger; Regulations of Company; Running-board; Speed; Starting and Stopping Car; Stations; Sudden Jerks and Jolts; Tickets; Transfers; Wanton or Wilful Injury.*)

who are passengers.....	vol. 4, pp. 270-281
in general	vol. 4, p. 270; vol. 5, p. 215
persons riding gratuitously.....	vol. 4, p. 272
trespassers	vol. 4, p. 276
employees of carrier as passengers.....	vol. 4, p. 278
employees of others carried under contract.....	vol. 4, p. 279
persons riding on cars not used for passengers.....	vol. 4, p. 279
persons accompanying passengers.....	vol. 4, p. 280
licensees	vol. 4, p. 281
commencement of relation of carrier and passenger.....	vol. 3, p. 6
	vol. 4, p. 1032; vol. 6, p. 211
by signaling car to stop.....	vol. 6, p. 278
termination of relation of carrier and passenger.....	vol. 1, p. 179
	vol. 2, p. 548; vol. 6, pp. 211-219
by leaving premises of carrier	vol. 6, p. 211
by failing to use way provided for leaving premises.....	vol. 6, p. 214
by failing to alight at destination.....	vol. 6, p. 215
by alighting on public street.....	vol. 6, p. 216
by remaining on car after it passes destination.....	vol. 6, p. 217
by transferring to another car.....	vol. 6, p. 219
by leaving car to prevent an assault.....	vol. 6, p. 219
by passengers holding tickets over connecting lines.....	vol. 6, p. 217
effect on character as passenger of temporary departure from car without intent to abandon transportation.....	vol. 5, pp. 713-716
	vol. 6, p. 218

PASSENGERS — (*Continued*).

- invitation to board car as effecting commencement of relation of carrier and passenger.....vol. 3, p. 914
- when payment of fare makes person a passenger.....vol. 3, p. 394
- employees being transported by company, as passengers.....vol. 1, p. 340
vol. 5, p. 216
- possession of transfer slip as evidence of status of passenger.....vol. 2, p. 124
- injuries to passengers due to acts of employees.....vol. 4, pp. 419-430
 - in general.....vol. 4, p. 419
 - New York rule.....vol. 4, p. 420
 - insults, indignities and personal violence by employees.....vol. 4, p. 420
 - assaults and ejections by employees.....vol. 4, p. 421
 - false arrest of passenger.....vol. 4, p. 421
 - management of cars and appliances.....vol. 4, p. 421
 - sudden jerks and jolts.....vol. 4, p. 421
 - overcrowding cars.....vol. 4, p. 422
 - stopping at safe place for alighting.....vol. 4, p. 424
 - reasonable time for ingress and egress.....vol. 4, p. 424
 - aged, infirm and feeble passengers.....vol. 4, p. 425
 - duty to carry to destination....vol. 2, p. 548; vol. 4, pp. 220, 425
vol. 5, p. 324; vol. 6, p. 311
 - excessive rate of speed.....vol. 4, p. 426
 - miscellaneous.....vol. 4, p. 426
- injuries to passengers by acts of fellow passengers.....
 - vol. 3, pp. 342, 783-792; vol. 4, p. 328; vol. 5, pp. 564-565
 - liability for wilful, violent or improper acts in general.....vol. 3, p. 784
 - for assaults and personal injuries in general.....vol. 3, p. 785
 - by intoxicated passenger....vol. 3, p. 787; vol. 5, pp. 6-11
 - by insane passenger.....vol. 3, p. 788
 - by fights between other passengers.....vol. 3, p. 788
 - ejection by other passengers.....vol. 3, p. 789
 - abusive or indecent language.....vol. 3, p. 789
 - by intoxicated passenger.....vol. 3, p. 789
 - liability for accidents or unpremeditated acts.....vol. 3, p. 790
 - by intoxicated passengers.....vol. 3, p. 791
 - through starting or stopping car by.....vol. 3, p. 792
- injuries to passengers by acts of third persons.....vol. 3, pp. 792-794
vol. 4, p. 328; vol. 5, pp. 564-565
 - assaults by third persons.....vol. 3, p. 792
 - by intoxicated persons.....vol. 3, p. 793
 - by person committing crimes.....vol. 3, p. 793
 - ejection.....vol. 3, p. 793
 - abusive language.....vol. 3, p. 793
 - injuries through strike sympathizers.....vol. 3, p. 793
 - accidents caused by unknown vicious persons.....vol. 3, p. 794
 - contributory negligence of third person causing accident.....vol. 3, p. 794

PASSENGERS — (Continued).

- injuries to passengers while transferring.....vol. 3, p. 731
- separation of races on street cars.....vol. 4, pp. 136, 992
- duty of passenger to remain seated until car stops.....vol. 1, p. 743
- projection of body beyond side of moving car.....vol. 3, p. 245
vol. 4, p. 160
- riding upon running-board of car.....vol. 8, p. 1
- riding on steps of car.....vol. 7, p. 542
- duty to carry to points indicated by signs on car without
transfer to other cars.....vol. 5, p. 851
- intoxicated passengersvol. 6, pp. 628-637

PASSES.

- liability for injury to persons riding on.....vol. 5, p. 216
- liability for injury to policeman riding on.....vol. 5, p. 863

PAVEMENT.(See *Streets.*)

- liability for defects in.....vol. 1, p. 124
- of streetsvol. 3, p. 41; vol. 4, p. 296
- power of municipality to control.....vol. 3, p. 41
- statutory requirements as to paving.....vol. 3, p. 43
- nature and extent of company's liability.....vol. 3, p. 43
- construction of pavement and kind of repairs.....vol. 3, p. 44
- necessity of repairs.....vol. 3, p. 45
- liability where repairs are made by municipality.....vol. 3, p. 45

PEDESTRIAN.

(See *Contributory Negligence; Crossing Track; Dangerous Crossing; Deaf Person; Last Clear Chance; Look and Listen; Motorman; Obstacles Near Track; Obstructions to View; Street Cleaners; Trestles; Workman on Street.*)

- injury to from defective rails.....vol. 6, p. 7
- walking between tracks injury to.....vol. 1, p. 218
- stepping behind one car in front of another.....vol. 7, p. 224
- injured while standing near track.....vol. 3, p. 802
- injured while on sidewalk.....vol. 7, p. 690
- injured while standing at crossing between double tracks...vol. 2, p. 351
- collision with, when intoxicated.....vol. 3, p. 796
- in street, injury to by wanton or wilful negligence.....vol. 3, p. 113
- injury to pedestrian by being struck by car rounding curve..
vol. 4, p. 259; vol. 6, p. 533
- injuries to, in general.....vol. 3, p. 666; vol. 4, p. 528; vol. 5, p. 204
- relative rights of cars and public in streets.....vol. 5, p. 240
- duty to look and listen before crossing track.....vol. 7, pp. 19-28, 35-38

PHYSICIAN.

- liability of street railway company for services of.....vol. 7, p. 186

PLACE OF STOPPING.

- duty of street railroad company as to.....vol. 1, p. 254
passenger alighting from car at unusual.....vol. 1, p. 282

PLATFORM.

(See *Appliances; Crowded Cars; Defective Cars, Tracks and Appliances.*)

- passenger riding upon, not negligence *per se*.....vol. 1, p. 9
injury to passenger riding on..vol. 2, p. 527; vol. 3, p. 75; vol. 5, p. 112
defective platformsvol. 3, pp. 333, 540

PLEADING.

(See *Employee; Fellow Servants.*)

- allegations as to defects in appliances, etc.....vol. 3, p. 202
specific allegations of negligence.....vol. 3, p. 473
variance between pleading and proof.....vol. 4, p. 171

POLES.

(See *Defective Cars, Tracks and Appliances.*)

- location of poles, etc.....vol. 4, p. 779

PRESUMPTION OF NEGLIGENCE.

(See *Burden of Proof.*)

- where injury caused by collision with vehicle.....vol. 2, p. 183
where passenger is injured by collision.....vol. 2, p. 839
from derailment of car, causing injury to passenger.....vol. 2, p. 966
where passenger is injured.....vol. 2, p. 126; vol. 3, p. 193
where passenger is injured by collision with vehicle.....vol. 3, p. 373
arising from defective appliances.....vol. 3, p. 444
from sudden start or stop or sudden lurch or jerk of car....
vol. 4, p. 1049; vol. 6, pp. 689-696
from existence of defects in streets.....vol. 1, p. 791; vol. 4, p. 5
from existence of defects in track.....vol. 6, p. 13
from sudden jerk in rounding curve; rebuttal.....vol. 1, p. 244
presumption of negligence from mere proof of injury..vol. 4, pp. 351-360
in general.....vol. 4, p. 351; vol. 5, pp. 796-799; vol. 6, p. 616
when negligence presumed.....vol. 4, p. 353
when negligence not presumed.....vol. 4, p. 356

PROTECTION OF PASSENGERS.

(See *Children; Passengers; Employee; Intoxication.*)

- appliances for.....vol. 1, p. 20; vol. 3, p. 880
protection from violence and insult....vol. 1, p. 772; vol. 3, pp. 694, 906
duty to protect in act of boarding car.....vol. 3, p. 763
degree of care in protection of passengers.....vol. 4, p. 240

PROXIMATE CAUSE.

(See *Children.*)

- of injuryvol. 2, p. 521
where passenger carried beyond destination.....vol. 2, p. 548
liability of railway notwithstanding contributory negligence
where injury was avoidable.....vol. 4, p. 685; vol. 5, p. 241

RAILROAD.(See *Street Railroad.*)

term includes street railroad.....vol. 2, p. 298

distinction between street railway and commercial railroad..
vol. 4, p. 318; vol. 6, p. 265**RAILROAD CROSSING.**

right of way at.....vol. 2, p. 480

REGULATION OF STREET CAR TRAFFIC.(See *Municipal Ordinances.*)**REGULATIONS OF COMPANY.**(See *Ejection of Passengers; Employee; Evidence; Notice.*)

when admissible as evidence.....vol. 1, p. 272

duty as to promulgation of.....vol. 1, p. 350

as to passengers, in general.....vol. 4, p. 992; vol. 5, p. 33

as to separation of races.....vol. 4, p. 992

regulation as to payment and collection of fares.....vol. 5, pp. 1-5

rules respecting baggage, parcels, etc.....vol. 5, p. 66

contributory negligence of employee in violating rule of
company.....vol. 5, p. 408

regulation of street railway as to denominations of bills

which will be changed.....vol. 5, p. 837; vol. 6, p. 447

as to right of way of fire apparatus.....vol. 6, p. 290

RELEASE.of railway company from claim for injuries.....
vol. 3, p. 250; vol. 6, pp. 566-584**RES GESTÆ.**(See *Evidence.*)**RIGHT OF WAY.**(See *Eminent Domain.*)

of steam railroad at crossing.....vol. 2, p. 480

of vehicle and car at street intersection.....vol. 2, p. 170; vol. 3, p. 390

right of traveler to drive on or along track..vol. 3, p. 412; vol. 6, p. 309

relative rights of street cars and public on streets.....
vol. 5, p. 240; vol. 6, p. 354**RULES.**(See *Regulations of Company.*)**RUNNING-BOARD.**(See *Appliances; Crowded Cars.*)

taking position on, preparatory to alighting.....vol. 1, p. 694

passenger standing upon.....vol. 1, p. 10; vol. 4, p. 547

passenger injured while riding on running-board.....vol. 3, p. 75
vol. 5, pp. 112, 725; vol. 6, p. 134; vol. 8, p. 1**SAFE PLACE TO WORK.**(See *Defective Cars, Tracks and Appliances.*)

SCOPE OF EMPLOYMENT.

(See *Assault; Defective Cars, Tracks and Appliances.*)

SELF-PRESERVATION, INSTINCT OF.

- presumption arising from.....vol. 1, p. 200
- rebuttal of presumption.....vol. 1, p. 202
- rule as applied to street railroads.....vol. 1, p. 203

SICK PERSONS.

- as passengers, duty to aid.....vol. 2, p. 954

SIDEWALK.

- injury to person on.....vol. 7, p. 690

SIGNAL TO START OR STOP.

- conductor not to give, before passenger is in place of safety..
vol. 1, p. 780; vol. 6, p. 350
- signal by passenger to stop; effect to create relation of car-
rier and passenger.....vol. 6, p. 278

SPEED.

(See *Evidence; Horses; Invitation to Board Car; Municipal Ordinances.*)

- dangerous rate of.....vol. 1, p. 242; vol. 2, p. 520; vol. 3, p. 411
vol. 4, pp. 71, 266
- what rate deemed negligent.....vol. 1, pp. 244, 261, 587
- cases where deemed excessive.....vol. 1, p. 262
- sudden slackening; injury to passenger caused by.....vol. 1, p. 301
- ordinance regulating rate.....vol. 1, p. 493; vol. 3, p. 461
- violation of speed ordinance as evidence of negligence.....vol. 7, p. 50
- excessive, causing injury to passengers.....vol. 1, p. 636
- rate of, at night.....vol. 3, p. 796
- running car through crowded streets at full speed.....vol. 3, p. 465
- effect of excessive speed upon contributory negligence.....vol. 1, p. 494
- slackening speed as invitation to become passenger.....vol. 6, p. 283

STARTING AND STOPPING CAR.

(See *Alighting from Car; Boarding Car; Conductor; Motorman; Municipal Ordinances; Passengers; Place of Stopping; Presumption of Negligence; Signal to Start; Sudden Jerks and Jolts.*)

- stopping car within certain distance.....vol. 1, p. 398
- expert evidence as to distance within which car can be
stopped.....vol. 7, p. 291
- injury to passenger by sudden or premature start of car....
vol. 3, pp. 282, 731
- injury to passenger by sudden stop of car.....vol. 3, p. 506
- injury to passenger by sudden start of car, while alighting..vol. 2, p. 250
vol. 3, p. 474
- injury to passenger by sudden start or stop of car; presump-
tion of negligence.....vol. 4, p. 1049

(See *Appliances; Defective Cars, Tracks and Appliances.*)

STREETS AND HIGHWAYS — (Continued).

acceptance by municipality.....	vol. 2, p. 101
use by steam railroad.....	vol. 2, p. 727
use of, by street railway company.....	vol. 3, p. 610
street railroads on narrow streets.....	vol. 4, p. 60
obstructing street with cars.....	vol. 4, p. 97
relative rights of street cars and public in streets.....	vol. 2, p. 170
	vol. 3, pp. 390, 412; vol. 5, p. 240
damages for change of grade of highway by construction of railway	vol. 5, pp. 415-417

SUDDEN JERKS AND JOLTS.

(See *Alighting from Car; Boarding Car; Passengers; Starting and Stopping Car.*)

injury to passenger by sudden lurch of car.....	vol. 2, p. 586
injury to passenger by sudden slackening of speed.....	vol. 1, p. 301
passenger thrown from car while rounding curve.....	vol. 4, p. 431

SURFACE WATERS.

(See *Construction of Railway.*)

SWITCHES.

(See *Appliances; Construction of Railway; Defective Cars, Tracks and Appliances.*)

derailment due to defective switches.....	vol. 4, p. 171
construction and maintenance.....	vol. 6, p. 9

TAXATION.

of street railways.....	vol. 2, p. 36; vol. 3, pp. 241, 684; vol. 4, p. 148
of earnings	vol. 3, p. 356

TICKETS.

(See *Ejection of Passenger; Fare; Transfers.*)

purchase of, by passenger.....	vol. 1, p. 5
--------------------------------	--------------

TRACKS.

(See *Appliances; Defective Cars, Tracks and Appliances; Vehicle.*)

injury due to derailment.....	vol. 4, p. 171
location of tracks.....	vol. 4, p. 371
defective tracks	vol. 4, pp. 374, 451
municipal ordinance as to rails and tracks.....	vol. 7, p. 642

TRANSFERS.

(See *Ejection of Passenger.*)

issue and execution of.....	vol. 1, p. 267; vol. 2, p. 911; vol. 3, p. 668
nature of transfers.....	vol. 2, p. 912
status of persons holding transfers.....	vol. 2, p. 913
statutory provisions	vol. 2, p. 913

presentation of transfers.....vol. 2, p. 915

 duty of passenger.....vol. 2, p. 915

 duty of company.....vol. 2, p. 916

ejection of passengers:

 where verbally transferred.....vol. 2, p. 916

 where presenting torn transfers.....vol. 2, p. 918

 where transferred to wrong line.....vol. 2, p. 918

 where transfer has a time limit erroneously punched.....vol. 2, p. 918

 right of purchasers to resist.....vol. 1, p. 271

 damages, exemplary and compensatory..vol. 1, p. 270; vol. 2, p. 920

ticket produced is conclusive.....vol. 2, p. 920

notice of change of rules.....vol. 2, p. 920

erroneously punching transfers.....vol. 1, p. 268; vol. 6, p. 594

other errors by employees.....vol. 1, p. 269

effect of New York Railroad Law, sec. 104..vol. 1, p. 569; vol. 6, p. 246

effect of change of boundaries of municipality upon.....vol. 8, p. 106

right to reach destination by circuitous route.....vol. 6, p. 246

possession of slips as evidence of status of passenger.....vol. 2, p. 124

in general.....vol. 4, p. 114; vol. 5, pp. 536-540; vol. 6, p. 123

(See *Assault*; *Electricity*; *Children*.)

on cars, who are.....	vol. 6, p. 21
injuries to children trespassing on cars.....	vol. 6, p. 21
on tracks, who are.....	vol. 6, p. 235
duty toward trespassers on tracks.....	vol. 6, p. 236
wanton injury to.....	vol. 2, p. 417; vol. 3, pp. 114, 515

(See *Appliances*.)

injury to pedestrians using.....vol. 1, p# 796

(See *Defective Cars, Tracks and Appliances; Electricity; Employee.*)

(See *Collision*; *Contributory Negligence*; *Crossing Tracks*; *Dangerous Crossing*; *Fire Apparatus*; *Horses*; *Imputed Negligence*; *Last Clear Chance*; *Look and Listen*; *Motorman*; *Obstructions to View*; *Right of Way*; *Wanton and Wilful Injury*.)

collision with vehicle driven along tracks.....	vol. 1, pp. 101, 460
	vol. 2, p. 562; vol. 3, p. 274; vol. 8, p. 292
application of last clear chance doctrine.....	vol. 8, p. 477
collision with vehicle attached to unmanageable horse.....	vol. 3, p. 287
collision with vehicle suddenly driven on track.....	vol. 2, p. 138
collision with vehicle standing on track.....	vol. 3, p. 1
collision with covered vehicle.....	vol. 1, p. 516; vol. 3, pp. 370, 939
	vol. 6, p. 472

VEHICLE — (Continued.)

- collision where driven on track.....vol. 3, p. 274; vol. 4, p. 435
- crossing track in front of approaching car.....vol. 3, pp. 484, 882
vol. 8, p. 292
- duty of driver to stop before crossing track.....vol. 2, p. 231
- duty of driver to look and listen.....vol. 7, p. 1
- collision with vehicle at crossing.....vol. 3, p. 301; vol. 4, pp. 108, 458
vol. 8, p. 292
- collision with vehicle driven diagonally across tracks..vol. 4, pp. 332, 448
- right of traveller to drive on or along track.....vol. 3, p. 412
- collisions with, in general.....vol. 5, p. 297
- relative rights of cars and public in streets.....vol. 5, p. 240
- wheels striking protruding rails.....vol. 6, p. 4
- wheels dropping into cable slot.....vol. 6, p. 8
- sleigh overturned on ridge of snow between tracks.....vol. 6, p. 541

VERDICT.

- general.....vol. 3, p. 173

VESTIBULES.

- validity of statutes and ordinances requiring.....vol. 6, p. 184

WANTON OR WILFUL INJURY.

(See *Assault; Children; Contributory Negligence; Instructions to Jury; Trespasser.*)

- what constitutesvol. 3, p. 111
- causing injuries to travelers on the street.....vol. 3, p. 113
- causing injuries to trespassers.....vol. 2, p. 417; vol. 3 pp. 114, 515
- causing injuries to passengers.....vol. 3, p. 115
- effect where person injured was also negligent.....vol. 2, p. 416
vol. 3, p. 116
- damages may be punitive.....vol. 3, p. 117

WIRES.

(See *Defective Cars, Tracks and Appliances; Electricity; Employee; Municipal Ordinances.*)

- maintenance of, over railroad track.....vol. 8, p. 188

WORKMAN ON STREET.

- collision with cars.....vol. 2, p. 422
- contributory negligence of workman.....vol. 2, p. 423
- signal to warn workman of approach of car.....vol. 2, p. 424
- injury to street cleaners.....vol. 2, p. 424

STREET RAILWAY REPORTS.

VOLUME VIII.

Ward v. International Railway Company.

(New York — Court of Appeals.)

INJURY TO PASSENGER STANDING ON RUNNING BOARD OF CAR; CONTRIBUTORY NEGLIGENCE; WHETHER PASSENGER NEGLIGENT IN REMAINING ON RUNNING BOARD QUESTION FOR THE JURY. — A passenger who was standing upon the running board of a street surface car was injured by being

CONTRIBUTORY NEGLIGENCE OF PASSENGER RIDING UPON RUNNING BOARD.

1. General Rule.
2. Applications and Limitations of General Rule.
3. Car Not Crowded.
4. Assumption of Risks by Passenger.
5. Passenger Preparing to Alight.
6. Rule in Pennsylvania.

1. **General Rule.** — A passenger upon a street railway car is not necessarily negligent or guilty of negligence *per se* if he rides upon the running board; his negligence in so riding depends upon the circumstances, and is generally a question for the jury.

Arkansas. — *Oliver v. Ft. Smith, etc., Co.*, 89 Ark. 222, 116 S. W. 204.

California. — *Seller v. Market St. Ry. Co.*, 1 St. Ry. Rep. 9, 139 Cal. 268, 72 Pac. 1006; *Frazer v. California St. Cable R. Co.*, 4 St. Ry. Rep. 78, 146 Cal. 714, 81 Pac. 29.

Colorado. — *Denver Tramway Co. v. Reid*, 22 Colo. 349, 45 Pac. 378.

District of Columbia. — *Koontz v. District of Columbia*, 24 App. D. C. 59.

Illinois. — *Math v. Chicago City Ry. Co.*, 243 Ill. 114, 90 N. E. 235; *West Chicago St. R. Co. v. Marks*, 82 Ill. App. 185, aff'd, 182 Ill. 15, 55 N. E. 67; *Purington & Kimball Brick Co. v. Eckman*, 102 Ill. App. 183. See also *North Chicago St. Ry. Co. v. Williams*, 140 Ill. 275.

Indiana. — *Ft. Wayne Traction Co. v. Hardendorf*, 3 St. Ry. Rep. 164, 164 Ind. 403, 72 N. E. 593; *Citizens' St. R. Co. v. Hoffbauer*, 23 Ind. App. 614, 56 N. E. 54; *Indianapolis St. Ry. Co. v. Haverstick*, 4 St. Ry. Rep. 283, 35 Ind. App. 281, 74 N. E. 34, 111 Am. St. Rep. 163; *Frank Bird Transfer Co. v. Morrow*, 3 St. Ry. Rep. 231, 36 Ind. App. 305, 72 N. E. 189; *Union Traction Co. v. Sullivan*, 4 St. Ry. Rep. 240, 38 Ind. App. 513, 76 N. E. 116.

thrown to the pavement by a collision between the car and an automobile. In an action against the railway company and the owner of the automobile, in which he obtained judgment against both defendants, it appeared that, at the time the passenger boarded the car, about a mile distant from the place of the collision, all of the seats were occupied and he took a position upon the running board, on which other persons were standing. After that and prior to the time of the collision there were vacant seats in the car, one of which he might, with reasonable vigilance and effort, have secured and occupied, and had he done so he would not have been injured. *Held*, that it was error for the trial court to charge, in effect,

Kansas. — *Topeka City Ry. Co. v. Higgs*, 38 Kan. 375, 16 Pac. 667, 5 Am. St. Rep. 754.

Maine. — *Cameron v. Lewiston, etc., Ry.*, 103 Me. 482, 70 Atl. 534. See also *Stone v. Lewiston, etc., Ry. Co.*, 3 St. Ry. Rep. 323, 99 Me. 243, 59 Atl. 57.

Massachusetts. — *Moody v. Springfield St. Ry. Co.*, 182 Mass. 158, 65 N. E. 29; *Mason v. Boston, etc., Ry. Co.*, 4 St. Ry. Rep. 475, 190 Mass. 255, 76 N. E. 717; *Pomeroy, etc., Ry. Co.*, 5 St. Ry. Rep. 436, 193 Mass. 507, 79 N. E. 764; *Egan v. Old Colony St. Ry. Co.*, 5 St. Ry. Rep. 438, 195 Mass. 159, 80 N. E. 696; *Eldridge v. Boston Elev. Ry. Co.*, 203 Mass. 582, 89 N. E. 1041; *Olund v. Worcester, etc., Ry. Co.*, 206 Mass. 544, 92 N. E. 720; *Heahion v. Boston Elev. Ry. Co.*, 208 Mass. 117, 94 N. E. 390.

Michigan. — *Pomaaki v. Grant*, 119 Mich. 675, 78 N. W. 891.

Mississippi. — See *Bridges v. Jackson Elec. Ry. L. & P. Co.*, 4 St. Ry. Rep. 547, 86 Miss. 584, 38 So. 788.

Missouri. — *Seymour v. The Citizens' Ry. Co.*, 114 Mo. 266, 21 S. W. 739; *Sweeney v. Kansas City Cable R. Co.*, 150 Mo. 385, 51 S. W. 682; *Allen v. St. Louis Transit Co.*, 3 St. Ry. Rep. 562, 183 Mo. 411, 81 S. W. 1142; *Kreimelmann v. Jourdan*, 107 Mo. App. 64, 80 S. W. 323; *Vessels v. Metropolitan St. Ry. Co.*, 129 Mo. App. 708, 108 S. W. 578.

Nebraska. — *Boesen v. Omaha St. Ry. Co.*, 6 St. Ry. Rep. 809, 79 Neb. 381, 112 N. W. 614.

New Jersey. — *City Ry. Co. v. Lee*, 50 N. J. L. 435, 14 Atl. 883; *Whalen v. Consolidated Tract. Co.*, 61 N. J. L. 606, 40 Atl. 645, 41 L. R. A. 836, 68 Am. St. Rep. 723; *Wheeler v. South Orange & M. Tract. Co.*, 3 St. Ry. Rep. 631, 70 N. J. L. 725, 58 Atl. 927.

New York. — *Spooner v. Brooklyn City R. Co.*, 54 N. Y. 230, 13 Am. Rep. 570; *Cramer v. Brooklyn Heights R. Co.*, 6 St. Ry. Rep. 380, 190 N. Y. 310; *Gregory v. Elmira, etc., R. Co.*, 6 St. Ry. Rep. 375, 190 N. Y. 363, 83 N. E. 52; *Coleman v. Second Ave. R. Co.*, 41 Hun 380; *Wood v. Brooklyn City R. Co.*, 5 App. Div. 492, 38 N. Y. Supp. 1077; *Hassen v. Nassau Elec. R. Co.*, 34 App. Div. 71, 53 N. Y. Supp. 1069; *Brainard v. Nassau Elec. R. Co.*, 44 App. Div. 613, 61 N. Y. Supp. 74; *Henderson v. Nassau Elec. R. Co.*, 46 App. Div. 280, 61 N. Y. Supp. 690; *Sheeron v. Coney Island, etc., R. Co.*, 78 App. Div. 476, 79 N. Y. Supp. 752; *Edwards v. New Jersey, etc., Ferry Co.*, 144 App. Div. 554, 129 N. Y. Supp. 717; *Bruno v. Brooklyn City R. Co.*, 5 Misc. 327, 25 N. Y. Supp. 507. See also *Mullane v. N. Y. City Ry. Co.*, 51 Misc. 24, 99 N. Y. Supp. 798.

as matter of law, that the plaintiff was not negligent in standing upon the running board. As between the plaintiff and the owner of the automobile, the law imposed upon the plaintiff the obligation to reasonably and with ordinary vigilance and prudence care for his safety and freedom from personal injury, and it was for the jury to determine whether a reasonably prudent man would under the circumstances and conditions which accompanied the plaintiff subsequent to the boarding of the car by him, have been standing, as was the plaintiff, upon the running board at the time of the collision, and whether the negligence of the plaintiff, if found, contributed to his injuries.

Ohio. — *Lake v. Cincinnati, etc., R. Co.*, 13 Ohio C. C. 494; *Hollingsworth v. Cincinnati St. Ry. Co.*, 21 Ohio Cir. Ct. R. 536, 12 O. C. D. 100.

Oregon. — *Anderson v. City and Suburban Ry. Co.*, 42 Ore. 505, 71 Pac. 659.

Rhode Island. — *Elliott v. Newport St. Ry. Co.*, 18 R. I. 707, 28 Atl. 338, 23 L. R. A. 208; *Verrone v. Rhode Island, etc., Ry. Co.*, 4 St. Ry. Rep. 974, 27 R. I. 370, 62 Atl. 512, 114 Am. St. Rep. 41; *Betz v. Rhode Island Co.*, 70 Atl. 1058.

Texas. — *San Antonio v. Bryant*, 30 Tex. Civ. App. 437, 70 S. W. 1015.

Washington. — *Cogswell v. West St., etc., Ry. Co.*, 5 Wash. 46, 31 Pac. 411; *Lawson v. Seattle, etc., Ry. Co.*, 2 St. Ry. Rep. 945, 34 Wash. 500, 76 Pac. 71.

Wisconsin. — *Geitz v. Milwaukee*, 72 Wis. 307, 39 N. W. 866. See also *Schoenfeld v. Milwaukee City Ry. Co.*, 74 Wis. 433, 43 N. W. 162.

In *Math v. Chicago City Ry. Co.*, 243 Ill. 114, 90 N. E. 235, the court said: "The footboard is not furnished for ordinary use in riding on cars, but it is universally known that there are times when street cars are so crowded with passengers that some are compelled to ride on the footboard or not reach their business or homes at all. Such conditions furnish an excuse for standing on a footboard, so that there is no rule of law that standing in such a place constitutes, in itself, negligence on the part of a passenger." In *Pomeroy v. Boston, etc., Ry. Co.*, 5 St. Ry. Rep. 436, 193 Mass. 507, 79 N. E. 764, the court said: "The transportation of passengers often includes the use by them of the running board by the invitation and with the permission of the carrier, and where this condition of travel appears ordinarily as a matter of law negligence cannot be inferred on the part of a passenger who stands thereon during transit."

2. Applications and Limitations of General Rule. — Though a passenger is not guilty of contributory negligence *per se* in riding on the running board of a street railway car, he is bound to exercise reasonable care for his safety, and if he fails to exercise such care may be deemed guilty of contributory negligence. *Third Ave. R. Co. v. Barton*, 46 C. C. A. 241, 107 Fed. 215, 52 L. R. A. 471; *Frazer v. California St. Cable Co.*, 4 St. Ry. Rep. 78, 146 Cal. 714, 81 Pac. 21; *Math v. Chicago City Ry. Co.*, 243 Ill. 114, 90 N. E. 235; *Union Traction Co. v. Sullivan*, 4 St. Ry. Rep. 240, 38 Ind. App. 513, 76 N. E. 116; *Allen v. St. Louis Transit Co.*, 3 St. Ry. Rep. 562, 183 Mo. 411, 81 S. W. 1142; *Maercker v. Brooklyn Heights R. Co.*, 137 App. Div. 49, 122 N. Y.

DEFENDANT appeals from judgment for plaintiff. Reported 99 N. E. 262, 206 N. Y. 83.

Alfred L. Becker and James O. Moore, for appellants.

Eugene M. Bartlett, for respondent.

Opinion by COLLIN, J.:

The plaintiff has recovered a judgment against the defendant for the damages for personal injuries received by him, while a

Supp. 87; *Cusick v. Interurban St. Ry. Co.*, 86 N. Y. Supp. 758; *Rosen v. Dry Dock, etc., R. Co.*, 91 N. Y. Supp. 333; *Anderson v. City & Suburban Ry. Co.*, 42 Oreg. 505, 71 Pac. 659; *Elliot v. Newport St. Ry. Co.*, 18 R. I. 707, 28 Atl. 338, 23 L. R. A. 208; *Lawson v. Seattle, etc., Ry. Co.*, 2 St. Ry. Rep. 945, 34 Wash. 500, 76 Pac. 71; *Wenzel v. City, etc., R. Co.*, 64 W. Va. 310, 61 S. E. 1001.

The law imposes on a passenger riding on a running board the duty of observing for his own safety the degree of care that a person of ordinary prudence would observe while riding on a running board, and requires greater attention to the surroundings and precautions to avoid danger than when occupying a seat. If the circumstances are such that standing on the foot-board is an act of carelessness on the part of a passenger, or there is a failure to exercise such care as persons of ordinary prudence would exercise in the same position, there can be no recovery. *Math v. Chicago City Ry. Co.*, 243 Ill. 114, 90 N. E. 235.

If the jury by a special verdict find that the plaintiff, injured while riding upon the running board of a street car, was guilty of contributory negligence, judgment should be rendered for the defendant. *Schoenfeld v. Milwaukee City Ry. Co.*, 74 Wis. 433, 43 N. W. 162.

Where a passenger upon a running board was requested by the conductor to come forward to a vacant seat, and in passing the conductor he went outside of him and was struck by an elevated pillar in the street, it was held that the invitation of the conductor did not absolve the passenger from the exercise of reasonable care under the circumstances, and that the question of his care should be submitted to the jury. *Third Ave. R. Co. v. Barton*, 46 C. C. A. 241, 107 Fed. 215, 52 L. R. A. 471.

Common prudence requires that the passenger should either keep his body within the lines of the car, or, if he is disposed to swing himself out beyond such lines, to keep a diligent lookout to avoid coming in contact with other vehicles. *Frazer v. California St. Cable R. Co.*, 4 St. Ry. Rep. 78, 146 Cal. 714, 81 Pac. 29. Where the conductor of a car wished to pass a passenger standing upon a running board, and the passenger bent back so as to permit the conductor to pass between him and the car, he cannot recover for injuries arising from striking a pole near the track. *Nugent v. Fair Haven, etc., Ry. Co.*, 73 Conn. 139, 46 Atl. 875.

If the passenger knowingly exposes himself to danger such as an ordinarily prudent person under the circumstances would not have done, and is thereby

passenger on a street surface car of the defendant railway company, through a collision between the car and an automobile of the defendant motor company at an intersection of streets in the city of Buffalo, N. Y. The car was an open car, and at the time of the collision the plaintiff was standing upon one of the running boards extending along its sides holding to the stanchions or uprights. He testified that the collision so jolted the car that he was thrown from the running board to the pavement of the street and received the injuries claimed.

injured, or, if by reasonable precaution he could have foreseen the danger and avoided the injury, he ought not to be allowed damages, but these are questions for the jury. *Union Traction Co. v. Sullivan*, 4 St. Ry. Rep. 240, 38 Ind. App. 513, 76 N. E. 116.

Where a passenger, who had been employed as a conductor for several years, took a position on the running board and, as the car passed through a narrow but busy street with which he was entirely familiar, faced the car's interior and did not look to see if there was danger of colliding with vehicles or obstructions in the streets, and was struck by the pole of a cart which he could have seen by looking in the direction the car was going, and could have avoided had he seen it, he was guilty of contributory negligence. *Heshion v. Boston Elev. Ry. Co.*, 208 Mass. 117, 94 N. E. 390.

It is the duty of a passenger riding on the running board of a car to exercise such a degree of care as is reasonably necessary to prevent his being struck by a passing car; if, by standing up and not leaning out, he can avoid being struck, and he fails to observe that care, he is not entitled to recover for his injuries. *Allen v. St. Louis Transit Co.*, 3 St. Ry. Rep. 562, 183 Mo. 411, 81 S. W. 1142.

Where a passenger jumped on a moving car and swung himself along on the running board to seek a seat, although there was a vacant seat at the point where he first got on the car, and he is struck by a post of an elevated railroad, he is guilty of contributory negligence. *Cassio v. Brooklyn Heights R. Co.*, 59 App. Div. 617, 69 N. Y. Supp. 208.

A passenger on a street car who, knowing that it was approaching a curve and that his signal to the conductor to stop was too late, got upon the running board and was thrown off when the car, going at the rate of ten or twelve miles an hour, struck the curve with a shock insufficient to disturb the passengers within the car, is guilty of contributory negligence which bars a recovery. *Maercker v. Brooklyn Heights R. Co.*, 137 App. Div. 49, 122 N. Y. Supp. 87.

Where a passenger is riding upon the running board of a crowded street car and collides with a post, vehicle or other obstruction close to the track, his contributory negligence is generally a question for the jury. *Koontz v. District of Columbia*, 24 App. D. C. 59 (collision with projecting plank); *Parington-Kimball Brick Co. v. Eckman*, 102 Ill. App. 183; *Pomaski v. Grant*, 119 Mich. 675, 78 N. W. 891; *City Ry. Co. v. Lee*, 50 N. J. L. 435, 14 Atl. 883 (collision with passengers on running board of another car); *Wood v.*

There was evidence from which the jury might have found that the plaintiff boarded the car at a point a mile or thereabouts from the place of the collision, at which time all of the seats were occupied and the plaintiff took his position upon the running board, upon which eight or ten other persons were, and while there he paid his fare as a passenger; that at and prior to the time of the collision there were vacant seats in the car, one of which the plaintiff might with reasonable vigilance and effort

Brooklyn City R. Co., 5 N. Y. App. Div. 492, 38 N. Y. Supp. 1077 (collision with vehicle); Faris v. Brooklyn City & N. R. Co., 46 N. Y. App. Div. 231, 61 N. Y. Supp. 670 (collision with vehicle); Henderson v. Nassau Elec. R. Co., 46 N. Y. App. Div. 280, 61 N. Y. Supp. 690 (collision with vehicle); Bruno v. Brooklyn City R. Co., 5 Misc. (N. Y.) 327, 25 N. Y. Supp. 507 (collision with horses of street car); Walsh v. Interurban St. Ry. Co., 50 Misc. (N. Y.) 637, 98 N. Y. Supp. 656; Hollingsworth v. Cincinnati St. Ry. Co., 21 Ohio Cir. Ct. Rep. 536, 12 O. C. D. 100 (collision with car on other track); Elliott v. Newport St. Ry. Co., 18 R. I. 707, 28 Atl. 338, 23 L. R. A. 208 (collision with trolley pole); Geitz v. Milwaukee City Ry. Co., 72 Wis. 307, 39 N. W. 866 (collision with post).

The fact that there were other persons standing on the running board of the car tends to show the passenger's freedom from negligence. Koontz v. District of Columbia, 24 App. D. C. 59. But the passenger is not guilty of negligence *per se* in so riding where there are no other persons on the running board. West Chicago St. Ry. Co. v. Marks, 82 Ill. App. 185, *aff'd*, 182 Ill. 15, 55 N. E. 67.

A passenger is not necessarily guilty of negligence where he rides on the running board though he is intoxicated; Lawson v. Seattle, etc., Ry. Co., 2 St. Ry. Rep. 945, 34 Wash. 500, 76 Pac. 71; or though he is a cripple, where the injury is not the proximate result of his condition. Topeka City Ry. Co. v. Higgs, 38 Kan. 375, 16 Pac. 667, 5 Am. St. Rep. 754.

In Boesen v. Omaha St. Ry. Co., 6 St. Ry. Rep. 809, 79 Neb. 381, 112 N. W. 614, where a passenger was injured by being thrown off while standing upon the running board, and it appeared that he took such position at the request of the conductor, the court said: "If a passenger, at the direction of those in charge, takes a designated place on the car of the company, he cannot be charged with negligence solely from the fact that he rode in such position. He cannot be charged with contributory negligence because of the position he occupies at the direction and request of the company. The negligence, if any, in standing where he is directed is the negligence of the company."

Where a passenger riding upon the running board of a car is thrown off by a sudden, violent jerk, his contributory negligence is generally a question for the jury. Sheeron v. Coney Island, etc., R. Co., 78 App. Div. 476, 79 N. Y. Supp. 752; Verrone v. Rhode Island, etc., Ry. Co., 4 St. Ry. Rep. 974, 27 R. I. 370, 62 Atl. 512, 114 Am. St. Rep. 41. And see *infra*, the cases cited under *Assumption of Risk*, p. 8.

Where a passenger riding upon a running board is injured because the con-

have secured and occupied and had he so done he would not have been injured. The trial justice in his main charge omitted any instruction concerning the negligence of the plaintiff, stating to the jury that they might eliminate from their consideration of the case any question with reference to his negligence. No exception to that part of the charge was taken. Following upon certain requests on the part of the defendants, the trial justice charged, in effect, as a matter of law, that the plaintiff was not negligent

ductor stumbled and grasped the passenger to save himself; he can recover for his injuries. *Whalen v. Consolidated Traction Co.*, 61 N. J. L. 606, 40 Atl. 645, 41 L. R. A. 836, 68 Am. St. Rep. 723. Where a conductor, while collecting fares, by swinging himself out around the passengers on the running board, is struck by a trolley pole and thrown against a passenger, the latter can recover for his injuries. *Horan v. Rockwell*, 110 N. Y. App. Div. 522, 96 N. Y. Supp. 973.

3. Car Not Crowded.—A passenger is required to exercise reasonable care for his safety during transit, and this sometimes imposes upon him the duty of occupying a vacant seat in a street car in preference to riding on the running board, but, according to the rule generally adopted, he is not guilty of contributory negligence *per se* if he rides on the running board; his negligence is generally a question for the jury under all the circumstances. *Seymour v. Citizens' Ry. Co.*, 114 Mo. 266, 21 S. W. 739; *Allen v. St. Louis Transit Co.*, 183 Mo. 411, 81 S. W. 1142; *Vessels v. Metropolitan St. Ry. Co.*, 129 Mo. App. 708, 108 S. W. 578; *San Antonio v. Bryant*, 30 Tex. Civ. App. 437, 70 S. W. 1015.

But according to the view taken in some states, if a passenger takes a position on the running board, in the absence of a reasonable cause or excuse, when there is a vacant seat in the car, he will be deemed negligent. *Camden v. Railroad Co.*, 44 Am. Rep. 123; *Railroad Co. v. Carroll*, 5 Ill. App. 201; *Caspers v. Dry Dock, etc., R. Co.*, 22 N. Y. App. Div. 156, 47 N. Y. Supp. 961.

A passenger will not be charged with negligence by moving along the running board in order to obtain or change his seat. *Kreimelmann v. Jourdan*, 107 Mo. App. 64, 80 S. W. 323; *Cameron v. Lewiston, etc., Ry. Co.*, 103 Me. 482, 70 Atl. 534; *Wheeler v. South Orange, etc., Tract. Co.*, 3 St. Ry. Rep. 631, 70 N. J. L. 725, 58 Atl. 927; *Coleman v. Second Ave. R. Co.*, 41 Hun 380.

Where a person got on the wrong car and then passed along the running board to ask the conductor for a transfer, it was held that his negligence was a question for the jury. *Citizens' St. R. v. Hoffbauer*, 23 Ind. App. 614, 56 N. E. 54. Where a passenger preparatory to alighting from the car went along the running board to get a bundle which he had left under a rear seat, it was held that he was not guilty of negligence as a matter of law. *Mason v. Boston, etc., Ry. Co.*, 4 St. Ry. Rep. 475, 190 Mass. 255, 76 N. E. 717.

A passenger having a seat upon a crowded car is not deemed negligent in surrendering his seat to a woman passenger and riding upon the running board. *Brainard v. Nassau Elec. R. Co.*, 44 N. Y. App. Div. 613, 61 N. Y. Supp. 74.

in standing upon the running board as a passenger, and thereto each defendant excepted. We are to determine whether or not there was error therein.

The railway company received the plaintiff upon its car and accepted the fare, and the relation between it and the plaintiff was that of carrier and passenger. The plaintiff in taking the position upon the running board, when he mounted the car, was not guilty of contributory negligence as a matter of law, because

Where there is no vacant seat a passenger is not deemed negligent in riding upon the running board, though he might have found a position of less danger by standing between the seats. *Hassen v. Nassau Elec. R. Co.*, 34 N. Y. App. Div. 71, 53 N. Y. Supp. 1069. Where a passenger rode upon the running board for several blocks without looking ahead to avoid collisions, and was struck by a wagon which other passengers upon the running board avoided by stepping between the seats, he is guilty of negligence.

In *Missouri*, a passenger riding on the running board can recover for injuries from a collision with a vehicle or obstruction in the street, though the injury would have been avoided had he occupied a vacant seat within the car. *Allen v. St. Louis Transit Co.*, 183 Mo. 411, 81 S. W. 1142; *Seymour v. Citizens' Ry. Co.*, 114 Mo. 266, 21 S. W. 739.

It is proper to permit a witness to testify that the usual and ordinary use of the running board is for passengers to go from one part of the car to another and that passengers use the running board for that purpose. *Citizens' St. R. Co. v. Hoffbauer*, 23 Ind. App. 614, 56 N. E. 54.

4. Assumption of Risks by Passenger.—A passenger, though not guilty of negligence in standing upon the running board of a street car, assumes the risks incident to the operation of the car in the customary and usual way.

Arkansas.—*Oliver v. Ft. Smith, etc., Co.*, 89 Ark. 222, 116 S. W. 204.

Illinois.—*Chicago City Ry. Co. v. Schaefer*, 121 Ill. App. 334.

Indiana.—*Citizens' St. R. Co. v. Hoffbauer*, 23 Ind. App. 614, 56 N. E. 54.

Louisiana.—*Gilly v. New Orleans, etc., R. Co.*, 49 La. Ann. 588, 21 So. 850.

Massachusetts.—*Eldridge v. Boston Elev. Ry. Co.*, 203 Mass. 582, 89 N. E. 1041.

Maine.—*Cameron v. Lewiston, etc., Ry.*, 103 Me. 482, 70 Atl. 534.

Mississippi.—*Bridges v. Jackson Elec. Ry. L. & P. Co.*, 4 St. Ry. Rep. 547, 86 Miss. 584, 38 So. 788.

New York.—*Gregory v. Elmira, etc., R. Co.*, 6 St. Ry. 375, 190 N. Y. 363, 83 N. E. 52; *Edwards v. N. J., etc., Ferry Co.*, 144 N. Y. App. Div. 554, 129 N. Y. Supp. 717.

Rhode Island.—*Elliott v. Newport St. Ry. Co.*, 18 R. I. 707, 28 Atl. 338, 23 L. R. A. 208; *Verrone v. Rhode Island, etc., Ry. Co.*, 27 R. I. 370, 62 Atl. 512, 114 Am. St. Rep. 41.

The risks he assumes are those arising from known dangers and from the usual jolting and swaying of the car. He does not assume the risks arising

there was then no seat which he could secure and occupy, and whether or not he was guilty of contributory negligence in remaining on the running board depended upon all the conditions and circumstances as delineated by the testimony and was a question for the jury. *Cattano v. Met. Street Ry. Co.*, 173 N. Y. 565; *Wood v. Brooklyn City R. R. Co.*, 5 App. Div. 492. His negligence, if found to exist, would defeat his right of recovery provided it contributed to produce the injury upon which that right was

from the negligent management of the car by the employees of the company. *Oliver v. Ft. Smith, etc., Co.*, 89 Ark. 222, 116 S. W. 204; *Eldridge v. Boston Elevated Ry. Co.*, 203 Mass. 582, 89 N. E. 1041. Nor does he assume the risk of injury from a sudden violent jerk of the car. *Sheeron v. Coney Island, etc., R. Co.*, 78 N. Y. App. Div. 476, 79 N. Y. Supp. 752; *Verrone v. Rhode Island, etc., Ry. Co.*, 4 St. Ry. Rep. 974, 27 R. I. 370, 62 Atl. 512, 114 Am. St. Rep. 41. He does not assume the danger of a collision with a pole in proximity to the track where he has no knowledge thereof. *Cameron v. Lewiston, etc., Ry. Co.*, 103 Me. 482, 70 Atl. 534; *Citizens' St. Ry. Co. v. Hoffbauer*, 23 Ind. App. 614, 56 N. E. 54; *Elliott v. Newport St. Ry. Co.*, 18 R. I. 707, 28 Atl. 338, 23 L. R. A. 208. Nor the danger of a collision with a plank or beam used by the company in making repairs to the track and extending over the running board. *Cramer v. Brooklyn Heights R. Co.*, 190 N. Y. 310, 6 St. Ry. Rep. 380, 83 N. E. 35. He does not under all circumstances assume the danger of a collision with a wagon in the street. *Eldridge v. Boston Elev. Ry. Co.*, 203 Mass. 582, 89 N. E. 1041. See also *Elliott v. Newport St. Ry. Co.*, 18 R. I. 707, 28 Atl. 338, 23 L. R. A. 308.

In *Citizens' St. R. Co. v. Hoffbauer*, 23 Ind. App. 614, 56 N. E. 54, the court said: "When appellee in the case at bar went upon the footboard, he took upon himself the duty of looking out for himself against the usual and obvious peril of the place, as long as the car was operated and managed in the usual manner. But the danger of being hit by a trolley pole while on the footboard was not such a danger as he was bound to anticipate when the car was run in the unusual manner of having the footboard next to the trolley poles, and he had no knowledge that it was so running. In the absence of knowledge he had the right to assume that the car was properly managed and was running with the footboard away from the poles, and that there was no danger from trolley poles while on the footboard."

If a passenger chooses to stand on the running board when there is room for him on the rear platform or in the seats of the car it is not the duty of the conductor to warn such passenger that he may be exposed to jerks or lurches incidental to the ordinary motion of the car when passing over switches or around curves. *Olund v. Worcester, etc., Ry. Co.*, 206 Mass. 544, 92 N. E. 720.

When a passenger rides upon the running board of a car when he could have occupied a seat he assumes all the dangers of his position, such as the danger of striking a pole; *Bridges v. Jackson Elec. Ry. L. & O. Co.*, 4 St. Ry. Rep. 547, 86 Misc. 584, 38 So. 788; or a car upon the other track. *Moody v.*

based. A passenger, who without negligence stands upon the running board, step or platform of a street surface car, assumes the risks incident to the operation of the car in the customary and ordinary way, such as the movements attendant upon the starting and stopping and passing over the curves and the jolting and rocking of the car, but does not assume those which are exceptional or which spring from the negligence of the railway company, such, for instance, as those of derailment or collisions. He is, however, under the duty of exercising care, reasonable and commensurate with the dangerous nature of his position, to shield himself from the results of those exceptional risks. *Kramer v. Brooklyn Heights R. R. Co.*, 190 N. Y. 310; *Gregory v. Elmira Water, Light & R. R. Co.*, 190 N. Y. 363; *Kiefer v. Brooklyn Heights R. R. Co.*, 111 App. Div. 404.

But a passenger who takes or retains, in the absence of a reasonable cause or excuse, a position upon the running board, steps or platform of a street surface car when there is a vacant seat which he may reach and occupy with reasonable and proper vigilance and effort, is negligent. He may not causelessly and without

Springfield St. Ry. Co., 182 Mass. 158, 65 N. E. 29. But a passenger does not assume the risk of striking a car on another track when he is using the running board to get a seat he wants. *Kreimelmann v. Jourdan*, 107 Mo. App. 64, 80 S. W. 323.

An instruction that a passenger assumes the increased risk of riding on the footboard, holding on to the handle bar, if he knew there was standing room inside the car, is not erroneous if supported by the evidence. *Brightwood Ry. Co. v. Carter*, 12 App. D. C. 155.

In *Missouri*, a passenger riding on the running board when there are vacant seats in the car assumes only the risks incident to his position, and not those which might result from the failure of the company's servants to observe due care in the management of the car. *Vessels v. Metropolitan St. Ry. Co.*, 129 Mo. App. 708, 108 S. W. 578.

5. Passenger Preparing to Alight.—The question of the contributory negligence of a passenger taking a position upon the running board of a street car preparatory to alighting from the car is discussed in a note to *Bainbridge v. Union Traction Company*, 1 St. Ry. Rep. 694.

6. Rule in Pennsylvania.—In Pennsylvania it is held that it is not necessarily negligence for a passenger to ride on the running board when the car is crowded so that there is no room inside, and the passenger's negligence in such a case is a question for the jury. *Bumbear v. United Traction Co.*, 198 Pa. St. 198, 47 Atl. 961; *Abel v. Northampton Tract. Co.*, 4 St. Ry. Rep. 960, 212 Pa. St. 329, 61 Atl. 915. Such a passenger, however, assumes the risks incident to the usual swaying and jolting of the car and from collision with passing vehicles and obstructions which unexpectedly appear. *Bumbear*

reason occupy a hazardous position when, by reasonable watchfulness and exertion, he may place himself in the safer one which the railway company has provided for its passengers. *Coleman v. Second Avenue R. R. Co.*, 114 N. Y. 609; *Bradley v. Second Avenue R. R. Co.*, 90 Hun 419; *Clark v. Railroad Co.*, 36 N. Y. 135; *Ginna v. Second Avenue R. R. Co.*, 67 N. Y. 596. The plaintiff was bound, as matter of law, to be reasonably diligent in ascertaining whether or not a seat became vacant, and in case a seat did become vacant, in then reaching and securing it, unless there existed a reason justifying him in remaining upon the running board. The exception of the railway company to that part of the charge under consideration was well taken.

The relation between the plaintiff and the motor company was that which exists between travelers upon the street or highway. Under it the law imposed upon the plaintiff the obligation to reasonably and with ordinary vigilance and prudence care for his safety and freedom from personal injury. If he failed to exercise reasonable care and thoughtfulness in regard to evading injury through the dangers fairly incident to traveling upon the street, he was negligent. The relation between the plaintiff and

v. United Traction Co., 198 Pa. St. 198, 47 Atl. 961; *Rice v. Philadelphia Rapid Transit Co.*, 4 St. Ry. Rep. 965, 214 Pa. St. 147, 63 Atl. 419, 112 Am. St. Rep. 738.

If it is reasonably practicable for the passenger to pass in the car it is his duty to do so; if he fails to do so, and voluntarily assumes a position of danger on the running board, he is guilty of contributory negligence and assumes all the risks of his position. *Bumbear v. United Traction Co.*, 198 Pa. St. 198, 47 Atl. 961; *Burns v. Johnstown Pass. Ry. Co.*, 4 St. Ry. Rep. 962, 213 Pa. St. 143, 62 Atl. 564, 2 L. R. A. (N. S.) 1191; *Harding v. Philadelphia Rapid Transit Co.*, 6 St. Ry. Rep. 134, 217 Pa. St. 69, 66 Atl. 151, 10 L. R. A. (N. S.) 352. See also *Wood v. Chester Traction Co.*, 36 Pa. Super. Ct. 483. Where a passenger riding on the running board is killed by contact with a pole along the side of the track, and the deceased at the time of the accident was disorderly and reckless, disregarding repeated warnings of his danger, the company is not liable. *Woodroffe v. Roxborough, etc., Ry. Co.*, 201 Pa. St. 521, 51 Atl. 324, 88 Am. St. Rep. 827. A passenger struck by a pole while he was riding on the running board cannot recover where he knew of the poles and their proximity to the track and warned several other passengers thereof, and they were not struck, but he was. *Burns v. Johnstown Pass., etc., Ry. Co.*, 4 St. Ry. Rep. 962, 213 Pa. St. 143, 62 Atl. 564, 2 L. R. A. (N. S.) 1191. A passenger unwilling to assume the dangers incident to a position on the running board of a crowded car should wait for a subsequent car. *Philadelphia Rapid Transit Co.*, 6 St. Ry. Rep. 134, 217 Pa. St. 69, 66 Atl. 151, 10 L. R. A. (N. S.) 352.

the railway company and the duties and obligations springing from it do not enter into the consideration of the plaintiff's negligence or freedom from negligence in his contact and relation with the motor company. Would a reasonably prudent man, under the circumstances and conditions which accompanied the plaintiff subsequent to the boarding of the car by him, have been standing, as was the plaintiff, upon the running board at the time of the collision, and did the negligence of the plaintiff, if found, contribute to his injuries? Certainly these were questions for the jury, and the exception of the motor company was well taken. *Connolly v. Knickerbocker Ice Co.*, 114 N. Y. 104; *Mills v. Woolverton*, 9 App. Div. 82; *Miller v. Uvalde Asphalt Paving Co.*, 134 App. Div. 212; *Spofford v. Harlow*, 85 Mass. 176. Any negligence of the motorman or conductor of the car participating in causing the collision would not defeat a recovery by the plaintiff from the motor company. *Chapman v. New Haven Railroad Co.*, 19 N. R. 341; *Little v. Hackett*, 116 U. S. 366; *Bennett v. New Jersey R. R. & T. Co.*, 36 N. J. L. 225.

The judgment should be reversed and a new trial granted, with costs to abide the event.

GRAY, WILLARD BARTLETT, HISCOCK and CHASE, JJ., concur; CULLEN, Ch. J., concurs in result; VANN, J., absent.

Judgment reversed, etc.

Richmond v. Tacoma Ry. & Power Co.

(Washington — Supreme Court.)

1. **PEDESTRIAN STRUCK BY CAR AT CROSSING; EVIDENCE; NEGLIGENCE; CONTRIBUTORY NEGLIGENCE; QUESTION FOR JURY.** — Action for injuries to a pedestrian struck by a car while crossing the tracks to board another car. Evidence examined and held sufficient to warrant the jury in finding defendant guilty of negligence.

The question of plaintiff's contributory negligence in failing to observe an approaching car was properly submitted to the jury, and could not have been decided as a matter of law.

2. **DUTY OF PEDESTRIAN CROSSING TRACK; LOOK AND LISTEN.** — A pedestrian in crossing a street railway track is required to use his senses and exer-

Injury to Pedestrian. — For a discussion of the liability of a street railway company for an injury to a pedestrian struck by a car, see *Nellis on Street Railways* (2d Ed.), §§ 404-406, 419-424.

cise such care as a man of ordinary prudence would be expected to exercise under such circumstances.

The rule of stop, look and listen as applied to steam railroads cannot be applied in its entirety to street railways operated in a populous district.

3. INSTRUCTIONS; LAST CLEAR CHANCE; SPEED ORDINANCE; PRESUMPTIONS. — An instruction that plaintiff should be allowed to recover, although negligent, if the defendant's motorman saw the danger in time to prevent the accident, but failed to do so, is not prejudicial, although the jury found that the plaintiff was not negligent.

An instruction that as a pedestrian approached a street crossing he had a right to presume that no street car would be run along such track in violation of an ordinance governing the rate of speed, is proper, although the plaintiff did not testify as to knowledge of such ordinance.

An instruction that a pedestrian crossing a street is entitled to presume that street cars will be run within the speed limit prescribed by ordinance is proper, yet, if such limit is exceeded, the pedestrian is not thereby relieved of the obligation to exercise due care.

DEFENDANTS appeal from judgment for plaintiff. Reported 122 Pac. 351.

John A. Shackleford and F. D. Oakley, for appellants.

Davis & Neal, A. O. Burmeister, and Dunkleberger & Heinly, for respondent.

Opinion by PARKER, J.:

This action was commenced in the Superior Court for Pierce county to recover damages for personal injuries which the plaintiff alleges resulted to him from the operation of one of the street cars belonging to the defendant Tacoma Railway & Power Company. A trial before the court and a jury resulted in a verdict and judgment in favor of the plaintiff, from which the defendants have appealed.

Appellant Tacoma Railway & Power Company is the owner of an electric street railway system in the city of Tacoma. Appellant A. B. Justice was, on the 27th day of July, 1910, an employee of the company in charge of one of its street cars as motorman, when respondent was struck and injured by the car at the crossing of South Fifty-second and M streets in the city. The negligence charged against appellants is, in substance, that the car was being run at an excessive and unlawful rate of speed, and without any warning of its approach to the crossing until too late to enable respondent to avoid being injured by it, while crossing the track on which it was approaching. Appellants deny the

negligence charged against them, and affirmatively allege that respondent's injuries were the result of his own want of care and contributory negligence. The first and principal contention made by counsel for appellants is that the trial court erred in denying their motions for an instructed verdict and for judgment notwithstanding the verdict. This involves their right to have a determination of the cause in their favor upon the evidence as a matter of law, and we will first notice the facts upon which this question must be determined.

The evidence is not free from conflict; but a careful reading of the entire record convinces us that the evidence was sufficient to warrant the jury in regarding the following facts as established thereby. One of the company's lines is a double-track street railway running north and south on M street, where it crosses South Fifty-second street. This crossing is in a somewhat thickly populated residence district of the city. At the northwest corner of this crossing is a grocery store building, fronting directly upon M street. This is a crossing at which very frequent stops are made by the cars, for the purpose of letting off and taking on passengers. The cars run north upon the east track and south upon the west track. Respondent was familiar with the locality and the manner of operating cars there. He had resided for a considerable time some two blocks to the west of the crossing, and was accustomed to go from his home along the south sidewalk of Fifty-second street to take north-bound cars, which, according to custom, stopped at the north sidewalk crossing. On the morning of July 27, 1910, respondent started from his home to take a north-bound car. He had proceeded but a short distance when he saw a north-bound car coming some distance to the south. He then increased his pace, walking very fast, and also running at least a part of the distance, in order to reach the car when it would stop at the north sidewalk crossing. As he proceeded east along the south side of Fifty-second street he could not see north along M street any great distance, because the grocery store building at the northwest corner obstructed his view to the north, until he reached a point near M street. When he was near M street, and about forty-five feet from the street car track, he could have seen a car coming from the north on the west track had such car been within a distance of about 200 feet from the south sidewalk crossing towards which he was going. He then looked to the north along M street, and did not see any car coming from that direction.

He hurriedly proceeded on his way, then running, and reached the west track at the south sidewalk crossing just after the north-bound car passed that point on the east track, and about the time that car was stopping at the north sidewalk crossing. He intended to pass round to the rear of that car and get on it on the east side; entrance thereto being on that side only, because of the double track. While he was crossing the west track, and evidently while he was near to the east side thereof, he was struck by a swiftly moving south-bound car and thrown to the south and east, landing near or upon the east track. He did not look for the coming of the south-bound car after he was about forty-five feet from the track, but hurriedly proceeded on his way, evidently thereafter intent only on reaching the north-bound car before it started from the north sidewalk crossing, where he expected it to stop. He does not remember of hearing any warning, by bell or whistle, of the approach of the south-bound car. This may be accounted for by the noise of the other car coming to a stop and the rapid succession of events then occurring, though it seems highly probable that a bell warning was given from the south-bound car about the time it passed the north sidewalk crossing and the other car which was there. Such signal was, in any event, given only a very short time before respondent was struck, and while the car was moving very fast. He says he did not see the south-bound car at any time. If his story is to be believed, it is evident that that car had not reached a point where it could be seen by him when he looked north from a point forty-five feet distant from the track; so the car was then at least 200 feet north of the south sidewalk crossing. That car passed the north sidewalk crossing while the other car was there, at a speed of twenty-five miles an hour as estimated by one witness, and another witness, who had been a street car conductor, estimated its speed at that point at thirty miles an hour. These were apparently disinterested witnesses and seemed to have had fairly good opportunities for observing the speed of the car, though witnesses for the appellant disagreed with them. The brakes were first applied and an effort made to check the speed of the car at about the time it passed the north crossing and the other car. It had then only fifty-one feet to run before reaching the south crossing, where it struck respondent. Its speed was checked to some extent before reaching respondent, but it was evidently then still continuing at a considerable speed; for it was not finally stopped until it ran a hundred feet or more after striking appellant. One

witness testified that it ran 150 feet, arriving at that conclusion by knowing the width of the lots fronting upon the street, and knowing the place where it finally stopped. There was then in force in the city of Tacoma an ordinance of the city regulating the speed of street cars within the city limits, which limited the speed of cars upon double-track lines in this part of the city to twenty miles per hour.

For the purpose of showing the duty of the motorman in controlling his car while passing over crossings and passing other cars, while stopped to let off and take on passengers at crossings, respondent called the superintendent of the company as a witness, who was interrogated and answered as follows:

"Q. I will ask you to state whether or not the company had any rules relative to the operation of a street car in passing another car standing at a crossing taking on passengers, or just going up to the crossing for the purpose of taking on and letting off passengers? A. Yes, sir. Q. I will ask you what that rule was? A. Cars passing another car, discharging or loading passengers, are required to reduce speed and sound gong. Q. Reduce the speed to what? A. What the motorman would consider a safe rate of speed. * * * Q. Would that be for the purpose of enabling him to stop and avoid injuries to people who might get in front of his car? A. Yes; that is the idea. Q. The object of that rule is to protect passengers who are going to or are taking the other car? * * * A. It is not altogether; people might be crossing the street, and a view of the passing car obstructed by the standing car; that is a rule that is for the safety of any one — pedestrians, horses or passengers, or any one else. Q. For the protection of the public generally? A. Yes, sir. Q. There is no particular speed to which it is reduced? A. No, sir."

We note this evidence, not for the purpose of indicating a violation of rules of the company, but as throwing light upon the question of appellant's negligence in the operation of the car at this point, and as indicating what might be expected from the operation of the car by a person of ordinary prudence approaching the crossing at that time.

The evidence being sufficient to warrant the jury in believing these facts, argument seems unnecessary to demonstrate that the question of appellant's negligence was for the jury to determine. The speed of the car, the presence of the street crossing, the presence of the other car, stopped at the crossing to let off and take on passengers, the delay in any attempt to check the speed of the car until it was practically upon the crossing at the side of the other car, and the delay in giving any signal of its approach until about that time, it seems to us, leave nothing to be argued upon the

question of appellant's negligence, except such argument as might be properly addressed to the jury. Clearly this branch of the case does not present a question of law for the court to decide. Indeed, the argument of learned counsel for appellants gives but little attention to their negligence, but is addressed almost wholly to the alleged contributory negligence of respondent, which we will now consider.

It is insisted that respondent's failure to look north along M street, where he could have observed the approaching car after he had first looked in that direction from a point about forty-five feet from the track, was so plainly contributory negligence on his part that the court should decide, as a matter of law, that he is precluded from recovering damages for the injuries he received, even though appellant was negligent. In the early case of *McQuillan v. Seattle*, 10 Wash. 464, 38 Pac. 1119, 45 Am. St. Rep. 799, this court expressed its views upon the question of contributory negligence being generally one for the jury, as follows:

"Generally, the question of contributory negligence is for the jury to determine from all the facts and circumstances of the particular case, and it is only in rare cases that the court is justified in withdrawing it from the jury. * * * There are two classes of cases in which the question of negligence may be determined by the court as a conclusion of law; but we think the case in hand does not fall within either of them. The first is where the circumstances of the case are such that the standard of duty is fixed and the measure of duty defined by law, and is the same under all circumstances. * * * And the second is where the facts are undisputed and but one reasonable inference can be drawn from them. * * * If different results might be honestly reached by different minds, then negligence is not a question of law, but one of fact for the jury."

And in the case of *Traver v. Spokane Street Railway Company*, 25 Wash. 225, 239, 65 Pac. 284, 289, even stronger language was used, as follows:

"The great weight of authority is to the effect that, before a court will be justified in taking from the jury the question of contributory negligence, the acts done must be so palpably negligent that there can be no two opinions concerning them."

This doctrine has been adhered to and variously expressed in many other decisions of this court. *Steele v. Northern Pacific Ry. Co.*, 21 Wash. 287, 57 Pac. 820; *Burian v. Seattle Electric Co.*, 26 Wash. 606, 67 Pac. 214; *Christianson v. Pacific Bridge Co.*, 27 Wash. 582, 68 Pac. 191; *Shearer v. Town of Buckley*, 31 Wash. 370, 72 Pac. 76; *Budman v. Seattle Electric Co.*, 61 Wash.

281, 112 Pac. 356; *Williams v. Northern Pac. Ry. Co.*, 63 Wash. 57, 114 Pac. 888.

It is a matter of some interest, as well as of value, in this connection to notice the reason of this, and ask ourselves why it is more rare for a case to be taken from the jury upon the ground of contributory negligence than upon the ground of want of proof of the defendant's negligence. Contributory negligence involves the consideration of affirmative proof of such negligence. It is not something that meets the plaintiff's right to recovery by a mere assertion of it on the part of a defendant. It is not a denial, but an affirmation which requires proof before it is of any effect. Hence, when a court decides, as a matter of law, that an injured plaintiff is precluded from recovering damages for his injury, because of his own negligence contributing thereto, the court is in effect deciding that facts have been affirmatively proven which conclusively show, as a matter of law, such contributory negligence. It is not easy to see why the question of plaintiff's contributory negligence should be decided by the court, as a matter of law, in the affirmative, under any different circumstances or required degree of proof than that the question of defendant's negligence should be decided by the court, as a matter of law, in the affirmative. It is true that the affirmative proof need not necessarily come from defendant's evidence. It may appear in the plaintiff's evidence. The question nevertheless involves an affirmative finding in order to be decided, as a matter of law, in defendant's favor. This is quite a different matter from withdrawing a case from the jury because of the failure of required affirmative proof to sustain a claimed right. In 1 Thompson on Negligence, § 425, that learned author observes:

"Contributory Negligence Generally a Question of Fact for the Jury.—As we shall see, the statement is often loosely made in judicial opinions that *negligence* is generally a question of fact for the jury; whereas, the true rule, so far as there can be any rule, is that whether there has been contributory negligence on the part of the plaintiff is a question for the jury, under the same circumstances and subject to the same limitations as the question whether there has been negligence on the part of the defendant. Loose expressions, often found in judicial opinions, to the effect that contributory negligence is generally a question for a jury, are concessions to the obvious principle that whether a man, woman, or child has used, in a particular situation, the care which such persons ordinarily use, or whether they have, under the circumstances, used reasonable care, or acted reasonably, is a question which, as a general rule, is better determined by twelve men, on a comparison of their experience, than by a single legal scholar on the bench."

At section 433 the author makes further observations of interest along this line of thought. It would indeed be a remarkable case that would call for a directed verdict against a defendant upon the ground that his negligence had been so conclusively proven as to enable the court to so decide as a matter of law; and yet there seems to be no more reason for expecting such disposition of personal injury cases occasionally, as matters of law, than to expect directed verdicts against a plaintiff by reason of his contributory negligence. Both involve an affirmative showing of negligence against an equally strong presumption to the contrary. These observations suggest the exercise of great caution in deciding, as a matter of law, that a plaintiff is guilty of contributory negligence.

Now, in view of the facts we have summarized as occurring in this case, can the minds of reasonable men differ upon the question of the contributory negligence of respondent in proceeding towards and across the track without looking to the north, the direction from which he knew a car might come, after he had passed a point forty-five feet from the track? This question cannot be determined by any hard and fast rules. The law does not fix with any degree of exactness the measure of respondent's duty under these circumstances. Of course, it can be said that he was required to use his senses and exercise such care as a man of ordinary prudence would be expected to exercise under such circumstances; but this, in substance, is as far as it is practicable for the law to go in defining his duty. This is not a steam railway, but a street railway in a populous residence district of the city. Hence the rule of stop, look, and listen has no application here as a rule of law defining respondent's duty, though, of course, the extent of the use of his faculties in that regard, as shown by the evidence, is a circumstance bearing upon the degree of care he exercised. In *Roberts v. Spokane Railway Co.*, 23 Wash. 325, 335, 63 Pac. 506, 509 (54 L. R. A. 184), it is said:

"The degree of care required in crossing a highway and steam railway, in looking up and down the track, is not necessarily the test of care required in crossing the track of a street railway on a public street. Failure to look and listen before crossing the tracks of an electric railway in a public street, where the cars have not the exclusive right of way, is not negligence as a matter of law."

In the very recent case of *Morris v. Seattle, Renton & Southern Ry. Co.*, 120 Pac. 534, this rule is again recognized and numerous other decisions of this court cited in support thereof. The evi-

dence was sufficient to warrant the jury believing that the respondent looked from a point forty-five feet from the track, and could see only about 200 feet north along the track, and did not see any car approaching from that direction. This fact would, in no event, require any greater degree of care on his part than as if he had seen a car approaching 200 feet away; that is, he was warranted in governing his actions as if he saw a car approaching at that distance. He surely was not proceeding in the face of any greater hazard than that condition would suggest to him. This court has held that a pedestrian is justified in ordering his movements upon the assumption that street cars will be operated, not only in conformity with local laws, but with a high degree of care, and with due regard for public travel upon the street. *Chisholm v. Seattle Electric Co.*, 27 Wash. 237, 67 Pac. 601; *Mallett v. Seattle, Renton & Southern Ry. Co.*, 119 Pac. 743.

Respondent being entitled to act upon this assumption, it cannot be decided as a matter of law that he was guilty of contributory negligence in hurriedly proceeding upon his way across the track, when it was the duty of appellants, in any event, to keep the speed of the car within the limit of twenty miles per hour, and to check the speed of the car upon approaching the crossing, especially in view of the presence of the other car receiving and discharging passengers there; that point being between respondent and the approaching car, and about fifty feet distant from where he intended to cross the track. Even if the car had proceeded at the extreme speed limit allowed by the ordinance over the entire 200 feet, the jury might still conclude that it would not have reached the south crossing before respondent would have crossed over the track at that point, in view of the speed at which he was proceeding. But we have seen that respondent had a right to presume, not only that the speed of the car would, in no event, be over twenty miles per hour, but that its speed would be checked before reaching the north crossing, especially in view of the presence of the other car there, from all of which he might well conclude that he had ample time to cross the track at or near the south crossing before any car coming from the north could possibly reach that point by proceeding at proper speed and observing the proper caution upon passing the north crossing and the other car there.

The Supreme Court of Iowa, in *Powers v. Des Moines City R. Co.*, in 143 Iowa 427, 121 N. W. 1095, makes some observations

in a case somewhat like this, which are quite appropriate here, as follows:

"The unlawful speed at which the car was being operated has a bearing upon the question of plaintiff's contributory negligence; for he had a right to assume when he started to cross the street, having seen the car approaching a block away, that it was running at a lawful rate of speed, and, if he could cross the track in safety before the car could reach him coming at that rate of speed, he was not chargeable with contributory negligence, unless he had become aware that it was running at a higher rate of speed. It was necessary for plaintiff to walk only about thirty feet in a diagonal direction to cross the track, and it is not contended that, had the car been approaching at a speed not exceeding eight miles an hour, he would not have been across the track and out of danger before the car reached the street crossing. The general claim for defendant made in argument is that plaintiff must have known that the car was coming at a rapid rate on account of the dust and noise to which his companions, as witnesses, testified, and that it was his duty to look out for danger before he went upon the track; but if, as a matter of fact, plaintiff, having observed the car a block distant, proceeded to do that which would have been safe, if the car was going at a lawful rate of speed, it certainly was not conclusively contributory negligence on his part that he did not stop before reaching the track to make another observation of the car, unless he was aware that the danger was greater than that which he had cause to anticipate from his first observation."

That decision is valuable as showing how the solution of the question of respondent's contributory negligence does not depend alone upon his own acts, but that such question may be largely influenced by the negligence of appellant. This is not the doctrine of comparative negligence, which seems to be repudiated by most of the courts. It simply involves the right of respondent to govern his actions in the light of such actions on the part of appellants as a reasonably prudent person in his situation would anticipate. *Kansas, etc., R. Co. v. Gallagher*, 68 Kan. 424, 75 Pac. 469, 64 L. R. A. 344.

Counsel for appellants call our attention to and particularly rely upon the following decisions of this court: *Skinner v. Tacoma Ry. & Power Co.*, 6 St. Ry. Rep. 822, 46 Wash. 122, 89 Pac. 488; *Helliesen v. Seattle Electric Co.*, 6 St. Ry. Rep. 357, 56 Wash. 278, 105 Pac. 458; *Fluhart v. Seattle Electric Co.*, 7 St. Ry. Rep. 763, 118 Pac. 51. In the *Skinner* Case, the car was not running at a dangerous or unlawful rate of speed. The person injured was moving slowly and deliberately across the track, and stepped upon the track at a time when the car would have to be stopped within a distance of ten feet; that is, he stepped upon the track immedi-

ately in front of the car when it was moving towards him, and was a very short distance from him, and there did not appear to be any negligence on the part of the motorman which misled the injured person. In the *Helliesen Case*, there was not involved any question of excessive speed of the car. The injured person says she looked a moment before she started across the track and saw no car coming; yet the physical facts proved positively that the car was coming, and at a distance not forty feet from her. The decision seems to be upon the theory that she stepped upon the track directly in front of the car when it was close to her, and when she an instant before had looked towards it. The *Fluhart Case* may not be so easily distinguished from this one; nevertheless we think it is distinguishable, and that it is very close to the line between questions of law and fact. It appeared in that case that respondent, when he looked in the direction from which the car was coming, could see the distance of a block; that he was then within six or seven feet of the track, moving leisurely; that he proceeded on his way and was struck by the outer edge of the front of the car before he reached the track. Indeed, had his speed been retarded but the least bit, he would have run against the car, instead of the car running against him. This occurred but an instant after he said he looked in the direction from which the car came, and saw no car coming. This, we think, is enough to distinguish that case from this, even though in that case the speed of the car seems to have been excessive. We are of the opinion that this cause was properly submitted to the jury, and that the question of respondent's contributory negligence could not have been decided as a question of law.

The court instructed the jury touching the doctrine of last clear chance, in substance, that, although they might believe that respondent was guilty of negligence, if they should believe that the motorman in charge of the car saw respondent's dangerous position and could thereafter have prevented the accident, but failed to do so, that the verdict should be for the plaintiff, because the motorman was obliged to exercise a reasonable degree of care to prevent the accident after seeing respondent's dangerous position, although he may have been negligent in getting in the way of the car. It is not contended but that this is correct as an abstract proposition of law, but that there is no evidence justifying the giving of any such instruction. It may be conceded, for the sake of argument, that the instruction upon this subject was technically erroneous, because

it appears from the evidence that the motorman did exercise all possible efforts to prevent injuring respondent after he discovered respondent's dangerous position. This instruction might be considered prejudicially erroneous, if it were not for the fact that the record affirmatively shows that it was not prejudicial. Certain special interrogatories were submitted to the jury touching respondent's contributory negligence. Among others was the following interrogatory, and the jury's answer thereto:

"Q. Did the plaintiff, in approaching the track upon which he was struck, and in going upon same, exercise the same degree of care and diligence as would have been exercised by an ordinarily careful and prudent man, having due regard for his own safety under similar circumstances and conditions?
A. Yea."

This, we think, conclusively shows that the jury did not consider, and were not in the least misled by, this technically erroneous instruction. Having found that respondent was not negligent, the jury, of course, gave no consideration to the question of the circumstances under which he might have recovered if he had been negligent. We think the technical error in giving this instruction is affirmatively shown to be free from prejudice against appellants' rights.

The court, among others, gave the jury the following instruction:

"You are instructed that, as the plaintiff approached the street car track at the point of the accident, he had a right to presume that no street car would be run along such track in violation of the ordinances or laws governing the rate of speed of cars at that point; and, while this presumption that the defendants would not run a car at an unlawful rate of speed, if it was so run, would not relieve the plaintiff of the obligation to exercise due care for his own safety, yet it is a circumstance which you may take into consideration in determining what is due care under such conditions, and in determining whether the plaintiff did all that an ordinarily prudent man would have done, under similar circumstances, to escape injury in case the law had been obeyed."

It is insisted that this instruction is prejudicially erroneous as against appellants. It is first contended that it is so, because respondent did not testify that he knew that there were any ordinances or laws governing the speed of cars, nor that he relied upon the fact that a car would not exceed the speed limit. Counsel argue that the speed limit ordinance can avail respondent nothing, because he is not shown to have been relying upon it as a matter of fact. We think, however, that it was proper for the jury to understand that respondent had a right to presume that the ordinance was not

being violated, and that respondent knew of the existence of the ordinance; this upon the theory that all persons are presumed to know the local laws. It has been doubted that evidence is admissible to prove that an injured person, as a matter of fact, knew of the existence of such an ordinance. *Moore v. C., St. Paul & K. C. Ry. Co.*, 102 Iowa 595, 71 N. W. 569; *Eckhard v. St. Louis Transit Co.*, 4 St. Ry. Rep. 651, 190 Mo. 593, 89 S. W. 602. In the latter case the court said:

"Deceased had a right to presume that the defendant would obey the ordinance of the city regulating the speed of railroad trains."

This was said when there was evidently no evidence in the case as to what the actual knowledge of the deceased was as to such ordinance. The decisions of this court above cited are in harmony with this view.

Some contention is made that the instruction as a whole has the effect of taking from the jury the consideration of the question of respondent's contributory negligence, and permitting him to recover in any event, if the speed of the car was unlawful. We think a careful reading of the instruction will not support such contention, as the court therein plainly told the jury that, while respondent was entitled to presume that defendant's car would be kept within the ordinance speed limit, yet, if such limit was exceeded, respondent would not thereby be relieved of the obligation to exercise due care. Indeed, it is plain that that presumption was stated by the court to the jury only as a circumstance bearing upon the question of respondent's due care. We conclude that the instruction was not erroneous.

Other instructions requested by counsel for appellants were refused by the court, upon which error was assigned. An examination of these, however, convinces us that they were embodied in instructions which were given by the court, in so far as appellants were entitled to have them given. We do not think they call for further discussion. We are of the opinion that the evidence was such that neither the question of appellants' negligence nor of respondent's contributory negligence could be decided as a question of law, but that the cause was properly submitted to the jury upon evidence which supports the jury's findings; and that there was no prejudicial error in the giving or refusing of instructions.

The judgment is affirmed.

DUNBAR, C. J., and GOSE, J., concur.

Blair v. Seattle Electric Co.

(Washington — Supreme Court.)

INJURIES TO HORSES; FOOT CAUGHT BETWEEN MAIN RAIL AND GUARD RAIL; MAINTENANCE OF GUARD RAIL; EVIDENCE; NEGLIGENCE; CONTRIBUTORY NEGLIGENCE; QUESTION FOR JURY. — Action to recover for injuries to a horse resulting from his foot being caught between the main rail and the guard rail. Evidence examined and *held*, that the guard rail was not necessary and was dangerous to horses passing over it, and that the defendant was negligent in maintaining it;

That whether or not the driver of the horse was guilty of contributory negligence in driving across the track at the point of the accident was a question for the jury;

That evidence of injuries to other horses by having their shoes caught at this place on previous occasions was admissible;

That the admission of evidence of similar accidents a block distant was not prejudicial, although the conditions were not exactly the same as at the place of the accident in question.

DEFENDANT appeals from a judgment for plaintiff. Reported 122 Pac. 358.

James B. Howe and *A. J. Falknor*, for appellant.

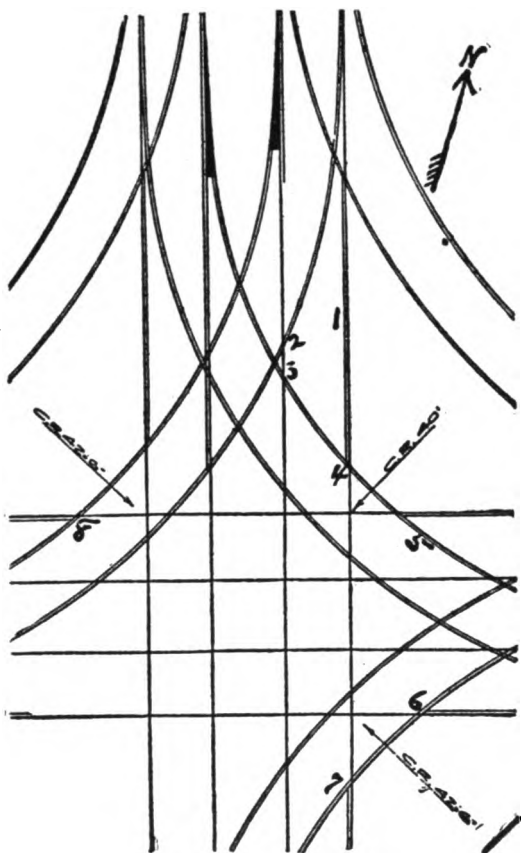
Walter L. Johnstone, for respondent.

Opinion by PARKER, J.:

This is an action to recover damages for injuries to a horse belonging to the plaintiff, which he alleges resulted from the negligence of the defendant in the manner of maintaining its street car tracks at the crossing of Second avenue and Pine street in Seattle. A trial before the court and a jury resulted in a verdict and judgment in favor of the plaintiff, from which the defendant has appealed.

Appellant maintains double-track lines of street railway, which cross each other at right angles at the intersection of Second avenue and Pine street in Seattle. Curved tracks connect the crossing tracks, creating the necessity of maintaining frogs at the several points where the curved rails cross the straight rails. The relative situation of these several tracks is indicated upon the accompanying plat. The double lines indicate the presence of guard rails inside

Construction of Tracks. — For the discussion of the construction of the roadbed and tracks of a street railway company, see *Nellis on Street Railways* (2d Ed.), § 125.



of and near the main rails, upon which the wheels of the cars run. Appellant claims that these guard rails are necessary for the purpose of more effectually keeping the cars upon the tracks while rounding curves, and while crossing frogs on straight tracks. This plat was introduced in evidence by appellant, and appears to be drawn with great care, for the purpose of representing the exact relative location of the rails and frogs at the place where the injury to the horse occurred. The numbers 1 to 8, inclusive, are our own. We have inserted these for the purpose of convenient reference to the several points indicated, which we will have occasion to notice later. We may, for the purpose of our discussion, consider the top of the plat as being north, though it is not exactly so.

On June 6, 1910, a heavy team of horses belonging to respond-

ent was driven by one of his teamsters west along the north side of Pine street across Second avenue. When the front feet of the horses reached the guard rail numbered 1 on the plat, one of the horses stepped upon the rail, so that the toe calk of one of its front shoes dropped into the space between the main rail and the guard rail and caught there, when the horse attempted to withdraw it. The horse became frightened, and in its effort to free its foot broke its leg, resulting in such serious injury that it became necessary to shoot the horse. The space between the north track on Pine street and the north sidewalk curb, along which the team was being driven, is not over seventeen feet wide. The guard rail where the horse got his foot caught was about twenty feet long, and, as will be noticed by its position upon the plat, extended practically clear across this seventeen-foot space, so that it could not be avoided by the driver, except to pass around the north end of it on Second avenue, going clear off of Pine street, or by passing around the south end of it over the street car tracks running along Pine street. It is clear that either of these alternatives would be rather an unusual course for a driver to pursue, unless there was some special reason therefor. The calk of the horse's shoe which caught between the rails was about three inches long, one inch deep, and three-fourths of an inch thick. It is not shown, nor is there any claim made, that this calk is materially different from that in common use upon heavy horses upon the city streets. The groove between the guard and main rail is about one and one-half inches wide, and about the same in depth; so the calk was evidently caught by reason of the manner in which a horse lifts its feet in walking, rather than because the calk tightly fitted in the groove. Other facts will be noticed in our discussion of counsel's contentions.

Counsel for appellant first contend that their motion for an instructed verdict in appellant's favor was erroneously overruled (1) because of want of evidence of appellant's negligence sufficient to support a verdict against it; and (2) because of contributory negligence on the part of respondent's teamster. We will notice these in this order.

It is argued in behalf of appellant that the guard rail where the horse's shoe was caught was a necessary appliance incident to a proper operation of its cars, because of the presence of the two frogs shown at Nos. 2 and 3 on the plat; and that therefore appellant had a right to maintain the guard rail opposite those frogs, even though such guard rail may have created a condition which was

dangerous to horses passing over it. Street car companies may have the right to construct necessary appliances on the surface of the street in connection with their tracks which, in some degree, may render the street somewhat less safe than it would be in the entire absence of street car tracks. Yet, no doubt, there is a limit beyond which street car companies may not go in constructing such appliances as increase the danger to team travel, no difference how necessary such appliances may be to the proper operation of their cars. However, we do not find it necessary to deal with this problem, since we are of the opinion that the evidence warranted the jury in finding against appellant upon the question of the necessity of the presence of this guard rail on the street surface, and the question of the danger it presented to horses passing over it.

There was evidence introduced tending strongly to show that this guard rail and others similarly situated on straight tracks where teamsters have occasion to drive across them at right angles are prolific of accidents and injuries to horses, more or less of the same nature as the injury here involved. For some reason the guard rails on the curves do not seem to produce such results. This may be because the grooves are wider and have more sloping sides. It seems quite clear to us that the evidence warrants the conclusion that this guard rail and others similarly situated are dangerous to horses passing over them; and that appellant was negligent in maintaining this guard rail, unless it is excused because of the necessity of so maintaining it.

The necessity for guard rails on the opposite side of the track from frogs, it is insisted, arises because when a car is running against the point of the frog, if the flanges of the wheels on that side of the car are not held away from the frog, they are apt to strike the point of the frog, causing the car to leave the track; and that the guard rail on the opposite side of the track results in holding the flanges of the wheels away from the point of the frog, thus insuring the passing over the frog in safety. The question of the necessity of having this guard rail there is necessarily a question of fact for the jury to determine, unless we can say that the evidence leaves no room for honest differences of opinion relative thereto. It is true we have here the testimony of appellant's witnesses, who are experienced, as to the necessity of guard rails in places of this nature. This is in effect opinion evidence, and it is not contradicted by other opinion evidence. We think, however, there are facts in the case which might warrant the jury

in believing that this guard rail was not necessary at this place. Let us notice some things shown by this record which might induce the jury to so believe. Upon the plat there will be noticed frogs at Nos. 4, 5, 6, 7 and 8, which are not materially different from the frogs at Nos. 2 and 3, though their angles are not quite so sharp; yet they are not accompanied by any guard rails on the opposite side of the track. There was also evidence that at another street crossing, where the tracks are in similar condition as here, there were no guard rails upon the straight tracks. This particular crossing is within one block of what the evidence indicates is the busiest street crossing in the city of Seattle. So it would seem clear that it is not a place where cars would have occasion to maintain other than a very moderate rate of speed. In view of these facts, it seems to us we cannot say, as a matter of law, that the guard rail was necessary at this point. It is clear from the record that the jury found against appellant upon the ground of the want of necessity for maintaining this guard rail at the place of the accident, as well as upon the ground that it was plainly dangerous to horses passing over it. This sustains the verdict so far as appellant's negligence is concerned.

Was respondent's teamster guilty of contributory negligence? It appears from the evidence that the teamster knew of other horses being caught and injured in a similar manner on previous occasions at this and other similarly situated guard rails. This is the principal basis of appellant's contention that the teamster was negligent in driving the team across the guard rail; he knowing the danger there. From the teamster's testimony it appears that he turned the horses and drove somewhat diagonally across the rail for the purpose of avoiding the catching of the horse's shoes in the groove. There were, however, some conditions there that prevented him from deviating from a straight course as much as he desired. It appears that when horses are driven diagonally across such a guard rail as this there is little danger of their shoes being caught in the groove. In view of the fact that this guard extended practically clear across the seventeen-foot space between the north track and curb line, along which teams would ordinarily be driven in that direction, and of the teamster's effort to avoid passing over the guard rail at right angles, we think it was for the jury to say whether or not he was negligent in the course he pursued. We think reasonable minds might differ on this question; hence it is

not one of law for the courts to decide. *Richmond v. Tacoma Ry. & Power Co.*, 122 Pac. 351, decided March 13, 1912.

It is contended that the court erroneously received evidence of injuries resulting to other horses by having their shoes caught at this place on previous occasions. This evidence was offered and received evidently upon the theory that it showed the dangerous condition existing there, and also as tending to show appellant's knowledge of such condition. The decisions do not seem to be in entire harmony upon this question; but we think the better rule is in favor of the admissibility of such evidence.

In the case of *City of Topeka v. Sherwood*, 39 Kan. 690, at page 695, 18 Pac. 933, at page 936, dealing with a question quite similar to this, the court observes:

"One of the facts it was necessary to establish in this action was the condition of the sidewalk. Before the plaintiff could recover she must prove that it was unsafe to walk over. Of course, this could be proven in different ways, and by other evidence than that of other accidents. It is conceded that this is not the most direct and positive evidence of which the case is susceptible; but the simple fact that there were frequent accidents on this part of the sidewalk would tend to show that it was unsafe. When the question of the proper condition or safety of anything constructed is to be determined, evidence tending to show that it served the purposes for which it was designed is always competent, and often the most satisfactory and conclusive in its character. On the other hand, evidence to show that frequent and repeated accidents resulted from its use would be testimony tending to show that it was not properly constructed. This walk had been tested by actual use, and this evidence tended to show that it was dangerous and unsafe. It is objected that the testimony presented new issues which the defendant had not expected, and could not be prepared to meet. In a limited sense every item of evidence material to the main issue presents a new issue in this respect; at least it invites, by way of reply, a contradiction or an explanation. In no other way did the evidence make a new issue. It was important, as we have said, to show that the sidewalk was unsafe and dangerous, and upon that question the defendant was required to be prepared. * * * It is further contended that the evidence of other accidents admitted in this action should have been excluded, for the reason that it was not proven that the other persons falling on the walk fell over the same plank that the plaintiff did. The evidence shows that only one of them fell at the same or near the same place where she did. It is established, however, that all fell on the sidewalk built of oak plank taken from the bridge. If it had been constructed of pine plank, as required by city ordinance, and secured and fastened down properly, and kept in reasonably good repair generally, the contention of defendant would probably be correct; but the plaintiff's complaint of the sidewalk is that it was not built of suitable material, was not thoroughly nailed down to the stringers in the first place, and had not been kept in even as good condition as it was when constructed. These accidents happening where they did would tend to prove

that that part of the sidewalk was poorly built out of unsuitable material, and would be some evidence tending to show a defect in the precise spot where the plaintiff received her injuries."

Lombar v. East Tawas, 86 Mich. 14, 48 N. W. 947; *District of Columbia v. Armes*, 107 U. S. 519, 2 Sup. Ct. 840, 27 L. Ed. 618; *Smith v. Seattle*, 33 Wash. 481, 74 Pac. 674; *Hansen v. Seattle Lumber Co.*, 41 Wash. 349, 353, 83 Pac. 102. In the last-cited case evidence was received not only showing accidents happening upon the same cogwheels involved, but upon others similarly situated. We think the admission of this evidence was not erroneous.

It is further contended on behalf of appellant that the trial court erred in admitting evidence of similar accidents at Second avenue and Pike street; that being one block distant from the place of this accident. The conditions of the tracks at the Pike street crossing appear to be substantially the same as to their relative location. The grooves between the guard rails and main rails on the straight tracks, however, apparently are not exactly the same as at the crossing here involved. The grooves are somewhat wider and somewhat deeper. The tracks are considerably older and, for that reason, probably more worn. This was all before the jury, and we are constrained to view this objection as going more to the weight of the evidence than to its relevancy. It did tend to show, at least in some slight degree, how the shoes of horses may get caught in grooves between the guard and main rails on straight tracks, wherever they are so situated that the course of team travel is directly across them at right angles. We do not think the evidence was prejudicially erroneous, even though the groove between the rails does appear to be slightly different from that here involved. We are of the opinion that the record shows no prejudicial error against appellant.

The judgment is affirmed.

CROW, GOSE and CHADWICK, JJ., concur.

Knuckey v. Butte Electric Ry. Co.

(Montana — Supreme Court.)

1. **INJURY TO PASSENGER BY SUDDEN STARTING OF CAR; PLEADING; COMPLAINT; AMENDMENT; VARIANCE.** — A complaint charged negligence in carelessly starting a car and putting the same in motion "by a sudden and violent start without allowing plaintiff sufficient time to get off * * * and in consequence thereof plaintiff was suddenly and violently thrown to the ground." Amended complaint examined and *held*, not to set forth a different cause of action from that stated in the original complaint.

No variance is to be deemed material unless it has actually misled the adverse party to his prejudice.

2. **EVIDENCE; CALLING NAME OF STREET; JUDICIAL NOTICE; QUESTION FOR JURY.** — Where plaintiff had testified that when he stepped from the car to the front platform he said "Warren," referring to the street at which he wished to alight, in an ordinary and natural tone of voice, it was not error to ask him to speak the name of the street as he did on the night of his injury.

The court will take judicial notice that it is the common practice of passengers, desiring to have a car stop, to simply state the name of the street. Whether the motorman hears such name is a question for the jury.

Evidence examined and *held*, that the motorman did hear the name in this case.

3. **WITNESSES; CROSS-EXAMINATION; CONTRIBUTORY NEGLIGENCE; QUESTION FOR JURY; INSTRUCTIONS.** — Where, while the plaintiff was under cross-examination, he said, "I had ridden there before many times," and the defendants' counsel asked him, "And were the conditions there the same as they had always been prior to that time when you were on the car," the plaintiff should have been permitted to answer.

The question of contributory negligence was properly submitted to the jury.

A request to charge that the plaintiff could only recover by proving the specific allegations of the complaint relating to negligence was properly modified by striking out the word "specific."

Judicial Notice as to Operation of Car. — In Chamberlayne's *Modern Law of Evidence*, § 836, it is said: "Everyday facts relating to the operation of street cars, as that persons ride on the platforms, that trolley cars stop on street corners to receive passengers and to allow them to alight, and that so doing constitutes a general invitation to proposing passengers to enter the car whether crowded or not, or that a trolley stick is not submitted to such a strain as to tear it from the hands of the conductor except where there is carelessness, require no proof. Usual incidents in the operation of cable cars, as that jerks are inevitable where the cable cannot be kept taut, are within the range of public knowledge. So of any other widely known fact, as, for example, that the company has changed the motive power used for operating its cars."

4. DAMAGES. — Where a passenger thrown from a car suffered injury resulting in the loss of all the toes from one foot, but he was not prevented from working as a miner after recovery from the accident, a verdict of \$10,000 is excessive and should be reduced to \$6,000.

DEFENDANTS appeal from judgment for plaintiff. Reported 122 Pac. 280.

George F. Shelton, Chas. A. Ruggles and Peter Breen, for appellants.

J. O. Davies and Maury & Templeman, for respondent.

Opinion by SMITH, J.:

This is the second time this case has been before the court. See *Knuckey v. Butte Electric Ry. Co.*, 41 Mont. 314, 109 Pac. 979. After remittitur filed in the District Court, the plaintiff amended his complaint so as to charge as follows:

"That while plaintiff was such passenger, and before the said car reached his aforesaid destination, plaintiff notified the defendants that he wished to get off the car at the crossing of the aforesaid streets, Warren and West Galena; that the defendants, in compliance with this direction from the plaintiff, slowed up said car to a very slow pace, to wit, to about a walking pace; that plaintiff, believing that the car would come to an immediate stop, went upon the front steps and platform of said car preparatory to alighting from said car when it came to a stop; that the defendants did not stop the said car at said crossing, but ran it a short distance, to wit, about 100 feet, past said crossing at said slow rate of speed, and then, while plaintiff was still standing upon the front platform and steps of said car, with the knowledge and consent of the defendants, and waiting for and still thinking that the car would come to an immediate stop, the defendants, in disregard of their duty to the plaintiff, so carelessly and negligently managed, operated and ran said car, and so carelessly and negligently, suddenly and violently accelerated the speed thereof, and so negligently caused the car to lurch forward violently, that plaintiff was violently thrown from said car to the ground, and by reason thereof "

received his injuries. The defendants answered. A trial was had before a jury, which returned a verdict for the plaintiff in the sum of \$10,000. From a judgment on the verdict and an order denying a new trial, defendants have appealed.

1. It is contended that the court erred in allowing the amended complaint to be filed, for the reason that it states a different cause of action from that set forth in the original complaint. The original pleading charged negligence in carelessly starting the car and putting the same in motion

"by a sudden and violent start without allowing plaintiff sufficient time to get off"

at Warren street,

"and in consequence thereof plaintiff was suddenly and violently thrown to the ground."

We find no reversible error in the ruling of the court. In both complaints the defendants were charged with so negligently operating the car that plaintiff was violently thrown therefrom to the ground. This is the gravamen of the charge. No variance is to be deemed material unless it has actually misled the adverse party to his prejudice. The defendants could not have been surprised or misled by the testimony offered in support of the amended complaint, because substantially the same evidence was produced at the first trial; and it was on the ground of a material and fatal variance between the allegations of the original complaint and plaintiff's testimony that such new trial was ordered. See also *Flaherty v. Butte Electric Ry. Co.*, 43 Mont. 141, 115 Pac. 40.

2. Plaintiff testified that when he stepped from the car to the platform he said, "Warren," referring to Warren street, in an ordinary and natural tone of voice. He was then asked to speak the word as he did on the night of his injury. His answer was: "Well, I stepped out, and I said the word 'Warren.'" Defendants moved that the answer be stricken out on the ground that plaintiff had already testified concerning the tone of his voice, and it was for the jury to determine what his ordinary tone of voice was, after listening to his testimony. The motion was denied. We find no prejudicial error in the ruling. Plaintiff also testified:

"When I said 'natural tone of voice,' I meant the tone of voice one would use when he stepped out on the platform to notify the motorman."

3. Plaintiff was allowed to testify over objection that on other occasions, desiring to have the car stopped, he had used the word "Warren" to indicate his wish to alight at that street. We take judicial notice that this is the common practice. Whether the motorman heard the word as pronounced by the plaintiff on the night in question was a matter for the jury to determine, by inference or otherwise, from all of the facts and circumstances of the case as detailed by the various witnesses.

4. While the plaintiff was under cross-examination, he said, "I

had ridden there before many times." He was then asked by defendants' counsel:

"And were the conditions there the same as they had always been prior to that time when you were on the car? Mr. Maury: We object; we were not allowed to go into the conditions; I don't think it is fair on the part of the other side to go into the conditions. The court: The objection is sustained; it is not proper cross-examination."

It is now insisted that the court should have allowed the witness to answer, and an elaborate argument is advanced wherein many suggestions are made concerning the competency, relevancy and materiality of the inquiry. We think the court unduly restricted the cross-examination, and again suggest the propriety of allowing the fullest scope for such examinations, to the end that the jury may be advised of all facts having a legitimate bearing upon the issues presented. We have no doubt, however, that had the same argument concerning the relevancy and competency of the testimony been presented to the court below, in substance, as has been made here, the objection would have been overruled. It is the duty of counsel to make the record show prejudicial error, and, even upon cross-examination, a reasonable effort should be made to advise the court of the object with which a question is asked. *State v. Byrd*, 41 Mont. 585, 111 Pac. 407. We cannot say that the action of the court affected the result of the case. In fact, we are satisfied that it could not have done so.

5. *

6. Defendants interposed a motion for a nonsuit and also a motion for a directed verdict, both of which were overruled. These motions were based, primarily, upon an assumption that the testimony failed to disclose knowledge on the part of the motorman that plaintiff wished to alight; that he did not hear the word "Warren" pronounced by the latter, and had no knowledge that he was on the platform of the car preparatory to getting off. The second contention is that plaintiff was guilty of contributory negligence as a matter of law. Plaintiff testified:

"When I got on the platform I says the word 'Warren' to the motorman, Mr. Rundblad. When I said this I might have been a distance of about two feet from him, but it is close on the platform; you would naturally run

* Paragraph not material to street railway law omitted.

against him in coming out of the car. I spoke this word in my natural tone of voice. Just after I said this word 'Warren' the car slowed down as it neared the east crossing. It slowed down to about four or five miles an hour, an ordinary walking pace, at the last crossing of Warren and East Galena. At the time I was standing on the platform; I was standing there ready to step down when the car stopped, and when it got down to this very slow speed I stepped down onto the top step. I was then facing east, with my hand on the front handrail, my right hand. From the last crossing of Warren the car proceeded at that rate of speed about a 100 or 150 feet. Then it started ahead violently with a terrible jerk and threw loose my hand and threw me to the ground. After I went out on the front platform the motorman slowed up the car when I mentioned the word 'Warren' to him. He shut the power off to slow it up. I didn't see him do anything. I heard the controller click around that shuts the power off."

Whether the motorman heard the word "Warren" as spoken by the plaintiff, and whether he decreased the speed of the car in response thereto, were, we think, questions for the jury to decide. It was their province to draw such reasonable inferences from all of the facts and circumstances as they deemed warranted by the evidence. We cannot say, from the record, that it was an unreasonable inference that Rundblad heard the word "Warren" and accordingly "slowed up." See *Jenkins v. Northern Pac. Ry. Co.*, 119 Pac. 794; *State v. Truskett*, 85 Kan. 804, 118 Pac. 1047-1051, a very interesting and novel case.

We are also of opinion that the question of contributory negligence was properly submitted to the jury. It is doubtless true that the plaintiff's testimony was open to serious doubts as to its credibility, and that the jury might well have determined that he jumped from the car while it was in motion, not with an idea that it was about to stop, but rather because he was near his home and had purposely ridden beyond Warren street to avoid walking the distance traversed by the car after that street was passed. But all of these matters have been laid at rest by the verdict. We are in the same state of mind in this case as we were in *Flavin v. Chicago, B. & Q. R. Co.*, 43 Mont. 220, 115 Pac. 667.

7. Defendants' counsel requested the court to charge the jury that the plaintiff could only recover by proving the specific allegations of his complaint relating to negligence. The court struck out the word "specific" on motion of counsel for the plaintiff. There was no error in so doing. The instruction was correct in either form. The word "specific" added nothing to it. The court clearly defined the issues to be determined by the jury and

instructed them that the material allegations of the complaint must be proven by a preponderance of the evidence. This was all that was necessary in the present case.

8. There is a suggestion in the brief that the complaint upon which the plaintiff went to trial does not state facts sufficient to constitute a cause of action. We think the complaint is sufficient.

9. In our judgment the damages awarded are excessive, but not sufficiently so to evidence passion or prejudice in the minds of the jurors. Plaintiff has lost all of the toes from one of his feet. Dr. McCarthy testified that he had recently examined the foot and found an amputation "taken right back of the articulation of the joints." The foot is still tender and there is a "callous over the end of the amputated surface." In the opinion of the surgeon the foot

"is not as strong as the other foot. It is impaired. He can't use it as well. It is smaller than the other foot, smaller than the other leg. He can't walk as well. The ball of the foot is gone. There is no spring to it, no action on the muscles like a normal foot, and consequently atrophy from inactivity. It will remain just about the way it is now. An injury of that kind impairs a man's usefulness for the remainder of his life. It will cause recurring pains all his life, once in a while. The callous should be removed once every week or ten days. Whenever that is done it will cause pain. There is, I think, a permanent cure for the callous. By operating I think that could be permanently removed and the painful condition would not continue. That would be a painful operation."

Plaintiff was twenty years of age at the time of the injury and is now twenty-four years old. It was necessary to operate three times before the foot healed and finally to graft skin thereon from his leg. He suffered intense pain during the operations and still suffers when the callous portion is removed. He lost six months' time on account of the injury. He is a miner by occupation and before his injury received \$4 per day in wages. He has resumed work at substantially the same wages; has never lost any time because of the injury other than when the mine was shut down and all of the men were idle. He walks with the other men to and from the mine where he is employed, a distance of three-quarters of a mile or more, but occasionally rides home with the shift boss. He gets the same amount of time as every other miner in the mine. He has

"worked as steadily as the Mountain View mine has, since he returned to work, and also got married in the meantime."

He has been out duck hunting once since his injury. He uses an artificial appliance on his injured foot to prevent the sensitive part from touching anything. His shift boss testified that he was a good, steady worker; that he had never observed anything to disqualify him from performing his work as a miner; that he had known and observed him for over two years and did not discover that he had an injured foot until about two weeks before the trial; that he was doing the same work as other miners, receiving the same wages.

The cause is remanded to the District Court of Silver Bow county, with directions to grant a new trial unless, within thirty days after remittitur filed, the respondent shall consent in writing that the judgment for damages be reduced to \$6,000. If such consent is given, the judgment shall be modified accordingly as of the date of its original entry, and, together with the order denying a new trial, will stand affirmed. That part of the judgment relating to costs in the court below is not to be disturbed. Respondent to recover costs on appeal.

Remanded with directions.

BRANTLEY, C. J., and HALLOWAY, J., concur.

Evansville & S. Traction Co. v. Montgomery.

(Indiana — Appellate Court.)

1. **KILLING OF HORSE BY FALLING OF POST; COMPLAINT; DEMURRER; PROXIMATE CAUSE.** — The complaint, in an action to recover the value of a horse killed by the falling of one of defendant's posts, which charges that the

Contributory Negligence of Passenger Alighting from Moving Car. — In *Nellis on Street Railways* (2d Ed.), § 363, it is said: "While it is the duty of the carrier, as we have shown, to stop his car at a usual and customary stopping place, when signaled by a passenger, and afford him a reasonable opportunity to alight in safety, a reciprocal duty devolves upon the passenger to use reasonable diligence in getting off. The passenger may assume that he will have a reasonable time to alight; and if he be injured in alighting the jury may infer that the time was insufficient. The question of his negligence is ordinarily one for the jury. So it is not negligence *per se* to alight from a slowly moving car. But the circumstances may be such, either as to speed, surroundings, or other conditions, as to render a person alighting from a moving car guilty of contributory negligence precluding recovery for an injury sustained. The facts in each particular case must determine the question of negligence."

defendant was negligent in maintaining a rotten post, and that plaintiff's horse was killed solely by reason of said negligence, shows a causal connection between the negligence charged and the injury, and is not demurrable.

2. **ACTIONABLE NEGLIGENCE DEFINED.** — Three elements are necessary to constitute actionable negligence: (1) A duty of the defendant towards the plaintiff; (2) a breach of that duty; and (3) an injury to the plaintiff from such breach.
3. **ACTIONABLE NEGLIGENCE; FRIGHTENING HORSE; COMPLAINT; DEMURRER.** — A complaint which charges negligence on the part of a street railway company in so operating its car as to frighten plaintiff's horses, causing one of them to run against a rotten post, which broke and fell and killed the horse, states actionable negligence in frightening plaintiff's horse, and is not demurrable.
4. **SAME; EVIDENCE.** — Evidence that the company had removed other posts more than half rotten near the one which fell, which posts were of the same kind and size and were placed in the same kind of soil at the same time as the post which fell, is proper as showing knowledge by the company of the dangerous character of the posts.
5. **DUTY OF COMPANY TO MAINTAIN POSTS.** — A street railway company owes a duty to travelers on a highway to maintain posts which will not fall because of their rotten and decayed condition, if there is a slight impact against them from an outside force.

DEFENDANT appeals from judgment for plaintiffs. Reported 98 N. E. 731.

Woodfin D. Robinson and William E. Stillwell, for appellant.

Fred M. Hostetter and William D. Hardy, for appellees.

Opinion by IBACH, J.:

This was an action by appellees against appellant to recover the value of a horse killed by the falling of one of appellant's posts. Error is assigned in overruling the demurrers to the first and second paragraphs of complaint, and in overruling the motion for a new trial.

The first paragraph of complaint charges that appellant corporation operates a system of street cars upon a certain highway near the city of Evansville; that the overhead feed wire which supplies power for this line is supported by posts set near each side of said highway, and there maintained by defendant;

"that on said March 4, 1909, employees of plaintiffs were conducting through and along said highway a number of plaintiffs' horses, when one of said posts and the wires thereunto attached fell, and struck and killed one of said horses; that said post was set in said public highway about four feet from

the side thereof, and was rotten and decayed, and in a condition dangerous to travelers on said highway, and that defendant had long known that said post was rotten and decayed and in said dangerous condition; that defendant carelessly and negligently permitted said post to stand in said public highway in said rotten and decayed condition, and that plaintiffs' horse was killed solely by reason of said negligence of the defendant, and without fault or negligence of the plaintiffs."

It is objected that this paragraph does not show a causal connection between the negligence charged and the injury, that the negligence charged is the maintaining of a post in a rotten and decayed condition, and it is not alleged that the post fell by reason of such rotten and decayed condition.

In the case of *Island Coal Co. v. Clemmitt*, 19 Ind. App. 21, 49 N. E. 38, the court considered a complaint very like to the present in essential features, and to which a like objection was made. There it was charged that the defendant carelessly and negligently placed a pile of refuse coal along the side of the public highway, that the nature of such refuse coal is to take fire and burn at and near the bottom and along the sides of the pile, and, after so burning, large portions slide down the sides, and the sliding of a large amount of such refuse, by reason of said burning, caused plaintiff's horse to run away, injuring plaintiff. It was argued that the negligence attributed to the defendant was the placing of the material, that the cause of the horse's fright was the burning and falling of the material, and therefore the injury was not traceable to the defendant's negligence as a proximate cause. The court said:

"If the injurious consequence averred cannot be said to appear to have accrued as an inevitable result of the appellant's alleged act, it may be said to be shown to have been a natural result, which might reasonably have been expected as a possible effect. * * * It may reasonably be understood from the pleading that the appellant placed and maintained this rubbish in the designated place knowing its dangerous quality and effect. If the words 'careless' and 'carelessly' and 'negligent' and 'negligently,' as used, may be said to have reference, by strict grammatical construction, to the piling of the material in the designated place, still they refer to the making of a pile composed of material of the known dangerous quality, by reason of which the appellee was injured; and the entire pleading shows that the appellant was negligent in producing a condition of things through which, as a natural result, the appellee suffered the injury charged. * * * It is sufficiently shown that there was a want of due care for the safety of persons rightfully using the highway, and a negligent exposure of such persons to peril from the cause through which the appellee was injured. The court did not err in overruling the demurrer."

This court knows that it is a natural result of the maintenance of a decayed and rotten post for such post to fall, and we think the reasoning of the opinion in *Island Coal Co. v. Clemmitt* entirely applicable to the present case. The complaint in the case of *Indianapolis, etc., Tel. Co. v. Sproul* was very similar to the present one, the objection there being made that no connection was shown between the knotty and defective and weakened and rotten condition of the cross-arm and its breaking. It was there said, and it has often been held by the Supreme Court and this court, that,

"so far as the question of proximate cause is concerned, the averment that the negligence specified caused the injury complained of is sufficient."

Indianapolis, etc., Tel. Co. v. Sproul, 93 N. E. 463; *Baltimore, etc., R. Co. v. Peterson*, 156 Ind. 364, 59 N. E. 1044; *Chicago, etc., Co. v. Stephenson*, 33 Ind. App. 98, 69 N. E. 270; *Greenawaldt v. Lake Shore, etc., Co.*, 165 Ind. 219, 74 N. E. 1081.

Three elements are necessary to constitute actionable negligence: (1) A duty of the defendant towards the plaintiff; (2) a breach of that duty, and (3) an injury to plaintiff from such breach. It was the duty of appellant in the present case to maintain posts along the public highway which would not fall because of their rotten and decayed condition. It is charged that they were negligent in maintaining posts in such rotten and decayed condition that they were dangerous to travelers, and that plaintiff's horse was killed solely by reason of such negligence on the part of defendant. This is a sufficient pleading of proximate cause. Appellant might have moved to make the complaint more specific, but, in the absence of such motion, the complaint is sufficient to withstand demurrer. *Indianapolis, etc., Tr. Co. v. Newby*, 45 Ind. App. 540, 90 N. E. 29, 91 N. E. 36. See also *Evansville, etc., R. Co. v. Krapf*, 143 Ind. 647, 656, 36 N. E. 901, and cases cited; *Louisville, etc., R. Co. v. Thompson*, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357, 57 Am. Rep. 120; *Board, etc., v. Huffman*, 134 Ind. 1, 31 N. E. 570.

The second paragraph of complaint charges negligence on the part of appellant in so operating its car as to frighten plaintiffs' horses, causing one of them to shy and run against a rotten and decayed post by the side of the road, which post, when the horse came in contact with it, broke and fell, and killed the horse. This paragraph sufficiently states actionable negligence in frightening plaintiffs' horse, and thereby causing its death, and is good against

demurrer. It makes no attempt to charge negligence in maintaining the post in a dangerous condition.

Appellant objected to the admission of the testimony of certain witnesses that other posts near to the one which fell and killed the horse had fallen previously to its falling, and that the company had removed others "more than half rotten." It was shown that these were the same kind of posts, of the same size, put in position at the same time, in the same character of soil, and had been equally exposed to the elements. This evidence was proper as showing knowledge of the company of the dangerous character of posts in that immediate locality. *Western Union Tel. Co. v. Levi*, 47 Ind. 552.

The evidence shows that appellees' employees were conducting horses for market along the highway in the customary manner used by horse buyers, when some of them became frightened at the street car. One of them came in contact with the post, either with his halter rope or his body, and this post, being "rotten clear through" at the ground, fell, because of such condition, and killed the horse. This pole was fourteen inches through and twenty feet high. The broken section was exhibited to the court. We think the evidence clearly sufficient to sustain a verdict. Appellant certainly owes a duty to travelers on a highway to maintain posts which will not fall because of their rotten and decayed condition, if there is a slight impact against them from an outside force, and the evidence shows that only a slight impact was sufficient to throw down this post, and that appellant had notice of the dangerous character of posts, and that appellant had notice of the dangerous character of posts in that immediate locality.

No error appearing, the judgment is affirmed.

Mahoning & S. Ry. & Light Co. v. City of New Castle.

(Pennsylvania — Supreme Court.)

1. **EQUITY; INJUNCTION; MUNICIPAL ORDINANCE.** — A court of equity may grant an injunction restraining a city from removing motormen and conductors from street cars for failure of the company to comply with an ordinance the validity of which is in question.
2. **POWER OF CITY TO ENACT ORDINANCE REQUIRING SAFETY BRAKES; STATUTES EXAMINED.** — Statutes examined and *held*, that the defendant city had no express or implied right to enact an ordinance requiring the plaintiff to equip all its cars with the latest, best and most approved safety brakes, specifying the kind of brakes to be used, and providing for fine or imprisonment for violation of ordinance.
3. **SAME; CONSTRUCTION OF ORDINANCE.** — In the absence of express authority conferring the power of enactment, a penal ordinance such as the present, which undertakes to enforce a higher standard than that imposed by the principles of the common law, should not be sustained.
4. **REGULATION OF STREET RAILWAY; POWER OF MUNICIPALITY.** — In the operation of its road and in the running of its cars the judgment of the board of directors of a railroad company, in the absence of statutory provision, is supreme and exclusive. The public safety imperatively requires that there be no division of this great responsibility with others, not even with municipalities.

PLAINTIFF appeals from decree dismissing bill in equity. Reported 82 Atl. 501.

**MUNICIPAL REGULATION AS TO SAFETY BRAKES UPON
STREET CARS.**

In *Nellis on Street Railways* (2d Ed.), § 149, it is said: "In the exercise of the power vested in the State or a city to make and enforce regulations looking to the safety of public, it is within the power of a city authorized to prescribe such regulations and rules from time to time as may be deemed necessary to protect the public welfare, interests, and accommodation, to provide by ordinance that all street cars shall be equipped with air or electric brakes. Such a regulation is a reasonable one, and does not violate a statutory provision that when a franchise is granted to a street railway company the municipal authorities shall make no regulations destroying it."

This proposition is supported by the holding of the court in *People v. Detroit United Ry. Co.*, 2 St. Ry. Rep. 460, 134 Mich. 682, 97 N. W. 36, 63 L. R. A. 746, 104 Am. St. Rep. 626. This seems to be the only case on the subject other than the decision reported herewith. The holding in the *Michigan* case is apparently contrary from the one in the reported *Pennsylvania* case.

STATEMENT OF FACTS.

Bill in equity to restrain the enforcement of and to declare invalid a municipal penal ordinance requiring a street railway company to use the latest, best, and most approved safety brakes, and specifically designating that certain brakes shall be used until some better one is devised.

At the hearing the ordinance was determined to be valid, and the bill was dismissed.

It appears from the evidence and findings of the court below that the city of New Castle is a city of the third class; that the plaintiff company is a traction or motor power company incorporated under the Act of March 22, 1887 (P. L. 8), running cars upon the streets of the defendant city, in which there are some steep grades; that the plaintiff operates four double-truck cars, twenty-six single-truck cars, and a number of trailers, the last mentioned having no motor or other power; that the weight of the single-truck cars is from nine to twelve tons each; that the speed limit fixed by ordinance in said city is eight miles per hour; that the plaintiff's cars are all equipped with a hand brake and a reverse of the usual pattern, and with a fender which increases the efficiency of the hand brakes; that the double-truck cars have in addition to the hand brake an air brake of the character required by the ordinance in question; that it is impracticable to install in the single-truck cars the apparatus necessary for the operation of the air brake required by the ordinance; that the hand brake is the safety appliance in most common use and most generally approved for braking or stopping street railway cars; that the magnetic brake required by said ordinance can be used in connection with the hand brake, and adds to the safety of operating cars, but that the magnetic brake "cannot be said to be in general use"; that this latter brake is known as the "Westinghouse magnetic brake," and appears to be the only brake that can be used on single-truck cars in connection with the hand brake, "unless the reverse should be regarded as a power brake;" that the reverse is not as good as the magnetic brake; that the latter is a good additional safety brake in emergencies, in that it enables a car to stop more quickly, and, if in order, can be used to advantage in the wintertime and also in going down hills; that it is impracticable to install and operate either the magnetic or air brake on the trailer cars; that for about two years the plaintiff's cars were equipped with mag-

netic brakes in addition to the hand brakes, but in 1907 their use was discontinued as unsatisfactory, and since that time they have used only the hand brake and the reverse; that "since the magnetic brake has been removed fewer accidents have resulted from the operation of the cars."

Before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART and MOSCHZISKE, JJ.

C. H. Akens, for appellant.

James A. Gardner, City Sol., for appellee.

Opinion by MOSCHZISKE, J.:

This was a proceeding in equity for an injunction to restrain the defendants from arresting the motormen and conductors in charge of the plaintiff's cars or from in any other manner enforcing the provisions and penalties of a certain municipal ordinance.

The ordinance was approved November 30, 1908, and required all companies operating street railway lines in the city of New Castle (section 1) to

"equip each and every car operated * * * with the latest, best and most approved safety brakes;" (section 2) "until some better or more practical brake or device is made for the purpose of braking or locking cars * * * to equip each of their respective cars with the kind of brake known as the magnetic brake * * * the said brake to be the same or similar to those which were recently used by the Mahoning & Shenango Railway & Light Company * * * in said city, or an air brake similar to those now in use on the interurban lines now entering the city, the said brake or brakes to be in addition to the hand brakes with which each car shall be equipped,"

and (section 3) that, upon conviction of any violation of the ordinance, a fine shall be imposed of not less than \$10 or more than \$100 and costs of suit, and upon refusal to pay, imprisonment not exceeding thirty days, with an allowance of execution process to collect fines and costs from corporations.

The court below decided that the ordinance was valid excepting in so far as it required the trailer cars to be equipped with the brakes designated; that, if the plaintiff was affected, it had an adequate remedy at law; and that equity had no jurisdiction to grant the relief prayed for. A decree was entered dismissing the bill.

It was the threat to take the employees of the plaintiff company off its cars by arrest which caused the filing of the bill. Had this threat been carried out, it would have meant the tying up of the plaintiff's lines and a serious interference with the use of its property. Under such circumstances, if the ordinance was invalid, there was ample authority to sustain equitable interference. In *Bryan v. Chester*, 212 Pa. 259, 61 Atl. 894, 108 Am. St. Rep. 870, where the validity of a police power ordinance was in question, it was contended, upon practically all of the grounds now urged, that equity had no jurisdiction, and should not interfere. But we said, "There can be no doubt that this proceeding was properly instituted;" and we sustained an injunction decree declaring the ordinance invalid.

There is nothing in the Act of February 25, 1869 (P. L. 249), incorporating the city of New Castle, in the Act of May 16, 1901 (P. L. 224), to amend the Act of May 23, 1889 (P. L. 277), as to cities of the third class, or in the Act of March 22, 1887 (P. L. 8), for the incorporation and regulation of motor power companies, which confers upon the defendant city the express right to enact an ordinance in the terms of the one in this case; nor had the city any incidental or implied power which would enable it so to do.

In constructing and maintaining its streets a city is not bound to adopt the latest and best devices (*Canavan v. Oil City*, 183 Pa. 611, 38 Atl. 1096), and yet that is the standard of public duty which the defendant city attempts to set for the plaintiff company; and, more than this, by designating what the latter must use as the latest and best safety brakes, the ordinance assumes to declare how the company shall perform this duty. In the absence of express authority conferring the power of enactment, a penal ordinance such as the present, which undertakes to enforce a higher standard than that imposed by the principles of the common law, should not be sustained. If a new and different one is to be set, the Legislature should act. Aside from the strictly legal aspect, it is apparent that, if such minute regulation is to be attempted at all, it is far better that the matter shall be under State control; for if each municipal subdivision be permitted to prescribe the particular kind of safety brakes to be used by cars passing through its territory, since there is no guaranty that the judgment of the different authorities will accord, the important development of connecting trolley lines as competitors of the railroads, which has added so much to the comfort and convenience of the traveling

public, will be seriously handicapped, if not practically brought to a standstill.

However, it is not necessary to theorize upon the subject in hand, for, no matter what the law may be in other jurisdictions, the controlling principles have been settled in this State. In *Pennsylvania Railroad Company's Case*, 213 Pa. 373, 62 Atl. 986, 3 L. R. A. (N. S.) 140, 5 Ann. Cas. 299, this court squarely ruled against the validity of an ordinance of the character of the one under consideration. We there said:

"The question raised on this appeal is as to the power of the borough * * * to pass an ordinance * * * requiring the Pennsylvania Railroad to erect, maintain, and operate safety gates. * * * A penalty is provided for a failure to comply with the requirements. * * * In the operation of its road and in the running of its cars the judgment of the board of directors of a railroad company, in the absence of statutory provision, is supreme and exclusive. The public safety imperatively requires that there be no division of this great responsibility with others — not even with municipalities — * * * for division of it would be the shifting of it in every case of accountability for failure to properly operate the road or run the cars. But, while this is true, corresponding duties of the highest order are imposed exclusively upon those having the control and management of railroads. One of these is to adopt and use suitable and adequate means to give notice of approaching trains. * * * What particular means, however, shall be employed to protect the public * * * is left to the company operating the road, the law merely demanding and requiring reasonable care. * * * What is attempted by the appellee in the present case? Having no voice in the operation of the appellant's road, it undertakes to do what the common law itself does not do. It assumes to declare how the railroad shall perform a public duty, * * * and would substitute its judgment for that of the board of directors as to what kind of protection shall be afforded, but with no corresponding responsibility resting upon it. * * * If it has the power to require the defendant to erect safety gates, it has the power to require the adoption from time to time of such other means as in its judgment ought to be adopted by the company for the protection of the public. * * * The power for which it contends would be practically unlimited. * * * The power which it would exercise may be a desirable one, but courts cannot recognize it unless it exists. * * *"

After distinguishing the cases relied upon to support the municipal authority to pass the ordinance and determining that the general welfare clause was not a sufficient warrant for that purpose, we ruled that the borough had no such express or implied power and declared its action void. On principle that case governs the present one.

The assignments of error are sustained, the decree is reversed,

and the record is remitted to the court below with directions to reinstate the bill, and to grant the injunction prayed for at the cost of the appellee.

Brown v. Metropolitan St. Ry. Co.

(Missouri — Kansas City Court of Appeals.)

1. **INJURY TO PASSENGER ALIGHTING FROM CAR; CATCHING HEEL OF SHOE ON STEP; INSTRUCTIONS.** — In an action by a passenger to recover for injuries alleged to have been caused by the sudden starting of the car while she was alighting and by her catching the heel of her shoe on a bolt or screw projecting above the plate on the step, an instruction that, if defendant negligently suffered and permitted a certain projection to be and remain on the step of said car, and the heel of one of plaintiff's shoes "caught thereon," and she was thereby caused to fall and was injured, she may recover if she was exercising ordinary care for her safety, is not so ambiguous as not to require the jury to find that the catching of the plaintiff's heel on the projection was the cause of her fall. The word "thereon" refers to the projection and not to the step.
2. **DAMAGES; INSTRUCTIONS; EVIDENCE.** — Where plaintiff at the time of her injury was thirty-eight years of age and had always enjoyed good health, and appeared that her fall severely wrenched and strained important muscles in her back and lower abdomen, and one year after the injury she was suffering from severe pains and a sympathetic nervous affliction of the throat and face, an instruction that damages could be awarded for injuries to her nerves and nervous system was proper.

Evidence examined and *held*, that a verdict for \$2,500 was not excessive.

DEFENDANT appeals from a judgment for plaintiff. Reported 143 S. W. 561.

John H. Lucas and *Clarence S. Palmer*, for appellant.

Boyle & Howell, for respondent.

Opinion by **JOHNSON, J.:**

This is a suit by a passenger against a carrier to recover damages for personal injuries alleged to have been caused by the negligence of the carrier. The answer is a general denial and a plea of contributory negligence. Plaintiff prevailed in the trial court, where

Defective Condition of Step of Street Car. — For a discussion of the liability of a street railway company for the defective condition of a car step, see *Nellis on Street Railways* (2d Ed.), § 310.

she recovered a judgment for \$2,500, and the cause is here on the appeal of defendant.

The injury occurred in the afternoon of April 30, 1909, on the Independence line of defendant's street railway system in Kansas City. Plaintiff, her husband, and sister were passengers on an east-bound car, and were in the act of alighting at Fairmont Park Junction, a regular stopping place, when she received a fall that caused the injuries of which she complains. The car had stopped, and plaintiff was stepping from the rear platform to the first step when her fall occurred. She alleges two acts of negligence as causes of her fall, viz., first that the car suddenly started forward as she was alighting, and, second, that a bolt or screw fastening the metal plate to the board step underneath had worked loose and had projected above the plate, resulting in the catching of plaintiff's heel as she stepped down on the plate, and thereby tripping her. The evidence of plaintiff tends to support each of these charges, and is contradicted by substantial evidence introduced by defendant. There is no dispute over the facts that plaintiff fell and that the heel of one of her shoes came off.

The evidence of plaintiff supports the conclusion that the heel was torn off by catching on the head of the projecting bolt, while the evidence of defendant is to the effect that the bolt did not project, that the heel came off without the aid of any unusual condition, but on account of its flimsy attachment to the shoe, and that it was the loss of the heel that caused plaintiff to fall. Counsel for defendant concede that plaintiff was entitled to go to the jury on each charge of the petition, and that the instruction given at the request of plaintiff submitting the issue of the sudden starting of the car is free from error, but they complain of the instruction of plaintiff relating to the issue of negligence in operating the car with a defective step. That instruction is as follows:

"If the jury find from the evidence that on the 30th day of April, 1909, the defendant was a carrier of passengers for hire by street railroad, and used the railway and car mentioned in the evidence for such purpose, and if they further find from the evidence that on said day the defendant's employees in charge thereof stopped the car mentioned in the evidence a short distance from the station at Mount Washington, a station along said line of railway, for the purpose of allowing plaintiff and other passengers to alight therefrom, if you find plaintiff was a passenger thereon, and that while said car was so stopped, if you so find, the plaintiff attempted to alight from said car and was in the act of so doing, and that defendant had carelessly and negligently suffered and permitted a certain projection to be and remain on

the step of said car at the place where passengers alight therefrom, and where plaintiff was attempting to alight therefrom, the heel of one of her shoes caught thereon, and she was thereby caused to fall from said car and upon the ground and was thereby caused to be injured, and if the jury further find from the evidence that the plaintiff while in her attempt to alight from said car was exercising ordinary care for her safety in doing so under the circumstances shown in the evidence, then your verdict should be for the plaintiff."

The italicized part of the instruction is criticised. Counsel contend it is so ambiguous it did not require the jury to find that the catching of plaintiff's heel on the projection was the cause of her fall. The point is hypercritical. The only reasonable meaning of the word "thereon" in the clause "the heel of one of her shoes caught thereon" is that the word refers to the projection and not to the step. The meaning might have been better expressed, but we do not believe the jury could have been misled into a misunderstanding of the term.

At the request of plaintiff, the court instructed the jury on the measure of damages:

"That, if under the evidence and instructions of the court you find in favor of plaintiff, you should assess her damages at such amount as you believe from the evidence will be a fair compensation to her for the pain of body and mind, if any, which she has suffered, occasioned by her injuries in question, if any, and for such pain of body and mind, if any, as in all probability she will suffer in the future, occasioned by such injuries, and for such permanent injury, if any, to plaintiff's back and her nerves and nervous system, as you may find was occasioned by said injuries, but the total damages which you may allow plaintiff must not in any case exceed the sum of \$10,000."

Defendant objects to this instruction on the ground that there is no evidence to support an inference that plaintiff's "nerves and nervous system" were permanently injured. We shall consider together this objection and the further objection that the verdict of \$2,500 was excessive. At the time of her injury plaintiff was thirty-eight years old, and had always enjoyed good health. She was a large woman, and her fall severely wrenched and strained important muscles in her back and lower abdomen, among them the broad ligament supporting the uterus and ovaries. The trial occurred over a year after the injury, and at that time plaintiff was a sufferer from severe pains and soreness in the small of the back and abdomen, from frequent headaches, from irregular and very painful menses, and from a sympathetic nervous affliction of the throat and face. We quote from her physician's testimony:

"Q. Doctor, referring now to the injury to the back, and particularly to the place where you said there was more soreness than other places, what region of the back is that? * * * Where was the soreness in the back — the most pronounced soreness? A. In what is known as the small of the back, which is the lumbar region — a little above the waist line. Q. In what degree, if at all, has that soreness continued from the time you took hold of the case down to the present time? That is, has it come and gone, or has it been there all the time? A. It has been there all the time that I have seen her. Q. Might that occur from a wrenching or twisting of the back? A. Yes, sir. Q. What is the effect of that condition on Mrs. Brown — this soreness and tenderness in the back — on her nervous system and her condition and health generally? A. It has had a profound effect on her system. The nervous system has been disordered. The soreness is in such a position that it makes her unable to sit normally in a chair, or lean back in a chair or seat. Q. It affects her assuming a normal position of the body? A. Yes, sir. Q. What effect would it have upon her bodily strength, and her ability to pursue the ordinary household duties? A. I believe it impairs her ability to perform her ordinary duties. Q. In your judgment, doctor, what is the future progress of this case? Will she recover or not? A. I don't think that the conditions will ever become normal again. The condition in the back has been there a long time, and is no better. Q. No better? A. It doesn't seem to yield to approved treatment. Q. As to this condition in the stomach — does that exist now or has that disappeared? A. The condition over the abdomen, in the muscles over the abdomen, has from time to time, I believe, cleared up. The soreness, as I remember, has been relieved somewhat, but then there are times when it seems to come back. There seems to be some connection between the muscles of the abdomen and the neck. I would have to give you what she told me, in order to describe that. * * * Q. Have you noticed any abnormal condition in the neck? A. No, sir. I have not. Q. That is systematic? A. Yes, sir. Q. And you relied upon what she told you as to your judgment as to that? A. Yes, sir. Q. State whether or not there might be a condition of the face and neck resulting from this condition you have described in the abdomen. A. Yes; there might be a reflex — a convulsive effect. Q. A reflex convulsive effect? Might that result from this condition in the abdomen? * * * A. Yes; it could come from that. Q. State whether or not that sort of condition might produce headaches. A. Yes, sir."

It is fairly inferable from this evidence that plaintiff's nerves and nervous system are permanently injured, and consequently we find that the instruction rests on a substantial evidentiary foundation.

We do not feel justified in pronouncing the verdict excessive. If plaintiff's evidence is to be believed, and its credibility was an issue for the jury to determine, we think the verdict awarded only fair compensation for the damages sustained. Twenty-five hundred dollars is not too much for continuously painful, permanent and partially disabling injuries.

The judgment is affirmed. All concur.

Boldt v. San Antonio Traction Co.

(Texas — Court of Civil Appeals.)

1. **NEGLIGENCE; WHEN QUESTION OF FACT.** — As a general rule, negligence is a question of fact and not of law. No act can be declared to be negligent *per se*, unless done contrary to a duty enjoined by statute, or appears so utterly opposed to the demands of common, ordinary prudence that no doubt exists as to its negligent character, and about which no reasonable minds would differ.
2. **INJURY TO PASSENGER'S ARM STRUCK BY ANOTHER CAR ROUNDING CURVE; CONTRIBUTORY NEGLIGENCE; NEGLIGENCE, QUESTION FOR JURY; EVIDENCE; RULES OF COMPANY.** — Action by a street car passenger to recover for injury to his arm, resting on the window sill of the car, by being struck by another car while rounding a curve. Evidence examined and *held*, that whether the plaintiff was guilty of contributory negligence in resting his arm on the window sill, and whether the defendant was guilty of negligence in allowing two cars to pass on a curve so abrupt that they came in contact, were questions for the jury.

A rule adopted by the defendant, prohibiting cars from passing each other on curves, was properly admitted in evidence as tending to show negligence upon the part of the defendant.

PLAINTIFF appeals from a judgment for defendant. Reported 148 S. W. 831.

T. J. Newton and *Will A. Morriss*, both of San Antonio, for appellant.

Templeton, Brooks, Napier & Ogden, of San Antonio, for appellee.

Opinion by *FLY, J.*:

Appellant sued appellee to recover damages alleged to have occurred through the negligence of appellee in breaking his arm

Negligence, a Question of Fact. — In Chamberlayne's "Modern Law of Evidence," § 125, discussing the duty of the jury relative to a question of a negligence, it is said: "It is not disputed that the finding of the constituent facts is matter for the jury. It is only in cases where but one inference is logically permissible that the court says that all the facts and established rules, as a matter of law, as to the existence of negligence, ignoring the possibility that the jury might have reached a conclusion not permitted by the rules of reasoning. Statements of fact, from which more than one inference is reasonably possible, or where the evidence as to the existence of material facts is conflicting, present questions for the jury, whose finding, if rational, should not be reversed."

while he was a passenger on one of its street cars in the city of San Antonio. Appellee pleaded contributory negligence on the part of appellant in placing a portion of his arm outside the window of the car. The court instructed a verdict in favor of appellee, and from the judgment predicated on that verdict this appeal has been perfected.

The evidence showed that appellant was a passenger on a car on Houston street going in the direction of Alamo Plaza; that another passenger occupied the seat, which could just accommodate two persons; that he sat next to a window, which had five rods or bars of iron across it, the highest being at such a point that a person could place his arm upon it; that appellant placed his arm upon the top rod so that his elbow protruded from two to four inches beyond the rod on the outside of the car. There are double tracks on the Houston Street Line at such a distance apart that there is a space of from eleven to twelve inches between when they are moving in a straight line; but if two cars attempt to pass each other at curves there is much less space, and, under certain circumstances, the cars will actually touch each other. Such was the condition of affairs when the car on which appellant was riding started around the curve from Houston street to Alamo Plaza, and another started around the curves from the Plaza to Houston street, and the cars touched each other and broke appellant's left arm, which was resting on the bar or rod, protruding from two to four inches beyond the rod. Except on a curve, the cars could have passed with perfect safety to a person resting his arm, as appellant did, upon the bar. Appellant testified that the top bar was convenient as a resting place for his arm; and, while it appeared that there was an arm rest inside the car, it was shown that it was low, and that, perhaps, sixty per cent. of passengers on the street cars used the upper bar as an arm rest. There was no danger from passing cars to arms on the top bars, except at curves; and appellee, recognizing the danger of cars passing at curves, had a rule as follows:

"Never attempt to pass a car on the curve; the car nearest the curve will have the right of way."

The bars or rods were placed on the windows to protect passengers; but they are only across the lower part, perhaps one-third or one-fourth, of the window. There are no screens on the windows.

As a general rule, negligence is a question of fact and not of law; and, while there are cases in which the judge may instruct a jury that certain proof constitutes negligence and take the case from the jury, the evidence must, in order to justify such a summary proceeding, remove every uncertainty and eliminate every question of fact upon which a jury can pass. From the earliest days of Texas history, the court of last resort has jealously protected litigants from the varying opinions of trial judges as to a proper standard of ordinary prudence which would show a certain act to be, or not to be, negligence. For instance, it has been held by some judges that an attempt to get on or off a moving train is *prima facie* evidence of contributory negligence; while others hold that it is a question of fact for a jury. Chief Justice Roberts, in the oft-cited case of *Railway v. Murphy*, 46 Tex. 356, 26 Am. Rep. 272, asks this question:

"Must we now, in the inception of our adjudications upon this subject, start out in the search through the thousands of reported cases to find the opinions of judges, as to the common and ordinary standard of prudence, in reference to every act, and every combination of acts, relating to negligence, or shall we follow the plain command of our own statute by submitting to the decision of the jury, as the sole judges thereof, the fact of negligence, as well as all other facts in every case?"

There can, under our laws and system, be but one answer to the question, and that was given by the Supreme Court in that case, and in all others with "no variableness, neither shadow of turning." Those answers were in direct response to statutory provisions making juries exclusive judges of the credibility of witnesses and the weight to be given to their testimony, and which command trial judges to "submit all controverted questions of fact solely to the decision of the jury." Article 1317.

It is the rule that no act can be declared to be negligent *per se*, unless done contrary to a duty enjoined by statute, or appears so utterly opposed to the demands of common, ordinary prudence that no doubt exists as to its negligent character, and about which no reasonable minds would differ; and it is in that very limited number of cases that a trial judge would be authorized to instruct a verdict. As stated in *Lee v. Railway*, 89 Tex. 583, 36 S. W. 63:

"Negligence, whether of the plaintiff or defendant, is generally a question of fact, and becomes a question of law to be decided by the court only when the act done is in violation of some law, or when the facts are undisputed and

admit of but one inference regarding the care of the party in doing the act in question; in other words, to authorize the court to take the question from the jury, the evidence must be of such a character that there is no room for ordinary minds to differ as to the conclusion to be drawn from it."

The rule was reiterated in *Choate v. Railway*, 90 Tex. 82, 36 S. W. 247, 37 S. W. 319.

The evidence in this record made out a plain case for submission to the jury. Appellant's act in placing his arm on a bar across the window, which was so inviting and convenient for an arm rest that not only he, but sixty per cent. of the passengers who ride on the street railways, used it for that purpose, and which only became dangerous by reason of the passing of the cars upon a curve, an act which appellee, by the promulgation of its rule forbidding it, recognized to be dangerous, was not an act prohibited by statute, nor by the inexorable rule of common sense and prudence, and the court had no authority to declare it negligence. Neither had the court the authority to declare that the passing of two cars upon a curve, so abrupt that they came in contact with each other, was not negligence which was the proximate cause of the injury to appellant. *Railway v. Williams*, 103 Tex. 228, 125 S. W. 881; *San Antonio Traction Co. v. Bryant*, 30 Tex. Civ. App. 437, 70 S. W. 1015.

The rule adopted by appellee, prohibiting cars from passing each other on curves, was properly admitted in evidence as tending to show negligence upon the part of appellee. The admissibility and effect of such testimony is established by a long array of authority. *Stevens v. Railway*, 2 St. Ry. Rep. 435, 184 Mass. 476, 69 N. E. 338; *Partelow v. Railway*, 196 Mass. 24, 81 N. E. 894. The rule is correctly stated in the Stevens Case, where it is said:

"So a rule made by a corporation for the guidance of its servants in matters affecting the safety of others is made, in the performance of a duty, by a party that is called upon to consider methods and determine how its business shall be conducted. Such a rule, made known to its servants, creates a duty of obedience as between the master and the servant, and disobedience of it by the servant is negligence as between the two. If such disobedience injuriously affects a third person, it is not to be assumed in favor of the master that the negligence was immaterial to the injured person, and that his rights were not affected by it. Rather ought it to be held an implication that there was a breach of duty towards him, as well as towards the master, who prescribed the conduct that he thought necessary or desirable for protection in such cases. Against the proprietor of a business, the methods which he adopts for the protection of others are some evidence of what he thinks necessary or proper to insure their safety."

The Massachusetts court states, in the Stevens decision, that the only decision to the contrary as to the foregoing rule is the case of *Fonda v. Railway*, 71 Minn. 438, 74 N. W. 166, 70 Am. St. Rep. 341, which is cited by appellee, but which we do not accept as authoritative. As sustaining the Massachusetts cases, see *Warner v. Railway*, 168 U. S. 339, 18 Sup. Ct. 68, 42 L. Ed. 491; *Street Railway v. Allemeier*, 53 N. E. 300; *Railway v. Ward*, 135 Ill. 511, 26 N. E. 520; *Railway v. Bates*, 103 Ga. 333, 30 S. E. 41. Appellant's knowledge, or lack of knowledge, of the existence of the rule would not affect the admissibility of the evidence or its probative force.

If, as contended, appellee placed the bars on the windows to prevent people from putting any part of their persons out of the car, they seem to have been an utter failure, because they covered less than half of the windows, and, rather than being a warning not to extend the arms out of the car, seemed to hold out an invitation to a majority of the passengers to use the bars in such a manner as to have their elbows protruding from the cars. The existence of the bars was not sufficient to raise such a presumption of negligence against a passenger who placed his arm on the top one as would deprive him of the right to be heard by a jury.

The judgment is reversed, and the cause remanded.

Silvey v. Georgia Ry. & Electric Co.

(Georgia — Supreme Court.)

ORDINANCE AUTHORIZING CONSTRUCTION OF DOUBLE TRACKS; DESIGNATION OF STREETS; DIVESTING CITY OF LEGISLATIVE POWER; FRANCHISE; REPEAL; INJUNCTION. — Upon review, the court declines to overrule the decisions in the cases of *Moore v. City of Atlanta*, 70 Ga. 611, and *Brown v. Atlanta Railway & Power Co.*, 113 Ga. 462, 39 S. E. 71.

A city ordinance, authorizing a street railway company to construct and lay such double tracks in the streets where it already has single tracks as it may from time to time deem proper for the purpose of rendering efficient service, sufficiently designates the streets in which the company may lay the double tracks. And the fact that the time at which such double tracks may be laid is thus left to the discretion of the company, to be exercised by it for the purpose of "rendering efficient service,"

Street Railway Franchise. — As to street railway franchises, see *Nellis on Street Railways* (2d Ed.), §§ 19-45.

does not divest the city of the legislative power involved in the grant of a franchise to the street railway company, nor does it confer upon the company itself the right to exercise an authority involving the element of governmental or legislative power.

An ordinance providing that a single track may be laid in any given street is not in any sense repealed by a subsequent ordinance authorizing a street railway to lay double tracks in all streets where single tracks had been laid.

Under the evidence and the pleadings, the court did not err in refusing the interlocutory injunction.

(Syllabus by the Court.)

PLAINTIFFS bring error from judgment for defendant. Reported 73 S. E. 629.

A. J. Alexander and Smith, Hammond & Smith, for plaintiffs in error.

Colquitt & Conyers, for defendant in error.

Opinion by BECK, J.:

Jerome Silvey and other citizens and taxpayers of the city of Atlanta, all of whom resided on Forrest avenue, a public street in the city of Atlanta, and who owned property abutting on that street, filed their equitable petition against the Georgia Railway & Electric Company, alleging as follows: The defendant is preparing to construct and operate on Forrest avenue a line of double tracks in lieu of the present single track now being operated. If this purpose should be consummated, it would, on account of the narrowness of Forrest avenue, result in the creation of a public nuisance by making it difficult and dangerous for other vehicles to use said street, and would inflict a special damage upon petitioners, not shared by the general public, by destroying the right of ingress and egress to and from their property by vehicles in the street, and would inflict upon them irreparable damages which cannot be estimated in money. The company has never been given the right, by any valid ordinance, to construct a double track, and the construction and operation of a double track would constitute an additional servitude and burden upon the fee in the street, which was not contemplated in the original dedication of the street. A large part of the value of the property of the plaintiffs is in the shade trees growing on the sidewalk, some of which are forty years old; and in the construction of a double-track line which is to be operated by a trolley system of electric wires, it would be necessary

to make a place for the trolley wires, and in doing so it would be necessary to cut off many large limbs and branches of said trees and greatly impair their beauty and symmetry. The fee of the sidewalk and roadway of Forrest avenue is in the abutting owners, and the trees are their individual property, and that the cutting and defacing of these trees would constitute an actual taking of their property. The defendant has not tendered to them any sum for the damage to be done to their property, and has made no effort to ascertain the same; and until this is done the proceedings of the defendant are without authority and void, and are a trespass upon petitioners' property. They pray for the grant of an injunction against the defendant, restraining it from constructing the double track as proposed. The defendant contends that it has authority to construct a double track, given to it in a valid ordinance passed by the municipal authorities. It denies that it would injure or damage the plaintiff's property, or that it would actually take any of their property, or that the laying of the double track would be an additional servitude and burden upon the fee in the street; and it shows that while it will be necessary to trim some portion of the branches of the trees which grow over the sidewalk to a certain extent, the same will be done under the supervision of the park commission of the city of Atlanta, or by the authorities of said city, and will not result in any damage to the value or the beauty of the trees. Also, that on account of the growth and development of the city of Atlanta the construction of a double track is necessary in order to render efficient service to the public. At the interlocutory hearing the court refused the injunction, and the petitioners excepted.

In an ordinance of the city of Atlanta, granting to the Atlanta Rapid Transit Company a franchise to construct a street car line on Forrest avenue, approved February 26, 1901, it is provided that

"authority and consent be and the same are hereby granted to the Atlanta Rapid Transit Company, its successors and assigns, to construct, electrically equip, and operate a line of single track of street railway, with all the necessary and proper turnouts, switches, curves, and connections along and over the following route, to wit: Commencing on Forrest avenue at the intersection of said street with Peachtree street and Ivy street, and running thence on Forrest avenue to Piedmont avenue, and from Piedmont avenue to Jackson street, and if Forrest avenue be subsequently extended from Jackson street to Boulevard, thence to Boulevard. The right being given to construct, equip, and operate either a single or double track on said street from Piedmont

avenue to Jackson street or Boulevard in the event Forrest avenue be so extended."

The ordinance embraces certain qualifications, limitations, restrictions and conditions upon the authority granted in the section quoted above. Another ordinance by the mayor and general council of the city of Atlanta was adopted January 27, 1902, and approved February 8, 1902, which provided for the consolidation of the Atlanta Railway & Power Company, the Atlanta Rapid Transit Company, the Georgia Electric Light Company, and the Atlanta Steam Company. The consolidated company resulting from the merger of the companies just named is the defendant in the present suit, and is the successor in title to all the rights, privileges and franchises of the constituent companies named above, with certain specified exceptions not necessary here to note. The tenth section of the above ordinance, passed in 1902, provides as follows:

"Be it further ordained that said consolidated company, its successors and assigns, are hereby granted the right and permission to physically connect, merge and consolidate the said properties which it may acquire, wherever it desires, and to construct and lay such double tracks, curves, switches, connections, wires, tracks, etc., as it may from time to time deem proper for this purpose, or for the purpose of rendering efficient service, and to straighten out the kinks in its tracks and lines; it being the intention hereof to allow the full and complete consolidation of the companies hereinbefore referred to and their properties whereby the freest possible use and profit thereof may result to said consolidated company, and so that said company may consolidate, control, and operate all of said properties as it may desire, subject only to proper police laws and restrictions."

1. It is insisted by petitioners that this section of the ordinance of 1902 is violative of paragraph 1, § 3, art. 1, of the Constitution of the State of Georgia, providing that private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid, in that it makes no provision for the assessment and payment of damages for injury to the property of petitioners in constructing a double-track line. The question of the validity of section 10 of the ordinance of 1902, on the ground that it is violative of the constitutional provision just cited, is controlled by the decisions in the cases of *Moore v. City of Atlanta*, 70 Ga. 611, and *Brown v. Atlanta Railway & Power Co.*, 113 Ga. 462, 39 S. E. 71. We have been requested to review and reverse these cases. In our opinion the rulings made in those cases should

not now be disturbed, and we accordingly decline to overrule them. See, in this connection, *Fleming v. City of Rome*, 130 Ga. 383, 61 S. E. 5.

The court was authorized to hold, under the evidence in the case, that the trimming of shade trees standing on the sidewalk in front of petitioners' property would not constitute an actual taking of petitioners' property. And where the branches of these trees extend over the streets in such a manner as to interfere with the enjoyment of the easement in a street, the city authorities would have the right to cut and trim the branches, though in so doing they should exercise due care not unnecessarily to injuriously affect the trees, their beauty and their symmetry. *City of Atlanta v. Holliday*, 96 Ga. 546, 23 S. E. 509.

2. In paragraph 9 of the petition it is conceded that section 10 of the ordinance of 1902, already set forth, gives to the consolidated company, in a general clause, a right to double track any of its existing lines, but the plaintiffs contend that this general grant of authority to lay double tracks should not be given effect, as it does not specify the streets in which the double tracks shall be laid, but leaves to the beneficiary company the right to select the streets and choose the time at which the double tracks shall be laid; that the grant of a right to construct a street railway in the streets of a city is the exercise of governmental power; that the legislative power thus involved in granting a street railway franchise cannot be delegated by a municipal government, and especially that such delegation would be void if made to the street railway company itself; and that if effect is given to this general clause in section 10 of the ordinance of 1902, it would amount, in effect, to divesting the city council of this governmental power in this particular respect and conferring it upon the street railway company. We do not think this contention is sound. The franchise authorizing the laying of a single track in the street had been duly granted, so far as appears from the record; and no suggestion to the contrary is made. So far as the granting of the right to lay a double track where only a single track had previously been laid may be considered as a franchise. That, too, was granted by the city council in the exercise of its governmental power. The franchise was granted in all of the streets where single tracks had already been laid. The council knew in which streets these single tracks then existed, and this designation of the streets in which the defendant company might lay double tracks was as effectual as if it had

named each one of them. The fact that the company was to exercise a discretion as to the time at which the improvements along its line should be made and double tracks should be laid was not in the nature of the exercise of any creative or legislative power, in which franchises like those under consideration must have their origin. It did nothing more than confer upon the company the authority to decide when the exigencies of traffic resulting from the growth and expansion of the city required it to increase the facilities for handling the traffic. It no more conferred upon the company the right to exercise a legislative or governmental function than would an ordinance which granted a franchise to lay a street railway in the streets of a city and which provided that the track might be laid at any time within one or two years. In each case — that supposed as well as in the actual case — discretion as to the exact time at which the work of laying the track should be commenced and performed would be vested in the company receiving the franchise; the only difference being that in the supposed case there was a limitation of time within which the privilege conferred should be exercised.

3. We cannot agree with the contention of counsel for plaintiffs in error that so much of the ordinance of 1902 as grants the right to lay a double track in streets where there was already a single track in any way contravenes or conflicts with that part of the ordinance of 1901, which allows the laying of a single track in a designated portion of Forrest avenue or throughout the length of that street. But where a single track had been originally laid under the ordinance of 1901, a double track could be laid under the provisions of the ordinance of 1902.

4. Under the evidence and the pleadings the court did not err in refusing the interlocutory injunction.

Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

Elliott v. Seattle R. & S. Ry. Co.

(Washington — Supreme Court.)

1. **PASSENGER WHILE ON STEP STRUCK BY CAR ON OPPOSITE TRACK; PLEADING; COMPLAINT.** — A complaint in an action to recover for injuries to a passenger who, while getting on the step of a car in the act of alighting, was struck by a car on the opposite track, which alleges that the accident occurred "also on account of defendant's negligence and carelessness in running another car in the opposite direction on the adjoining street car track * * * at a high and dangerous rate of speed, without giving any signal, sign, or warning of the approach thereof," states a cause of action.
2. **ORDINANCE; MAINTENANCE OF GATES OR GUARDS; NEGLIGENCE.** — Where a city ordinance makes it the duty of a street railway company, operating a double track system, to equip its cars with gates or guards and have them closed on the side next to the track, such company is negligent where such gates are opened by a third party and a passenger is injured, although the car was so crowded that the conductor could not see the gate.
3. **PASSENGER ALIGHTING FROM CROWDED CAR; CONTRIBUTORY NEGLIGENCE.** — The mere act of a passenger in alighting from a crowded car on the off side is not contributory negligence as a matter of law.

DEFENDANT appeals from judgment for plaintiff. Reported 122 Pac. 614.

Will H. Thompson and *Morris B. Sachs*, both of Seattle, for appellant.

Frank E. Green, of Seattle, for respondent.

Opinion by CHADWICK, J.:

This action was brought to recover damages for personal injuries. The plaintiff was a passenger upon an inbound car of the defendant company which operates a street car line between Renton and Seattle. A part of the way the track is single, but from Hillman City into Seattle there is a double track. When running over the single track both sides of the back platform are kept open. In running over the double track the left side or the one next to the double track is closed. This was accomplished by means of a collapsible iron gate which was fastened by a catch and bolt. On

Injury to Passenger Alighting from Car. — As to the liability of a street railway company for an injury sustained by a passenger while alighting from a street car, see note to *Champagne v. La Crosse City Railway Co.*, 2 St. Ry. Rep. 988.

the morning of the accident the testimony shows to a certainty that the conductor closed and fastened the gate at Hillman City. When plaintiff boarded the car, all of the seats were taken, and he took a position on the back platform, standing near the handle of a wheel brake on the left side. The car was one that was due to arrive in Seattle about 9 o'clock, but before arriving at Ninth street it had become so crowded that the passengers were standing on the platform and in an alcove at the end of the car so that they were, in the language of a witness, "chest to chest; back to chest." The testimony shows that, while the seating capacity of the car was about forty, there were approximately 125 passengers on the car. The testimony of the plaintiff tends to show that, as the car approached Ninth street where plaintiff and others who were regular patrons of the company were accustomed to alight, he crowded his way toward the left side of the car, intending to get off on the side next to the opposite track; that, as he was about to catch the handrail or handles at the side of the entrance, the brakes were set in such a way that the car lurched or jerked, so that all of those standing swayed with the car; that plaintiff was thrown off his balance and, in attempting to save himself, caught the grab at his right with both hands. The momentum of the car threw him around so that he was facing the entrance; that at this moment a car on the opposite track, going about twenty miles an hour, with no bell sounding, was approaching; that he could not save himself, and was struck by the grabhandle of the opposite car, and received the injury of which he now complains.

The testimony of the defendant tends to show that plaintiff, who made the trip six days in every week, deliberately and to suit his own convenience started to get off the car on the off side; that he backed down the steps, holding the handle on either side of the entrance; that he threw his head back beyond the nineteen inches of clearance between the cars; that he was unmindful of his own safety as well as of the fact that the double track was a token of danger, and that if the gate was open it was opened by plaintiff, or, if not by him, by another; in any event, that it was opened without the knowledge or consent of the conductor who, because of the crowded condition of the car, was riding on one of the steps at the right entrance and could not see the gate on the other side. We confess that, in the light of the record, the defense seems to have been the better sustained. But, as this court has so often announced, the facts are for the jury, and, it having accepted the

case of plaintiff as true and rejected the testimony of the defendant, the judgment must be affirmed unless the law as applied to the facts as found by the jury intervenes.

It is first urged that the complaint does not state a cause of action. It is said that this must be so unless it be the law that mere negligence in allowing the car to become overcrowded, and to be carrying an excessive number of passengers, is in itself actionable merely because the passengers in moving about push or crowd one of their number off the car; and unless it is shown that the action of the passengers was such that it was apparent to the employees in charge of the car that their action was endangering the passenger. This may be true, but it occurs to us that defendant has overlooked an important element in the case, if indeed it be not the proximate cause of the injury. It is alleged that the accident occurred

"also on account of defendant's negligence and carelessness in running another car in the opposite direction on the adjoining street car track * * * at a high and dangerous rate of speed, without giving any signal, sign, or warning of the approach thereof."

We think a cause of action is stated.

It is next urged that there is no proof of actionable negligence. The only question which occurs on this assignment is whether the defendant performed its whole duty when the conductor closed the gate at Hillman City, and is not to be charged because plaintiff or some one else opened it before the accident occurred. We are bound to assume, for the jury has so found, that plaintiff did not open the gate. This being so, it would follow that, if the gate was opened by another, the company would be liable to a passenger who was innocent of offense. Being charged with a high degree of care, it is bound to so operate its safeguards that, when they are not for any reason under the eye of the conductor, a third person cannot undo, to the prejudice of another, the precautions which have been taken, and which the law imposes for the safety of passengers. It will be remembered that the crowd was such on this car that the conductor could not see the gate. An ordinance of the city was introduced by plaintiff, and by its terms the duty is put upon street car companies operating double track systems to equip their cars

"with gates or guards upon that side of such platform of each of said cars which is next to the track of said line other than the one upon which said

cars are being run or operated, which gates or guards shall so inclose the platform of said car that it will be impossible for passengers to enter such cars or alight therefrom upon the side of said platform so furnished or provided with gates and guards."

This ordinance, the fact that the accident occurred, and the fact that plaintiff did not open the gate, are enough to sustain the finding of negligence. Such ordinances (and it may be questioned whether they do more than affirm a general rule) are intended to protect the absent-minded from their inattention, the careless from their want of care, and the foolish from their folly; and if, in spite of such precaution, one of these opens the gate, the fact that it had once been closed would not bar an action by one who was not responsible for the condition existing at the time the accident actually occurred. Defendant has cited many cases to sustain its position, but we do not conceive them to be in point. They could only be held applicable if we assume that plaintiff was guilty of contributory negligence, or that he opened the gate. This we have no power to do.

It is finally urged that the testimony shows that plaintiff was guilty of contributory negligence as a matter of law. The question is whether plaintiff should have taken his place standing inside the car or on the platform. Under the admitted facts he was making his way out, and was in the act of getting on the step at the time he was hurt. The fact that he might have ridden in the car instead of on the platform thus becomes immaterial.

Whether plaintiff should have gone to the right entrance instead of to the left is also a question for the jury, for his testimony is that the way was so crowded that he could not get to the right entrance. To hold plaintiff guilty of contributory negligence under the testimony in this case would be to hold that the mere act of a passenger in alighting from a crowded car on the off side is contributory negligence as a matter of law. The law will not sustain us in so holding.

Finding no error, the judgment is affirmed.

DUNBAR, C. J., and GOSE, CROW and PARKER, JJ., concur.

Craft v. Boston Elevated Ry. Co.

(Massachusetts — Supreme Judicial Court.)

RELATION OF CARRIER AND PASSENGER; INJURY TO PASSENGER BY CLOSING OF DOOR; PRESUMPTION OF NEGLIGENCE. — A person who attempts to enter a street car and is caught by the closing of the door has so far entered the car that the company owes to her the duty of a common carrier to a passenger.

The closing of the door which was under the exclusive care and control of the company was evidence of negligence, and the doctrine of *res ipsa loquitor* applies.

PLAINTIFF receives judgment on report from Superior Court. Reported 97 N. E. 610.

A. E. Yont, for plaintiff.

MacPherson & Mahar, for defendant.

Opinion by HAMMOND, J.:

The only question is whether there was evidence of the negligence of the defendant. At the time of the accident the plaintiff was entering the car by the right-hand door which was at the forward end of the car. The door is forty-six inches in width and the aperture is divided in the middle by a perpendicular rod. The door in closing passes outside this rod, leaving a space of about three inches.

"The rod is apparently designed as a handhold to steady passengers when entering or alighting from the car, and to separate outgoing and incoming passengers."

The plaintiff's evidence, which is not contradicted, was that the car was pretty well filled, she being the last passenger to enter at this door, all the seats being occupied, "and there were a few people standing in the aisle." She was passing to the left of the rod previously mentioned when suddenly, without warning, the door started to close and struck her, pinning her body against this

Injury to Passenger from Swinging Door. — As to the liability of a street railway company for an injury to a passenger from a swinging door, see note to *Carroll v. Boston, etc., St. Ry. Co.*, 3 St. Ry. Rep. 388.

Res Ipsa Loquitor. — As to cases when the doctrine of *res ipsa loquitor* is applicable, see *Nellis on Street Railways* (2d Ed.), §§ 495, 496.

rod. The door starts to close slowly and increases its speed as it acquires momentum. Her head, one shoulder, part of her body and one leg were on the inside, the other shoulder, leg and part of her body being held outside the door. She struggled to free herself and was assisted by passengers to a seat, and did not then or at any other time see the conductor, and had no communication with any employee of the defendant. She saw the motorman inclosed within his cab, his back being turned toward her.

There was testimony to the effect that it is possible for a passenger to operate the door by the levers in the rear.

The car was standing for the reception of passengers and in attempting to enter the car at the place and at that time the plaintiff had so far entered the car that the defendant owed to her the duty of a common carrier to a passenger. The car, the door and all the levers for moving them were under the exclusive care and control of the defendant. The closing of the door under the circumstances was evidence of negligence, and since the door was under the care of the defendant and since there was absolutely no explanation of the cause for the movement of the door, the negligence was *prima facie* that of the defendant. And that is so even if some passenger might have intentionally started the machinery by which it was closed. It was the defendant's duty not only to use care to see that its servants and agents properly managed the machinery, but also to see that no stranger started the mechanism. The doctrine of *res ipsa loquitur* applies. *White v. Boston & Albany Railroad*, 144 Mass. 404, 11 N. E. 552; *Savage v. Marlborough Street Railway*, 3 St. Ry. Rep. 406, 186 Mass. 203, 71 N. E. 531; *Hebblethwaite v. Old Colony Street Railway*, 192 Mass. 295, 78 N. E. 477, and cases cited. See also *James v. Boston Elevated Railway*, 201 Mass. 263, 87 N. E. 474, and cases cited; *Beattie v. Boston Elevated Railway*, 201 Mass. 3, 86 N. E. 920, and cases cited; *Rockwell v. McGovern*, 202 Mass. 6, 88 N. E. 436, 23 L. R. A. (N. S.) 1022.

In accordance with the terms of the report the entry must be: Judgment for the plaintiff for \$850.

Culbert v. Wilmington & P. Traction Co.

(Delaware—Superior Court.)

1. **NEGLIGENCE DEFINED.**—Negligence is the failure to observe, for the protection of the interests of another person, that degree of care, precaution and vigilance which the circumstances justly demand.
2. **PRESUMPTION OF NEGLIGENCE; BURDEN OF PROOF.**—Negligence is never presumed, and the burden of proving it rests upon the plaintiff.
3. **NEGLIGENCE QUESTION OF FACT.**—Whether negligence exists is a question of fact.
4. **PASSENGER PASSING BEHIND CAR STRUCK BY CAR ON PARALLEL TRACK; NEGLIGENCE; CONTRIBUTORY NEGLIGENCE.**—A plaintiff, injured by being struck by a car on parallel track going in opposite direction from car from which plaintiff has just alighted, cannot recover unless it be shown by a preponderance of the evidence that the negligence which caused the accident was the fault of the defendant, and that the plaintiff was free from contributory negligence.
5. **SAME; PREPONDERANCE OF EVIDENCE.**—By a preponderance of the evidence is not meant necessarily the number of witnesses, but the weight of the testimony.
6. **SAME; UNAVOIDABLE ACCIDENT.**—A pure accident, without any negligence on the part of the defendant, is not actionable.
7. **SAME; ORDINARY CARE AND DILIGENCE.**—The term "ordinary care and diligence," when applied to the management of electric cars in motion, may be understood to import all the care, circumspection, prudence and discretion which the particular circumstances of the place and occasion require.
8. **DUTY OF PEDESTRIAN APPROACHING TRACKS.**—A person approaching a railway track, or who attempts to cross it, is bound to avail himself of any knowledge he may have of the existing conditions. If his line of vision is obstructed, he is bound to look for approaching cars in time to avoid collision with them.
9. **CARE BY COMPANY AND PEDESTRIANS IN USE OF STREETS.**—Street railway companies and pedestrians are both required to use such reasonable care as the circumstances of the case demand.
10. **DUTY OF MOTORMAN APPROACHING CAR DISCHARGING PASSENGERS.**—A motorman in charge of a car approaching another car discharging passengers is bound to keep a careful lookout for passengers or other persons who may attempt to cross the tracks behind the standing or moving car, to have his car under proper control, and give such signals as are proper and necessary.

Contributory Negligence of Person Passing Behind One Car upon Parallel Track.—The question of the contributory negligence of a passenger passing behind the car from which he has alighted, and upon a parallel track where he is struck by a street car, is discussed in a note to *Stack v. East St. Louis, etc., Railway Co.*, 7 St. Ry. Rep. 224.

11. CONTRIBUTORY NEGLIGENCE; PROXIMATE CAUSE.—A plaintiff struck by a car may be entitled to recover notwithstanding some negligence on her part, if it was the negligence of the defendant alone that was the proximate or immediate cause of the injury.

ACTION for personal injuries. Verdict for plaintiff. Reported 82 Atl. 1082.

Henry R. Isaacs and Armon D. Chaytor, Jr., for plaintiff.

Walter H. Hayes and Ward, Gray & Neary, for defendant.

Charge to jury by PENNEWILL, C. J.:

Gentlemen of the jury: This is an action brought by the plaintiff, Martha B. Culbert, against the Wilmington & Philadelphia Traction Company, the defendant, for the recovery of damages for personal injuries which the plaintiff alleges she sustained as the result of the defendant's negligence.

There are several averments of negligence in the plaintiff's declaration, including the running of the car which injured the plaintiff at an improper and dangerous rate of speed, running said car without giving any or suitable warning of its approach, and the failure to use reasonable care to stop said car after the dangerous position of the plaintiff was seen, or by the exercise of reasonable care could have been seen, by the servant of the defendant having control of the car.

The averment of negligence, based upon the rate of speed at which the car is alleged to have been run, has been abandoned by the plaintiff, and therefore you will not consider such averment.

The plaintiff claims that on March 1, 1911, she got off one of the defendant's cars at Fourth and Harrison streets in this city, at which point the defendant maintains double tracks, and passed around the rear end of the car for the purpose of crossing to the other side of the street; that when she had passed around the end of the car another car of the defendant was right there running slowly in an opposite direction from what she had come, that is, in an easterly direction; that she was caught or struck by the east-bound car and dragged ten or twelve feet, the wheel of the rear truck running over her left foot, and so crushing it that amputation was necessary.

The defendant denies that it, or its servants in charge of the car, were guilty of any negligence from which the injuries complained of were inflicted; but, on the contrary, insists that its

servants were, at the time of the accident, in the exercise of reasonable and proper care; and that the accident was occasioned solely by the negligence of the plaintiff herself. And the defendant contends, that immediately before, and at the time of the accident, the motorman in charge of the east-bound car neither knew, nor by the exercise of reasonable care might have known, of the presence or perilous position of the plaintiff in time to have avoided the accident.

It is admitted in this case that the car in question, No. 22, which is alleged to have run into the plaintiff, was operated at the time by the defendant company by means of electricity; that the company was a corporation; that it was lawfully authorized to operate its cars and this particular car on West Fourth street. It is also admitted that there was a double track at the place of the accident, and that the company were running both the east and west bound cars, and doing so, under authority of the law; that the accident occurred at Fourth and Harrison streets, and it is also admitted that said streets are public streets of the city of Wilmington.

We decline to instruct you to return a verdict for the defendant as requested in its first prayer, because we think the case should be submitted to the jury, for their determination upon the evidence after applying thereto the law as we shall state it.

This action is based upon the negligence of the defendant company; and if the injuries of which the plaintiff complains were not the result of the negligence of the defendant, the plaintiff cannot recover.

Negligence is the failure to exercise ordinary care, that is, the failure to exercise such care as a reasonably prudent and careful person would use under similar circumstances. In its legal sense it is no more nor less than this: The failure to observe, for the protection of the interests of another person, that degree of care, precaution and vigilance which the circumstances justly demand.

Negligence is never presumed. It must be proved, and the burden of proving it rests upon the plaintiff. There is no presumption of negligence, either upon the part of the plaintiff or on the part of the defendant, from the mere fact that the plaintiff was injured by a collision with a car of the defendant.

Whether negligence exists in a particular case is a question of fact to be determined by the jury.

To entitle the plaintiff to recover at all it must have been shown

to the satisfaction of the jury by a preponderance of the evidence, that the negligence which caused the accident and injuries was the fault of the defendant, and that the plaintiff was not guilty of any negligence which entered into and contributed thereto.

But by a "preponderance of the evidence" is not meant necessarily the number of witnesses, but the weight of the testimony when properly and carefully considered by the jury.

A pure accident, without any negligence on the part of the defendant, is not actionable, and if the jury should believe from all the evidence that such was the character of the plaintiff's collision with the defendant's car, it would come under the head of unavoidable accident, and the plaintiff cannot recover.

The term "ordinary care and diligence," when applied to the management of electric cars in motion may be understood to import all the care, circumspection, prudence and discretion, which the particular circumstances of the place and occasion require of the servants of the defendant company; and this will be increased or diminished as the ordinary liability to danger, accident and injury is increased or diminished in the movement and operation of such cars.

What is due and proper care depends upon the facts in each case. A person approaching a railway track or who attempts to cross it, is bound to avail himself of the knowledge of the fact that the track is laid in the street, as well as of any knowledge or familiarity he may have with the conditions existing at the place.

The public as well as the defendant company, were entitled to use said highway. In using the highway all persons are bound to the exercise of reasonable care to prevent collisions and accidents. Such care must be in proportion to the danger of the peculiar risks in each case. It is the duty of the company to see that its servants in charge of the cars use reasonable care in operating them; that the cars move at a reasonable rate of speed; that they slow up, or stop if need be, where danger is imminent and could, by the exercise of reasonable care, be seen or known in time to prevent accident; and that proper warning be given of the approach of the car at a crossing on the public highway. There is a like duty of exercising reasonable care on the part of the traveler. The company and the traveler are both required to use such reasonable care as the circumstances of the case demand; an increase of care on the part of both being required where there is an increase of danger. The right of each must be exercised in a reasonable and

careful manner, so as not unreasonably to abridge or interfere with the right of the other. We are not prepared to lay down any absolute rule as to what precise acts of precaution are necessary to be done, or left undone, by persons who may have need to cross the tracks of electric railways. Nor will we attempt to specify the acts of precaution which are necessary to be done, or omitted, by one in the management of an electric car. Such acts necessarily must depend upon the circumstances of each particular case. The general rule is that the person in the management of the car, and the person approaching a car or crossing a railway track, are bound to the reasonable use of their senses of sight and hearing for the prevention of accident; and also to the exercise of all such reasonable caution as ordinarily careful and prudent persons would exercise in like circumstances. A person approaching a railway crossing with which he is familiar is bound to avail himself of his knowledge of the locality and act accordingly. If, as he attempts to cross the tracks of the company, his line of vision is obstructed, he is bound to look for approaching cars in time to avoid collision with them; and if he does not look, and for this reason does not see an approaching car until it is too late to avoid a collision, he is guilty of negligence and could not recover therefor. *Lenkewicz v. Wil. City Ry.*, 7 Pennewill 64, 67, 68, 74 Atl. 11.

Due care in the case of the company means, ordinarily, the timely employment of sufficient signals or warnings, giving notice of the approach of trains to public places, such as highways or street crossings; and in the case of individuals due care means proper circumspection in looking or listening, or both, when practicable, to avoid collision; and the greater the peril to the individual, the greater the duty of exercising care by the company, and of prudence and caution on the part of the individual. This, after all, is but common sense, the force of which must be evident to all. If the defendant failed to make use of the usual and appropriate means to warn the plaintiff at the time of the accident, such failure was negligence on its part, and if the accident occurred by reason thereof, it would be liable, provided the plaintiff did not by her own carelessness contribute in some degree proximately to her injury. *Short v. P., B. & W. R. R.*, 7 Pennewill 108, 112, 76 Atl. 363.

Where the railway approaches the crossing at a down grade, or where the view of the railway from the crossing street is obstructed by buildings or otherwise, greater care is required of the person in

charge of the car than where the approaches of the railway to the crossing are at the grade of the crossing, or where the view of the railway is unobstructed.

At a street crossing, the motorman in charge of a car approaching another car discharging passengers is bound to keep a careful lookout for passengers, or other persons who may attempt to cross the tracks behind the standing or moving car, to have his car under proper control, and give such signals as are proper and necessary to protect travelers who are in the exercise of ordinary prudence. But even under such circumstances the company would not be liable if the person injured could have avoided the injury by exercising such care and caution as a prudent person would have exercised under like circumstances.

If the negligence of the plaintiff entered into, and contributed to, the accident at the time she was struck by the car, she cannot recover even though the company was also guilty of negligence. In such case the plaintiff would have been guilty of contributory negligence, and the law will not permit a person to recover damages for his own negligence, neither will it attempt to measure the proportion of blame or negligence to be attributed to each party.

The plaintiff, however, would be entitled to recover notwithstanding there had been some negligence on her part, if it was the negligence of the defendant alone that was the proximate or immediate cause of the injury.

In every case each party has the right to presume that the other party will do his duty — exercise due care — but such presumption in no wise relieves either party from the duty of exercising ordinary and reasonable care on his own part.

As the plaintiff, in actions of this character, must sustain his allegations of negligence by satisfactory proof before he can recover, so the defendant, when he relies upon contributory negligence on the part of the plaintiff, to escape liability, must satisfy the jury by a preponderance, or weight of evidence, that contributory negligence on the part of the plaintiff was the proximate cause of the injury complained of.

Negligence on the part of the motorman or servant in charge of the car in question would of course be the negligence of the company. Any failure of either the plaintiff or defendant to exercise such care and prudence as was reasonably required under the circumstances the jury may consider an evidence of negligence.

If the jury find from the evidence that there had been a uni-

form and continuous practice of the defendant company to sound the gongs of its cars when passing standing cars, and that such practice or course of conduct was known to, and relied upon, by the plaintiff at the time of the accident, such facts may be taken into account by them in estimating the degree of diligence required of the plaintiff in looking out for an approaching car before she crossed the east-bound track.

If you find under the evidence that the motorman in charge of the car in question did see, or by the exercise of due care in looking out ahead could have seen, the plaintiff in time to have stopped the car and thus have prevented the accident, then the defendant would be liable. But if you find that the plaintiff suddenly approached alongside of, against or in front of the car and was struck, knocked down and run over by the car, without any improper act or omission on the part of the motorman, and that the latter applied the brakes of his car and did all he could to prevent the injury complained of, the plaintiff cannot recover.

As was said in the case of *Heinel v. Peoples Railway Co.*, 6 Pennewill 428, 67 Atl. 173, recently tried in this court:

"If the plaintiff moved from a position of safety to a position of danger near or upon the track of the railway on which the car was running, so suddenly as to make it impossible for the motorman to stop the car before the collision, the defendant cannot be held liable for the resulting injury to the plaintiff; so, if the motorman, after he saw, or by the exercise of reasonable care could have seen the plaintiff in a position of danger, did everything that a reasonably careful and prudent man would do under like circumstances to prevent the accident, the defendant would not be liable."

As a general rule, direct or positive evidence of a fact is entitled to greater weight than evidence of a merely negative character. You, however, are the sole judges of the credibility of the witnesses and of the weight and value of their testimony. Your verdict in this case should be in favor of that party for whom there is the preponderance or greater weight of the evidence. If you are satisfied from the preponderance and weight of the evidence, taking into consideration all the facts and circumstances of the case, that the injury to the plaintiff was caused by the negligence and carelessness of the defendant company, without fault on his part, then your verdict should be for the plaintiff. *Lenkewicz v. Wil. City Ry.*, 7 Pennewill 64, 69, 70, 74 Atl. 11.

Positive testimony, as we have said, is entitled to greater weight than negative testimony, especially if the latter should be unac-

accompanied by facts and circumstances showing an attentive attitude of the witness, testifying thereto, respecting the matter to which they testify. Whether the motorman did, or did not, give due and timely warning of the approach of the car you should determine from a preponderance or weight of the evidence respecting that question.

Whenever there is a conflict of testimony in a case, it is the duty of the jury to reconcile such conflict if they can; but if they cannot do so, they should accept and be governed by that which they consider, under all the circumstances, most worthy of credit and belief, having regard to the apparent fairness, bias, prejudice and interest of the witnesses, if any there be, their opportunities of knowing the things about which they testify, and their recollections thereof, as well as any other facts and circumstances which will aid in determining the truthfulness and correctness of the testimony given in the case.

If you are satisfied from the preponderance and weight of the evidence, taking into consideration all the facts and circumstances of the case, that the injury to the plaintiff was caused by the negligence and carelessness of the defendant company, without fault on her part, then your verdict should be for the plaintiff, and for such sum as will reasonably compensate the plaintiff for her pain and suffering both past and present, for her loss of time from her affairs, and her pecuniary loss from her impaired ability to attend to her necessary work and business in the future, and also for any expenses shown by the testimony to have been incurred by her for medicines, medical and hospital treatment, on account of such injury.

In conclusion, gentlemen, we say that the simple and only duty you have to perform in this case is to determine whether the plaintiff is entitled to recover anything from the defendant, and if you find she is entitled to recover, then you must ascertain the amount of her damages. Both of these conclusions you must reach after a careful, fair and conscientious consideration of the evidence and the law. Your verdict should be based on nothing but the testimony of the witnesses and the law as we have stated it.

Neither sympathy nor prejudice, for or against one party or the other, should in the slightest degree influence you in reaching your verdict, and we do not believe it will. It will not matter to you who the parties are, your only thought and consideration will be their rights under the laws of the State and the facts in the case.

It may be entirely unnecessary to make such suggestions as these to gentlemen of your intelligence, integrity and standing, but we have deemed it proper and fitting to do so in view of the importance of the case to the parties concerned, and your grave responsibility in determining their rights.

Verdict for plaintiff.

Riccio v. People's Ry. Co.

(Delaware — Superior Court.)

1. **USE OF STREET BY STREET RAILWAY COMPANY AND PEDESTRIANS.** — The right of a street railway company to the use of a street must be exercised with due regard to the right of pedestrians; the right of each must be exercised in a reasonable and careful manner so as not unreasonably to abridge or interfere with the right of the other.
2. **NEGLIGENCE DEFINED.** — Negligence is the failure to use such care as a reasonably prudent person would exercise under similar circumstances.
3. **PRESUMPTION OF NEGLIGENCE.** — The mere fact of an accident by which an injury is sustained, if not within the control of the defendant, does not, in itself, raise a presumption of negligence.
4. **NEGLIGENCE; BURDEN OF PROOF.** — The burden of proving negligence rests always upon the plaintiff.
5. **NEGLIGENCE OF MOTORMAN IMPUTED TO EMPLOYER.** — Negligence on the part of a motorman is the negligence of his employer.
6. **DUTY OF MOTORMAN; NEGLIGENCE.** — It is the duty of a motorman in the management of his car to use reasonable diligence to prevent accident, and his failure to do so constitutes negligence.
7. **SAME.** — The motorman of a car and a pedestrian each have the right to presume that the other will act as a reasonable person would under the circumstances. An increase of danger requires an increase of diligence by both.
8. **CONTRIBUTORY NEGLIGENCE.** — Where an injury is caused by the negligence of the plaintiff or by the concurrent negligence of both the plaintiff and the servants of defendant, the plaintiff is guilty of contributory negligence.
9. **SAME; USE OF SENSES TO AVOID INJURY.** — A pedestrian in close proximity to the tracks of a street railway company is bound to the exercise of a reasonable use of his senses to discover and avoid approaching cars.

Relative Rights of Street Cars and Public in Streets. — As to the relative rights of street cars and the public in the streets, see notes and cases cited in 2 St. Ry. Rep. 170; 3 St. Ry. Rep. 390, 412; 5 St. Ry. Rep. 240.

Injury to Pedestrian. — As to the liability of a street railway company for injuries to a pedestrian struck by its street car, see *Nellis on Street Railways* (2d Ed.) §§ 404-406, 421-424.

10. **SAME; UNAVOIDABLE ACCIDENT; SUDDEN MOVE BY PEDESTRIAN TO PLACE OF DANGER.** — If a pedestrian move to a position of danger near a street railway track so suddenly as to make it impossible to stop a car before hitting him, he cannot recover.
11. **SAME; DUTY OF MOTORMAN; LAST CLEAR CHANCE DOCTRINE.** — If a motorman saw, or by the reasonable use of his senses could have seen, a pedestrian standing in a dangerous position, in time to avoid the accident, it was his duty to do so.
12. **DAMAGES.** — A pedestrian injured by the negligence of a street railway company is entitled to such sum as will reasonably compensate him for his injuries resulting from the accident, including therein his pain and suffering in the past, and such as may come to him in the future from his injuries, also for loss of wages, expenses for medical attendance and other necessary expenses in seeking to cure himself, and reasonable compensation for any impairment of ability to earn a living in the future.

ACTION for personal injuries. Verdict for plaintiff. Reported 82 Atl. 604.

Leonard E. Wales, for plaintiff.

Robert H. Richards, for defendant.

STATEMENT OF FACTS.

Action on the case (No. 61, April term, 1911) to recover damages for personal injuries to the plaintiff, alleged to have been occasioned by the negligence of the defendant company in operating its cars on Second street, between Adams and Monroe streets, in the city of Wilmington, on the 4th day of May, A. D. 1911.

At the trial, when the plaintiff had rested, counsel for defendant moved for a nonsuit upon the ground that no negligence had been proved on the part of the defendant, and contended that there was no evidence to support any of the allegations of the five counts of the plaintiff's declaration; that the only allegation with respect to which any evidence had been introduced was the allegation of failure to give the plaintiff proper warning of the approach of the car. Upon that point the plaintiff and six witnesses gave testimony that they did not hear the motorman ring the bell or give any warning or signal of the approach of the car; but none of them, however, testified positively that no warning was given.

Mr. Wales, for plaintiff, contended that the testimony of the witnesses upon the point mentioned was sufficient to go to the jury, and furthermore that there was testimony showing that the plaintiff was close enough to the track to be hit and knocked down by

the car, and was, therefore, in a position of danger; and the evidence to the effect that the car did not stop until after the plaintiff was hit was a matter to be submitted to the jury to decide whether or not the servants of the defendant were negligent in colliding with the plaintiff.

The stenographic report of the testimony of the several witnesses upon the point whether warning of the approach of the car by bell was given disclosed that the contention of counsel for the defendant as to the character of said testimony was correct, none of the witnesses testifying positively that the bell was *not* rung.

Opinion by BOYCE, J.:

We have considered the question before the court as carefully and fully as we could in the limited time we have had; and our conclusion is that in view of the proximity of the several witnesses to the scene of the accident, we think the weight and value of their testimony, respecting any warning of the approach of the car to the place of the accident should be left to the jury; and we decline to grant the nonsuit.

Charge to jury by BOYCE, J.:

Gentlemen of the jury: This action was brought by Francesco Riccio, the plaintiff, against the People's Railway Company, the defendant, to recover damages for personal injuries alleged to have been occasioned by the negligence of the defendant company, in operating its cars on Second street, between Adams and Monroe streets, in this city, on the 4th day of May, A. D. 1911.

The plaintiff claims that on the day of the alleged accident he, with other employees of the Wilmington Gas Company, was engaged in laying a gas pipe on the north side of the tracks of the defendant, in said Second street near Adams street; that he was at and immediately before the accident working at a tool box, about four feet away from the northerly rail of the defendant company; that he did not hear the approach of the car or any warning of its approach, either by bell or otherwise; and that he was negligently struck by a car of the defendant company moving in an easterly direction.

The defendant claims that its servants gave timely warning by bell of the approach of its car before and after crossing Adams street; that the car was moving at a moderate and proper rate of speed; that its servants were in the exercise of due and proper

caution; and that the injuries complained of were not caused by the negligence of the servants of the company, but were caused solely by the negligence of the plaintiff in coming in contact with the car without the fault or negligence of the servants of the company, and the defendant denies any and all liability for the alleged injuries.

West Second street is a public street of the city of Wilmington. The defendant company has a right to use said street for the operation of its railway thereon. And the plaintiff had the right to use the said street for the ordinary purposes of a public highway, including the business in which he was engaged, exercised in a reasonably careful and cautious manner. The right of each must be exercised with due regard to the right of the other, and the right of each must be exercised in a reasonable and careful manner so as not unreasonably to abridge or interfere with the right of the other. *Dungan v. Wil. City Ry. Co.*, 4 Pennewill 461, 58 Atl. 868.

The defendant company of necessity, in the operation of its cars, could only use those parts of the street covered by their tracks within fixed limits, and for such purpose it had a right to use the said street at the place and time of the accident in common with other travelers and persons who saw fit to use it in any lawful manner.

There can be no recovery in this case unless the injury to the plaintiff was occasioned by the negligence of the defendant company. Negligence is the failure to use such care as a reasonable prudent person would exercise under similar circumstances.

The mere fact of an accident by which an injury is sustained, if not within the control of the defendant, does not, in itself, raise a presumption of negligence. *Queen Anne's R. R. v. Reed*, 5 Pennewill 231, 59 Atl. 860, 119 Am. St. Rep. 301.

The burden of proving negligence, as attributable to the defendant, rests always upon the plaintiff. Negligence on the part of the motorman, if shown to the satisfaction of the jury, would be the negligence of the defendant.

Your inquiry in this case, under the evidence, is narrowed to the questions whether the injuries complained of were caused by the negligence of the servants in charge of the car of the defendant in not giving due and proper warning of the approach of the car by bell or otherwise, and whether the servants were at and immedi-

ately before the accident in the exercise of due and reasonable care and caution.

It is the duty of the motorman in the management of his car to use reasonable diligence to prevent accident and his failure to do so would constitute negligence. The degree of diligence required depends upon the particular circumstances of each case.

The motorman of the car and the plaintiff each had the right to presume that the other would act as a reasonable person under all the circumstances, until the contrary appeared. If there exists an increase of danger by reason of the particular circumstances, an increase of diligence commensurate with the danger is required of both.

If the injury complained of was occasioned by the negligence of the plaintiff, or by the concurrent negligence of both the plaintiff and the servants of defendant, in that case the plaintiff would be guilty of contributory negligence and could not recover.

A pedestrian who is in close proximity to the tracks of a street railway company upon which cars are running is bound to the exercise of a reasonable use of his senses to discover and avoid approaching cars, and if he fails to exercise such use of his senses and as a result thereof is injured, he is guilty of contributory negligence, and if such negligence was the proximate cause of his injury, he cannot recover.

If the plaintiff moved from a position of safety to a position of danger near or upon the track of the railway on which the defendant's car was running so suddenly as to make it impossible for defendant to stop its car before the collision, the defendant cannot be held liable for the resulting injury to plaintiff. *Heinel v. People's Ry. Co.*, 6 Pennewill 428, 67 Atl. 173.

If the plaintiff was negligently standing near the defendant's track, in a position of danger, at and before the time of the accident, yet if the motorman saw, or by the reasonable use of his senses could have seen, the plaintiff standing in a dangerous position, in time to stop the car and avoid the accident, it was his duty to do so, and if he failed to do so, the company would be liable. *Heinel v. Railway Co.*, *supra*.

If the jury should find that the servants of the defendant were not at the time of the accident in the exercise of reasonable care and caution, and that by reason thereof the plaintiff suddenly and without time or opportunity for reflection placed himself in a position of peril, and without fault or negligence on his part,

operating at the time of the accident, he would be entitled to recover.

If the jury should believe from the evidence that the servants of the defendant approached the plaintiff with the car in the exercise of due care and caution, and after reaching the place where the plaintiff was working, or after a part of the car had passed him, the plaintiff either by stooping protruded a portion of his body against the side of the car and was thus struck and pushed or pulled down by the car, or that he stepped backward or otherwise moved so that he came in contact with the side of the car and was thus pushed down and injured, the defendant would not in such event be guilty of negligence and the plaintiff could not recover for his injuries received in consequence thereof.

You have the testimony of witnesses who say that they did hear a warning given of the approach of the car, and the testimony of witnesses who say that they did not hear a warning given.

Positive testimony is entitled to greater weight than negative testimony, especially if the latter should be unaccompanied by facts and circumstances showing an attentive attitude of the witnesses respecting the matter to which they testified. Whether the motorman did or did not give warning of the approach of the car, you should determine from a preponderance of the evidence, under all the facts and circumstances before you respecting the question.

Where the testimony is conflicting, it is the duty of the jury to reconcile it, if they can; if they cannot, they should give credit to the testimony of those witnesses who under all the circumstances appear to them to be most entitled to credit, taking into consideration the opportunities and advantages of each for seeing, observing and knowing the things of which they testify, as well as their apparent fairness, intelligence and any other element which may fairly test the truthfulness and accuracy of each. And your verdict should be for that party in whose favor is the preponderance or greater weight of the testimony. *Hearn et al. v. Railway Co.*, 1 Boice 271, 280, 76 Atl. 629.

If you should find for the plaintiff, your verdict should be for such sum as will reasonably compensate him for his injuries resulting from the accident, including therein his pain and suffering in the past, and such as may come to him in the future from his injuries, also for loss of wages, expenses for medical attendance and other necessary expenses in seeking to cure himself or treating

his injuries, and reasonable compensation for any permanent impairment of ability to earn a living in the future, if any is disclosed by the evidence. *White v. Railway Co.*, 6 Pennewill 105, 115, 63 Atl. 931.

Verdict for plaintiff.

City of Camden v. Public Service Ry. Co.

(New Jersey — Supreme Court.)

1. **MUNICIPAL ORDINANCE REGULATING STREET RAILWAYS; ENFORCEMENT BY MANDAMUS.** — An ordinance passed by city council of Camden, July 26, 1894, granting permission to a street railroad company to lay and operate a street railroad along certain streets of the city, which was accepted by the company, and which contains a provision that "all cars shall stop at street crossings clear of said crossings on signal to let off and take on passengers," is a legislative act touching a public duty; and the public duty thus imposed and assumed with respect to the operation of passenger cars may be enforced by mandamus.
2. **SAME; CONSTRUCTION AND APPLICATION.** — The ordinance of the city of Camden, granting permission to the Camden Horse Railroad Company to lay and operate a street railroad along certain streets of the city, contains a section declaring "that the provisions of this ordinance shall apply to and regulate the use of the streets above mentioned and all other streets of the city of Camden which are now or hereafter may be used by the said Camden Horse Railroad Company." *Held*, that a regulation as to the manner in which the company shall exercise its franchise, contained in section 5 of the ordinance, applies to the exercise of such franchise upon all streets now within the limits of the city.
3. **SAME.** — The ordinance of the city of Camden, granting permission to the Camden Horse Railroad Company to lay and operate a street railroad along certain streets of the city, contains a provision that "all cars shall stop at street crossings clear of such crossings on signal to let off and take on passengers." *Held*, that such provision applies to the operation, within the city limits, of so-called "club" or "special" cars, operated from the "ferry" in Camden to Moorestown and return, and intended for the accommodation of the general public.

(Syllabus by the Court.)

APPLICATION for rule to show cause why a writ of mandamus should not issue.
Reported 82 Atl. 607.

E. G. C. Bleakley, for relator.

E. A. Armstrong, for respondent.

Opinion by TRENCHARD, J.:

The city of Camden has a rule requiring the Public Service Railway Company to show cause why a writ of *mandamus* should not issue, commanding the company to stop all its cars operated over and through the streets and avenues of the city of Camden, at all street crossings in the city, to let off and take on passengers, and commanding the company to provide transfers over its branches in the limits of the city of Camden, without extra charge, and to accept such transfers as fares on all its cars operated over and through the streets and avenues of the city. In view of the decision of this court in *Newark v. North Jersey St. Ry. Co.*, 73 N. J. Law 265, 62 Atl. 1003, the relator abandons so much of its case as relates to transfers.

It is admitted that the Public Service Railway Company is operating a street railroad system over and through the streets of the city of Camden by virtue of the franchises given by the city to the Camden Horse Railroad Company. It is also admitted that the company is operating "special" or "club" cars from Camden to Moorestown and return, which cars run over and through the streets of the city of Camden, passing many of the street crossings without stopping for the purpose of letting off and taking on passengers. These cars make only three stops within the limits of the city of Camden.

The relator claims that the right to compel the company to stop its cars, including the "special" or "club" cars, at all street crossings to let off and take on passengers arises from an ordinance passed by city council on July 26, 1894, which ordinance authorized the Camden Horse Railroad Company to lay, maintain and operate a street railroad system in and along certain streets of the city of Camden, and provided, in section 5, that

"all cars shall stop at street crossings clear of said crossings on signal to let off and take on passengers,"

and which ordinance was duly accepted by the Camden Horse Railroad Company.

The question to be determined is whether such ordinance is a legislative act touching a public duty, to which acceptance by the street railway company lent the added force of a contract, or whether the rights it created were essentially private, and the efficacy of the ordinance was derived wholly from the assent of the railway company thereto. If the former, then, under the decisions

in *Rutherford v. Hudson River Traction Company*, 73 N. J. Law 227, 63 Atl. 84, and *Pleasantville v. Atlantic City Traction Co.*, 75 N. J. Law 279, 68 Atl. 60, it may be enforced by mandamus. If the latter, then, under the decision in *Newark v. North Jersey St. Ry. Co.*, 73 N. J. Law 265, 62 Atl. 1003, the city cannot enforce the ordinance by *mandamus*.

It will be observed that the duty to stop at street crossings to receive and discharge passengers differs from the duty to give transfers. It is not essential to the operation of a street railway and the use of its franchise that it issue transfers. It only issues them when it has agreed to so do by accepting an ordinance requiring their issue. Its liability under such an ordinance is, therefore, purely contractual, and the rights arising therefrom are of a private nature. *Newark v. North Jersey St. Ry. Co.*, 73 N. J. Law 265, 62 Atl. 1003. But the duty of stopping cars to let off and take on passengers is a duty arising from the charter of the street railway company. It cannot operate its line and comply with its charter, unless it stops its cars. The ordinance in question was therefore merely a regulation of the manner in which the company should exercise its franchise. The company could not have constructed or operated its street railway system, as authorized by the ordinance, without obtaining the consent of the city council. Act of March 9, 1893 (P. L. p. 144). We are, therefore, of opinion that the provision of the ordinance in question was a legislative act touching a public duty, to which acceptance by the street railway company lent the added force of a contract; and hence it may be enforced by *mandamus*. *Rutherford v. Hudson River Traction Co.*, 73 N. J. Law 227, 63 Atl. 84; *Pleasantville v. Atlantic City Traction Co.*, 75 N. J. Law 279, 68 Atl. 60; *Bridgeton v. Traction Co.*, 62 N. J. Law 592, 43 Atl. 415, 45 L. R. A. 837; *Wilbur v. Trenton Passenger Ry. Co.*, 57 N. J. Law 212, 31 Atl. 238.

The contention of the respondent that it is not required to stop its cars east of Cooper river, because when the ordinance was passed the territory east of Cooper river was not within the limits of the city of Camden, is without merit. Section 10 of the ordinance provides

"that the provisions of this ordinance shall apply to and regulate the use of the streets above mentioned and all other streets of the city of Camden which are now or hereafter may be used by the said Camden Horse Railroad Company."

The regulation as to the manner in which the company shall exercise its franchise, contained in section 5, must therefore be held to apply to the exercise of such franchise upon all streets now within the limits of the city of Camden.

Nor is there any merit in the contention that the ordinance does not apply to the operation within the city limits of "club" or "special" cars, operated from the "ferry" in Camden to Moorestown and return. These special or club cars are intended for the accommodation of the general public. If, in their operation, the company may lawfully ignore the obligations imposed by the ordinance and assumed by the company, it can and probably will increase the number of its special cars to and from this and other points as future demands of suburban passenger traffic may, to the company, seem to require. In this manner, the rights of the traveling public of the city of Camden would be disregarded, although the company was given and accepted a franchise to operate within the city upon the express condition that it stop all cars at street crossings to let off and take on passengers. Since this matter is of public importance, and all the facts in the case are before us, it is proper that the writ should be peremptory in form.

A writ of peremptory *mandamus* will be awarded in conformity with the terms of the rule to show cause and the views herein expressed, with costs.

City of Camden v. Public Service Ry. Co.

(New Jersey — Supreme Court.)

1. MUNICIPAL ORDINANCE; POWER OF CITY TO REGULATE STOPPING OF CARS. —

The ordinance, by virtue of which the Public Service Railway Company has the right to operate its street railway in certain streets of the city of Camden, contains a provision that "all cars shall stop at street crossings clear of said crossings on signal to let off and take on passengers." The city charter of Camden authorizes the city council to pass ordinances to regulate the streets of the city, and to prescribe the manner in which corporations or persons shall exercise any privilege granted to them in the use of any street. *Held*, that city council had power to enact an ordinance compelling the railway company to stop each railway car operated by it on the near side of each and every street crossing, as such car approaches such crossing, to take on or let off passengers.

2. **SAME; EVIDENCE OF VIOLATION OF ORDINANCE.** — Evidence given by witnesses that, acting under orders from the police department of the city of Camden, they waited for a street railway passenger car on the near side of a street crossing, and that they desired to board the car as passengers, and that the motorman refused to stop on signal, taken in connection with the admission of the counsel for the defendant at the trial that the cars were in fact operated without stopping at the crossing in question, justified a finding of a violation of an ordinance providing that such cars shall be stopped on the near side of such street crossings, as such cars approach such crossings, to take on or let off passengers.
3. **SAME; CONSTRUCTION OF ORDINANCE.** — The ordinance, by virtue of which the Public Service Railway Company has the right to operate its street railway in certain streets in the city of Camden, contains a provision that "all cars shall stop at street crossings clear of said crossings on signal to let off and take on passengers." A later ordinance, which was within the charter powers of the city, provided that it should be the duty of all corporations operating under ordinance a street railroad in the streets to stop each railway car so operated on the near side of each and every street crossing, to take on and let off passengers. *Held*, that the latter ordinance applies to the operation, within the city limits, of so-called "special" cars intended for the accommodation of the general public, and operated from the "ferry" in Camden to Moorestown and return.
4. **SAME; CONVICTION FOR VIOLATION OF ORDINANCE.** — Where an ordinance of a city declares that any corporation or officer, agent, servant, or employee of any corporation operating a street railroad in the city, who shall refuse to stop any railway car so operated in the city streets at the near side of any street crossing, on approaching the same, for the purpose of taking on or letting off passengers, shall, upon conviction, be liable to a fine, a conviction of a motorman was justified by evidence that he was in the employ of the company that was operating under ordinance a street railway car in the city streets, and as such motorman, while driving such car, refused to stop at a street crossing to take on passengers, as required by the ordinance.

(Syllabus by the Court.)

CERTIORARI by defendant upon conviction of violation of municipal ordinance.

Reported 82 Atl. 609.

E. A. Armstrong, for prosecutor.

E. G. C. Bleakley, for defendant.

Opinion by TRENCHARD, J.:

These two cases have been argued together. The writs bring up for review two convictions before the recorder of the city of Camden of the violations of an ordinance of that city, passed May 26, 1910, which provides as follows:

"Section 1. It shall be the duty of all corporations or persons now or hereafter operating a street railroad or railroads under an ordinance or ordinances of said city in, along or over any or all of the streets or highways of the city of Camden, to stop each railway car, so operated, on the near side of each and every street crossing, as such car approaches such crossing, to take on or let off passengers.

"Sec. 2. That any corporation or officer, agent, servant or employee of any corporation or of any other person so operating any such railroad or railroads in said city, who shall neglect or refuse to stop any railway car so operated, in, along, or over any of the streets of the city of Camden at the near side of any street crossing or crossings, upon approaching the same, for the purpose of taking on or letting off a passenger or passengers, shall upon conviction of such offense before the recorder of the city of Camden be liable to a fine of ten dollars and the costs of prosecution for each offense."

The recorder imposed a fine in each case; one against the Public Service Railway Company and the other against a motorman in the employ of that company, Samuel W. Barrett, who are the prosecutors. The reasons urged why the convictions should be set aside will be considered in the order argued.

First. The contention that the city had no power to pass the ordinance alleged to have been violated is without merit. The ordinance of the city of Camden, passed July 26, 1894, by virtue of which the railway company has the right to operate its street railway in the city streets contains a provision that

"all cars shall stop at street crossings clear of said crossings on signal to let off and take on passengers."

The charter of the city of Camden authorizes the city council to pass ordinances to regulate the streets of the city, and to prescribe the manner in which corporations or persons shall exercise any privilege granted to them in the use of any street. P. L. 1871, p. 210, § 30, subsec. 7. The city, having such authority under its charter, had the power to enact the ordinance in question to compel the street railroad company to stop each railway car operated by it in the city streets on the near side of each and every street crossing as such car approaches such crossing, to take on or let off passengers. *Cape May R. R. Co. v. Cape May*, 59 N. J. Law 404, 36 Atl. 678, 36 L. R. A. 657. In that case it was held by this court that a similar ordinance enacted pursuant to similar charter powers was not unreasonable in its purpose or effect. Therein, in the course of the opinion, Mr. Justice Lippincott said:

"Regulations may be made requiring street railway cars to stop at designated places, in order to accommodate passengers and prevent unnecessary

obstruction to public travel *as well as to avoid danger of accident to others* in the ordinary use of the streets and other public places. (Citing case. Street railways are a great public convenience, and they are to be properly protected in the exercise of their franchise; but they are not entitled to a monopoly of the street, nor even to the exclusive use of that part covered by their tracks. They must exercise their rights in harmony with the rights of the traveling public."

Secondly. The contention that the persons who signaled the car to stop were not *bona fide* passengers, and hence that the convictions were not justified, we deem to be not well founded. The evidence shows that these persons were acting under orders from the police department; that they waited for the cars on the near side of the street crossing, and desired to board them as passengers, and that the motorman refused to stop on signal. This evidence, taken in connection with the admission of the counsel for the defendants at the trial that the cars were in fact operated without stopping at the crossing in question, clearly justified the finding that the ordinance in question was violated.

Thirdly. Nor is there any merit in the contention that the cars in question were engaged in a special service, and hence could not lawfully be required to stop at street crossings within the city. The testimony shows that, although the cars in question were called "special" cars, and were operated from the "ferry" in Camden to Moorestown and return, yet they were intended for the accommodation of the general public. Since the traveling public was entitled to avail itself of these cars, they are subject to reasonable regulations as to the manner of operation. As we had occasion to point out, in *Camden v. Public Service Railway Company*, 82 Atl. 607, decided at this present term, if, in operating these cars, the company may disregard the rights of the public traveling in Camden, there would seem to be no limit to the extent to which the traveling public of the city of Camden may be deprived of like rights, although the company was given and accepted a franchise to operate within the city upon the express condition that it stop all cars at street crossings, clear of the crossing, on signal, to let off and take on passengers.

Fourthly. The prosecutor Barrett alleges as an additional reason for reversal that he

"was not engaged in operating the cars in question, and was not a person embraced by or covered under the provisions of said ordinance."

But there is no foundation in fact nor in law for such objection. Section 2 of the ordinance provides that any corporation or officer, agent, servant or employee of any corporation operating under ordinance a street railroad in the city streets, who shall neglect or refuse to stop any railway car, as required by section 1 of the ordinance, shall upon conviction be liable to a fine. The evidence shows that Barrett was the motorman employed by the Public Service Railway Company on the car in question, and, as such motorman, refused to stop the car at the street crossing to take on passengers, as required by the ordinance.

Both convictions will be affirmed, with costs.

Miller v. The Buffalo and Lake Erie Traction Company.

(New York — Appellate Division, Fourth Department.)

REAR-END COLLISION BETWEEN TROLLEY CAR AND VEHICLE; NEGLIGENCE; CONTRIBUTORY NEGLIGENCE; WHEN QUESTION FOR JURY.— Action against a railroad company to recover for personal injuries. The plaintiff, while driving a wagon at night, on leaving a city and reaching a macadam road which was in bad condition, drove with his wagon wheels between the tracks of the defendant's trolley line, that portion being paved with brick. He testified that he looked back every minute or two and could have seen a car for nearly half a mile, but did not discover one. The defendant's car, without sounding a bell or giving other warning, ran into the plaintiff's wagon from behind at such speed as to kill the horse and injure the plaintiff, the motorman being unable to stop the car until it had proceeded over 100 feet beyond the point of collision.

Held, that the negligence of the defendant and the contributory negligence of the plaintiff were questions for the jury, and that a judgment for the plaintiff should be affirmed.

A person driving upon a street car track who was struck by a car coming from behind at an excessive rate of speed and without warning, cannot

Duty to Look Back for Approaching Cars When Driving Along Street Railway Tracks.— The question whether the driver of a vehicle is guilty of contributory negligence in failing to look back for approaching cars while driving along the tracks of a street railway company is discussed in a note to *Wilson v. St. Louis Transit Co.*, 7 St. Ry. Rep. 1. It was there stated: "A driver is not necessarily guilty of negligence in driving along the tracks of a street railway company, but when driving in the same direction as cars proceed he should use reasonable care to ascertain the approach of cars. He is not, however, required to be constantly on the lookout for cars in the rear."

be held guilty of contributory negligence as a matter of law because he did not look back oftener than once in every two or three minutes.

It is immaterial that the defendant's motorman claimed to have sounded the gong immediately before the collision, as such warning was not timely and gave no chance for the plaintiff to leave the track.

DEFENDANT appeals from judgment for plaintiff. Reported 134 N. Y. Supp. 380.

Charles F. Blair, for appellant.

Nelson J. Palmer, for respondent.

Opinion by KEUSE, J.:

The plaintiff was driving a horse and wagon on Central avenue in the city of Dunkirk. A car came from behind and a collision occurred, without fault upon the part of the plaintiff, as he claims, and through the carelessness of the defendant's motorman.

The collision occurred on the night of November 25, 1910, at about ten o'clock. The plaintiff was a junk peddler. He had several bags of junk in his wagon. He had one horse and was sitting in the front of the wagon driving. He drove on the side of the street, between the track and the curb, until he came to where the macadam was in bad condition, which was not until after he had reached the Dunkirk city line. The street between the curb and the railroad tracks was muddy, stony and rutty, so he drove with his right wheels between the two rails of the track, where it was paved with brick. While it was at night, there were electric lights along Central avenue, and streets intersected the avenue. His horse was jogging along, as he says, about five or six miles an hour. As he was driving along he claims that he looked back every minute or two. A car could be seen for nearly a half a mile, but he did not discover the car. The car was lighted, but it is not very clear just how much. No bell was rung or other warning given, and the motorman did not discover the plaintiff and his rig upon the track in time to avoid the collision.

The car was going at the rate of fifteen or twenty miles an hour, as one of the witnesses says, and others say it was going but eight to ten miles an hour. How fast it was going in the open country, beyond the city line, may to some extent be inferred, if the plaintiff is truthful in stating that he looked around as often as every minute or two, and did not see the car, which could be seen for a half a mile. However, when the car struck the plaintiff

it was going enough faster than he was driving to break the wagon, kill the horse, hurt the plaintiff and go some distance beyond the point of the collision, one of the witnesses says 100 to 150 feet, before it was stopped.

There does not seem to be much doubt about the carelessness of the motorman, at least the jury was warranted in so finding. It is, however, contended that the plaintiff was guilty of contributory negligence as a matter of law. It would seem that that question was also one for the jury. But it is said that this court has decided otherwise upon similar facts in the case of *Geleta v. Buffalo & Niagara Falls Railway*, 2 St. Ry. Rep. 783, 88 App. Div. 372; affd., 181 N. Y. 524. There the injured plaintiff was driving along a highway in the open country, between Buffalo and Tonawanda. The road was in good condition between the curb and the track, and there was no necessity for his driving upon the track. It was dark; there were no street lights; it was snowing; the track was slippery, and perhaps he should have anticipated that the motorman might not be able to see him in time to avoid a collision. He looked around only once in two minutes. In that respect the case seems to be like this. But I am not aware that it has ever been held that a person driving upon a street car track in a city is guilty of contributory negligence as a matter of law if he does not happen to look back for an approaching car oftener than once in every two minutes and is struck by a car going at an excessive rate of speed, without giving him any previous warning at all. It is expected that a motorman will have his car under control at street intersections, and even in the block go at a reasonably safe rate of speed, and give timely warning to persons who may happen to be on the track ahead of him. A person so driving upon the track has a right to rely, at least to some extent, that ordinarily a motorman does not run him down without giving him some warning. Of course, if the person so driving upon the track is himself careless, he is precluded from recovering for his injuries, even in such a case, if his carelessness contributes to the result.

It should be stated in this connection that the motorman claims that as soon as he discovered the plaintiff he put on the brakes and sounded the gong, and that is all he had time to do before the collision. But unless the warning was given in time it, of course, would do no good; and it is very evident that it was not, because it could hardly be expected, even if the plaintiff had heard it, that

he could get off the track in time to avoid the collision if the motor-man, knowing that a collision was imminent, could not stop his car in time.

I think the judgment and order should be affirmed, with costs.

All concurred.

Judgment affirmed, with costs.

*Syracuse, Lake Shore and Northern Railroad Company v.
Carrier et al.*

(New York — Appellate Division, Fourth Department.)

CONSTRUCTION OF LINE TO CARRY HIGH TENSION CURRENT; WHEN SUCH LINE NOT EXTENSION OF RAILROAD; CONSENT OF PUBLIC SERVICE COMMISSIONERS; EMINENT DOMAIN; CONDEMNATION OF LANDS NECESSARY TO OPERATION OF RAILROAD. — If the plan of an electric railroad already in operation to erect poles outside of its right of way for the purpose of carrying high tension wires around a village so as to avoid danger to the inhabitants be regarded as an extension of the railroad, the permission and approval of the Public Service Commissioners is essential and the map thereof must be filed with the Secretary of State.

But the construction of such line bearing the high tension current in such manner as to avoid danger to the inhabitants of a village may be regarded, not as an extension to, but as an addition, accommodation or facility for the railroad necessary to its operation within the meaning of the Railroad Law, and it may condemn lands for such purposes.

On condemnation for the purposes aforesaid it cannot be urged that the railroad should as a condition precedent have obtained permission of the local authorities to lead the electric wires across highways, where the lands sought to be condemned do not adjoin the highways at any point and the plaintiff is the owner in fee of so much of the highway as it seeks to occupy with its line.

It seems, that if such railroad intends in the future unlawfully to use its line to supply electricity to others, it may be restrained from so doing if a proper case be presented.

DEFENDANTS appeal from order confirming report of commissioners appointed in condemnation proceedings. Reported 134 N. Y. Supp. 791.

Louis L. Waters [*King, Waters & Page*], for appellants.

William Nottingham, for respondent.

Eminent Domain. — The condemnation of lands for purposes of a street railway company is discussed in *Nellis on Street Railways* (2d Ed.), §§ 92-100. See also *American Electrical Cases*, vol. 5, p. 166.

Opinion by ROBSON, J.:

Plaintiff seeks in this proceeding to acquire for the purpose of constructing and maintaining thereon a double line of poles supporting wires and appurtenances for the overhead transmission of electric current at a high tension certain lands of which, it alleged in its petition, the defendants were the owners. It is a street surface railway corporation, owning and operating an interurban railroad, built on private right of way the whole distance, except in villages and cities, where portions of the streets are used. The road is operated by electricity, and extends from the city of Syracuse to and through the village of Phoenix. The premises sought to be acquired in this proceeding are not, nor are they sought to be used as a part of its way for trackage or construction other than the transmission line. The course of this transmission line diverges from the line of plaintiff's roadbed for its tracks at a point some distance south of the premises in question and does not again coincide with it until a point a considerable distance north thereof is reached. The purpose of this divergence is to avoid carrying the high tension wires through the village of Phoenix, as would be necessary if they followed the trackage location at this part of the route. Plaintiff by agreement with the several owners thereof acquired the other lands necessary for this transmission line, but was unable to agree with the owners of the strip in question for its purchase and these proceedings for condemnation were instituted.

Plaintiff's certificate of incorporation was duly filed and recorded in September, 1905, and states that it is to form a corporation for the purpose of building, maintaining and operating a railroad and for the purpose of maintaining and operating a railroad already built. The kind of road to be built is, as stated, a street surface railroad to be operated by horse power, cable or electricity, and is to be built, maintained and operated from Syracuse to Baldwinsville in the county of Onondaga, which places will be its termini. Prior to plaintiff's incorporation, a corporation, named Onondaga Lake Railroad Company, had built a part of this line from Syracuse northerly to Long Branch on Onondaga lake and had obtained from the Board of Railroad Commissioners in November, 1896, a certificate of public convenience and necessity under section 59 of the Railroad Law as it was at that date. Gen. Laws, chap. 39 (Laws of 1890, chap. 565), § 59, added by Laws of 1892, chap. 676, and amd. by Laws of 1895,

chap. 545. Afterwards this line was duly extended to Baldwinsville; and the name of the corporation was changed to Syracuse, Lakeside and Baldwinsville Railway in 1898. The property and franchises of the last-named corporation were sold upon mortgage foreclosure and the same were transferred by the purchaser at such sale to plaintiff, which had been organized for the purpose of taking over the property. Thereafter in June, 1906, plaintiff executed and caused to be filed and recorded a certificate of extension pursuant to section 90 of the Railroad Law (as amd. by Laws of 1895, chap. 933) and pursuant to section 6 of that law (as amd. by Laws of 1892, chap. 676) made and filed a map and profile of such extension. Neither the certificate of extension nor the map and profile thereof contained any description of, or direct reference to, the location of this transmission line, nor was any notice of the proposed extension of the railroad then given to the owners of the premises in question. The construction of the road-bed and tracks, as extended, had apparently proceeded to practical completion before plaintiff made and filed in the office of the clerk of the county of Onondaga the map and profile of the proposed transmission line, which was done October 29, 1908. This map and profile were never at any time filed in the office of the Secretary of State. This, among others hereinafter referred to, was a necessary step, provided the transmission line is to be regarded as itself an extension of the railroad. Notice of filing and that the route designated thereby passed over premises occupied by them was thereafter served on the defendant owners. Nothing was done by them to secure a change of the route proposed.

That plaintiff's proceedings for the extension of its line of tracks and right of way therefor from Baldwinsville to and through the village of Phoenix were regular in form and sufficient for that purpose I do not understand to be now questioned by appellants. It required no certificate of public convenience and necessity from the Board of Railroad Commissioners to enable it to take over and operate the railroad constructed and formerly operated by the Syracuse, Lakeside and Baldwinsville Railway, title to which it had acquired as transferee of the purchaser at the foreclosure sale. *People ex rel. Third Ave. R. Co. v. Public Service Commission*, 203 N. Y. 299. At the time it took the proceedings to extend its road from Baldwinsville the Public Service Commissions Law had not been passed and the consent of the Board of Railroad Commissioners to such extension was not required;

for the proposed extension was not to "be practically parallel with a street surface railroad already constructed and in operation;" in which case only did the statute then in force (Railroad Law, § 59a, added by Laws of 1898, chap. 643, and amd. by Laws of 1902, chap. 226) require that such consent be first obtained. *New York Central & Hudson River Railroad Co. v. Auburn Interurban Electric Railroad Co.*, 178 N. Y. 75. But if the transmission line is to be regarded as an extension of the railroad, then, since the proceedings therein were begun after the enactment of the Public Service Commissions Law, concededly the permission and approval of the proper commission were necessary before beginning the proposed extension. Public Service Commissions Law (Laws of 1907, chap. 429), § 53. Therefore, since power is not given to condemn lands for the purpose of any extension of an existing road unless such extension is authorized by proceedings taken pursuant to some statute, plaintiff would for that reason alone not be in a position to maintain this proceeding. *Matter of Greenwich & Johnsonville R. Co. v. G. & S. Railroad*, 172 N. Y. 462.

But it does not seem that the construction of this transmission line can properly be regarded as an extension of plaintiff's railroad. If it is not to be considered as an extension, then plaintiff has no authority to condemn lands therefor unless such right is given it by statute to provide for other corporate needs; and such statutory "authority must be seen to apply exactly to the case stated." *Matter of Greenwich & Johnsonville R. Co. v. G. & S. Railroad*, *supra*; *Erie Railroad Co. v. Steward*, 170 N. Y. 172. The Railroad Law as it existed at the time this proceeding was begun gave plaintiff authority to acquire by condemnation real estate necessary for the "construction, maintenance and accommodation" of its railroad "in the manner provided by law." Railroad Law, § 4, subd. 2, as amd. by Laws of 1892, chap. 676. By section 7 of the same law (as amd. by Laws of 1905, chap. 727) it was authorized in the same manner to acquire for use upon or in connection with its railroad

"such additions, betterments and facilities as may be necessary or convenient for the better management, maintenance or operation"

of its railroad. Transmission of electricity over the length of its road is concededly necessary, if the road is to be operated by that power. The overhead system plaintiff employs for that purpose

requires for the reasonably economical use of the current its transmission at a high voltage by means of exposed wires. It appears without dispute that the custom in the construction of electric roads is to avoid whenever it is possible placing the high tension wires for any considerable distance in the streets of a city or village. One apparent and sufficient reason for this, as the evidence shows, is that in case of fire or other accident resulting in bringing the line down to the street or in case of an accidental contact with the line by telephone or telegraph wires the lives of persons in the street, or elsewhere, who might come in contact with such a wire, would be menaced, and serious, if not fatal, consequences ensue. There is also an added danger in repair of telephone and telegraph lines near such a line; and even in the repair of the line itself, where telephone or telegraph wires are under it, the possibility that the men engaged in that service will not accidentally do something which will bring it in contact with the wires beneath and

“thereby cause loss of life and property to people connected with the telephone lines either at the telephone instruments or stations,”

cannot be certainly guarded against. The danger from these high tension wires when strung in places where the possibility of contact with other wires is avoided is reduced to a minimum. The construction and operation of a railroad it will be conceded should be after such manner as to provide for the safety, so far as possible, of all persons likely to be endangered thereby. The construction of this transmission line so as to avoid the village of Phoenix is the safer and is also the customary construction at such points. I think, therefore, it may properly be regarded as an “addition,” an “accommodation,” or a “facility” for plaintiff’s railroad within the meaning of those terms as used in the statute above referred to. The following statement of VANN, J., in *Matter of New York, Lackawanna & Western R. R. Co.*, 33 Hun 148, 154, aff’d., 98 N. Y. 664, seems to be apt descriptively in the present investigation:

“The purpose of its incorporation is to build and operate a railroad for public use. The operation of the road is as essential as its construction. The land in question, therefore, is needed for one of the legitimate purposes of the road, and when the necessity exists and a reasonable discretion is used the courts will not interfere even if the exercise of the power to take lands under the statute is attended with extreme inconvenience and hardship to individuals.”

See also *Matter of New York & Harlem R. R. Co. v. Kip*, 46 N. Y. 546; *Matter of New York Central & H. R. R. Co. v. Met. Gas Light Co.*, 63 id. 326; *Matter of New York Central & H. R. R. Co.*, 77 id. 248.

Appellants' counsel urges that it appearing that the proposed transmission line crosses two highways, plaintiff must, as a necessary condition precedent to its right to begin this proceeding, have obtained the consent of the local authorities to cross these highways with its line. In support of this position *Matter of Rochester Elec. R. Co.*, 123 N. Y. 351, and *Colonial City Traction Co. v. Kingston City R. R. Co.*, 153 id. 540, are cited. These cases are apparent authorities that a corporation intending to engage in the construction of a street surface railway, or an extension thereof, must obtain the consent of the proper local authorities to use and occupy streets or highways for the construction of the road, or extension thereof, before it is in a position to pursue condemnation proceedings. But if I am correct in the conclusion that plaintiff's transmission line is not an extension of its road, but is an incidental necessity to its operation, then the provisions of the Railroad Law, upon which the decisions above referred to are based, do not in terms apply. It may be that such consent must be obtained (and the record shows that it was in fact obtained) before plaintiff could legally cross the highways in question with its transmission line. But the land sought in this proceeding did not adjoin these highways at any point; plaintiff was the owner of the fee of so much of the highways as it sought to occupy with its line, and under the circumstances it would seem the procurement of such consent was not necessarily required to be had before plaintiff could begin this proceeding. *Matter of New York Central & H. R. R. Co.*, 77 N. Y. 248; *Matter of People's R. R. Co.*, 112 id. 578, 584.

Appellants also insist that plaintiff purposes to use this transmission line to supply electricity for the use of others not in any way connected with the railroad or with its operation. It appears from the proof that the transmission line as projected and constructed is not only proper, but is necessary, for the operation of the railroad. If plaintiff shall hereafter use it for purposes so foreign to those to serve which it was by law authorized to prosecute, this proceeding and injury to the rights of the defendants, or their successors in interest, should result therefrom, doubtless such

unauthorized use would be restrained if a proper case was presented.

The other objections urged by appellants' counsel have all been considered; but none of them appear to be of sufficient importance to warrant interference with the judgment and orders appealed from.

The judgment and orders should be affirmed, with costs.

All concurred.

Judgment and orders affirmed, with costs.

Flack v. Metropolitan St. Ry. Co.

(Missouri—Kansas City Court of Appeals.)

COLLISION WITH ELECTRIC COUPE; EVIDENCE; NEGLIGENCE OF MOTORMAN; HUMANITARIAN DOCTRINE; DUTY OF MOTORMAN.—Action to recover for personal injuries sustained from collision of street car with electric coupe. Evidence examined and *held* to show that the motorman saw or should have seen the plaintiff's peril in time to have prevented the injury by stopping the car or reducing its speed.

It was the duty of the motorman, as soon as he discovered the purpose of plaintiff to cross the track, so to control his car as not to endanger the safety of plaintiff.

DEFENDANT appeals from a judgment for plaintiff. Reported 145 S. W. 110.

John H. Lucas and *Halbert H. McCluer*, for appellant.

E. B. Morrison and *C. A. Lawler*, for respondent.

Opinion by **JOHNSON, J.:**

This is an action for damages for personal injuries plaintiff alleges were caused by negligence of defendant. The verdict of the jury was for plaintiff in the sum of \$11,083.33. A remittitur of \$3,583.33 was entered and judgment rendered for the remainder. Defendant appealed.

The injury occurred in the afternoon of March 14, 1909, and was caused by a collision between an electric coupe and an electric

Duty of Motorman as to Control of Car.—The duty of a motorman as to the control of the car which he is driving is discussed in a note in this volume to *Gurrie v. New York, etc., Tract. Co.*, p. 292.

street car operated by defendant on Broadway street in Kansas City. This street runs north and south, and is sixty feet wide between the curbs. Defendant operates a double-track railway in the middle of the street. Each of the tracks is four feet seven inches wide, the distance between them is five feet four inches, and therefore the width of the space occupied by both tracks is fourteen feet six inches. The width of the pavement on each side of the tracks is twenty-two feet nine inches. Thirty-eighth street runs east and west, and makes a jog of 200 feet at the intersection of Broadway. The street east of the intersection is about 200 feet north of the street west of the break. Plaintiff, who was the only occupant of the coupe, was east bound on Thirty-eighth street, and, when he reached the west line of Broadway, it was his intention to cross over to the east side of that street and go north to the east continuation of Thirty-eighth street, and thence east on that thoroughfare, but, on account of passing street cars, he changed his course by turning north on the west side of Broadway and running about twenty-five feet in that direction. Then he turned eastward to cross the tracks, took a course north of east, and had almost cleared the crossing of the west railway track when a south-bound street car on that track, running at high speed, struck the rear wheel of his coupe, and caused the injuries of which he complains. In approaching Broadway from the west plaintiff was running eight or ten miles per hour, but he reduced speed before entering Broadway, and ran slowly over the crossing. We quote from his testimony:

"Q. State, if you remember, what speed you were going at as you approached Broadway on West Thirty-eighth? A. Probably eight or ten miles an hour. Q. And until what time did you maintain that speed? A. Until I got almost into Broadway; I slowed down then. Q. Then what did you do after that? A. Well, a south-bound car passed me just there. I turned towards the north, slowing up, and then there was a north-bound car right there which I hit nearly, angling a little to the east. Q. Now, before this occurred, did you see a south-bound car, a car that afterwards struck you? A. Just before I turned there I looked up the street, and away up the street there 300 or 400 feet I saw a car. Q. Was that the same car that afterwards ran into your machine? A. I presume it was. Q. Then from that time on what did you do? That is, after getting to Broadway, what did you do then? A. I angled up towards the north. I went north angling a little to the east. I looked up the track a matter of a hundred feet or so, and didn't see a car. I turned almost due east with the idea of going across the track. Q. Then what occurred after that? A. When I got just up about to the street car track I looked to the right, and I saw this automobile going by. Q. That is

the one Miss Ransom was in? A. Yes, sir. Q. Then what occurred? A. Then I slowed down there, well, just dragged across waiting for them to get out of the road. Q. Where was your electric automobile when it was struck by the street car? A. I had got almost over it, over the track, somewhere just north of the north line of West Thirty-eighth. Q. That is you were nearly somewhere near the north line of West Thirty-eighth street? A. Yes, sir. Q. And your automobile had almost gotten off of the track when it was struck by the street car? A. Yes, sir. Q. What part of the automobile was struck by the street car? A. The left hind wheel. Q. Well, did you see the car, that street car, before it hit you? A. Well, after I slowed up. Q. I mean just before it hit you? A. Just as that automobile went by I heard the clang of a bell. I looked up. There was a street car. He was a matter of ten or twelve feet away from me. I put on my power with an effort to get over if I possibly could, but, before I could get off the track, the car hit me."

On cross-examination he testified:

"Q. Now, you first turned north after getting to Broadway, did you? A. Yes, sir. Q. How far did you go north, or in a northerly direction? A. I imagine about twenty-five to thirty feet. Q. Then did you turn in an easterly direction? A. At the time I looked up the track to see the car and turned to cross it. * * * Q. When did you come to the conclusion that you crossed the street, or started to cross the street, twenty-five feet or so north of Thirty-eighth street west? A. Well, as I got into Broadway, there was a north-bound car there prevented me from going straight across. I just slowed around to the north, let it go by. As soon as it went by I was ready to go over. Q. Did you discover a south-bound car there too? A. Just before I got to the street there was a south-bound car went down. Q. That would be a car two blocks ahead of the one that hit you? A. It was fully a block ahead. Q. Now, didn't you go clear up on the west side of the street until you got up opposite to East Thirty-eighth street and then cross over? A. No, sir. * * * Q. Now, when you were coming into Broadway, did you notice an automobile there then, any automobile there anywhere? A. No, sir. Q. When did you first notice the automobile? Where were you when you first noticed the automobile? A. Well, when I was almost in the track crossing it. Q. And where was that automobile at that time? A. Just a little bit to the south of me, going north. Q. That is a wide street there, isn't it? A. Yes, sir. * * * Q. How was this automobile going as to speed when you first saw it? A. I don't know how it was. It struck me that when I first noticed it that it had checked practically, and as I slowed up he sped on. Q. And after you first saw it was it in that space between the south-bound track and the curb? A. It was between the north-bound track and the curb? Q. Between the north-bound track and the curb? A. Yes, sir. Q. And was it about the middle way of that space? A. I could not tell you that. Q. You were headed kind of northeast, were you, as you were going across the tracks? A. I was going east a little incline to the north. Q. Did you look to see if there was a car going on the south-bound track before you went on to the track? A. Yes, sir. Q. How far was your car away from the—your automobile away from the car tracks when you looked north to see if there was a car coming on that

track? A. About eight or ten feet. Q. Then from the time that you looked to see whether a car was coming you went eight or ten feet to the track, and went about five feet across the track, that is, the front end of your car, you got nearly the whole car across the track? A. You mean before the automobile went by? Q. Before the car struck you? A. I had got almost off the track when the car struck me."

Miss Ransom, who was a witness introduced by plaintiff, was riding in the automobile which caused plaintiff to reduce his speed while on the crossing. She testified in part:

"Q. Now, as you passed the machine, I wish you would tell the jury what, if anything, you did to the speed of your machine? A. Why, we had to speed up our machine to get out of the way of the electric. Q. Where was it coming at that time? A. It was coming down into Broadway. Q. Did you notice the electric automobile at any time as it was about to go on the track, or close to the track? A. Yes, sir. Q. Did you notice the approaching street car, the one that hit it? A. Yes, sir. Q. At that time? A. Yes, sir. Q. Tell the jury how far it was away? A. Well, it was about a block away when I first saw him. Q. When you first saw it? A. Yes, sir. Q. Now, did you notice, after you passed or as you were passing, did you notice the electric any further? A. Why, you mean on to the track? Q. Yes. A. Why, it was in about two or three feet of the track then. Q. And when it got down to within about two or three feet of the track did you notice the street car then? A. Yes, sir. Q. Where was it? A. A couple of car lengths away. Q. How was it running, Miss Ransom? A. At a rapid rate of speed. Q. Are you a judge of speed? Could you tell the jury how many miles an hour it was going? A. No, I could not. Q. Did you hear any bells? A. No, sir. Q. Before the electric was struck? A. No, sir. Q. Tell the jury whether or not you saw the street car from then on until the collision occurred? A. I did. Q. (By Mr. Morrison): Was there or was there not any change in the speed of the car until the collision occurred? A. No, sir. Q. Did it strike the automobile hard or easy? A. Why, hard. Q. What happened to the electric after the street car struck the electric? A. It was carried about fifty or sixty feet."

On cross-examination:

"Q. Had it [the coupe] got to the line of Broadway then? A. When we were right — Q. When you were right opposite the entrance? A. Yes, sir. Q. It had gotten down to the line of Broadway at that time? A. Yes, sir. Q. Now, how fast were you going at that time? A. I don't know. Q. Well, have you any idea? A. Well, we had to speed up to get out of the way. Q. So that all you know is that when you were opposite Thirty-eighth street that you had to speed up, or you did speed up? A. Yes, sir. Q. What part of Broadway was you in, on the east side of the street? A. Yes, sir. Q. Over next to the curb? A. Yes, sir; oh, no, it was in the middle of the street, on the east side of the street. Q. Well, there is quite a space between the car track, some twenty-five or thirty feet between the track and the curb, isn't

there? A. Yes; I expect there is. I don't know. I know we was running in the middle of the street. Q. You were about half way of the space then, whatever it was? A. Yes, sir. Q. And did your automobile go over towards the curb at all? A. No, sir. Q. Just kept right along? A. Yes, sir. Q. And then there was about the same space on the west side of the car tracks that there was on the east side, wasn't there? A. Why, yes; it was in the middle of the street. Q. How fast was this electric automobile coming? A. It wasn't coming very fast; coming about as fast as — Q. Was it coming as fast as you were going? A. About as fast as the electric was running. Q. And it continued to run that way, did it? A. Yes; as far as I could see. Q. Did it turn north on the west side of Broadway? A. It looks to me like it came right straight across. * * * Q. Now, when you were going along the street there at a rapid rate, could you tell if the car was slowed up or not, the street car? Might it not have been slowed up, and you not have been able to tell it? A. From what I saw it didn't attempt to slow up at all. Q. That is, you think that it didn't slow up at all, but you wouldn't say as a matter of fact but what it did slow up? A. I know it didn't slow up. Q. How do you know that? A. Well, because we turned around in the automobile and watched. We saw there was going to be a collision. * * * Q. You were watching the electric, too, weren't you? A. Well, of course, we was watching the whole works. Q. Did the electric car slow up? A. Yes; the electric slowed to keep from hitting us. Q. How near did he ever get to you; did he ever get within a hundred feet of you? A. The electric? Q. Yes. A. Oh, I don't know whether he did or not. He must have got closer than that, or else we would not have tried to get out of the way."

The evidence of plaintiff tends to show that the street car was running eighteen or twenty miles per hour, and that the motorman made no effort to reduce speed, and gave no warning signal until the instant of the collision. Some of the witnesses introduced by defendant fix the speed of the street car at about fifteen miles per hour, and say that in the last 200 feet the car ran the speed was not slackened. The conductor of the street car, one of defendant's witnesses, testified that he heard the motorman

"ring his bell as though something was wrong, and I stepped up to see what it was then,"

and "saw an electric machine coming down West Thirty-eighth street." According to this testimony, the motorman must have realized that plaintiff might attempt to cross in front of the car. The motorman testified that he observed the approach of the coupe, saw it turn north on the west side of Broadway, and supposed it would remain on that side until the street car had passed, but that plaintiff suddenly wheeled eastward and ran in front of the car when it was too close for anything to be done to avert a col-

lision. He denied there was an automobile going north on the east side of Broadway.

The cause of action pleaded in the petition and submitted to the jury is founded on negligence under the humanitarian doctrine, and, in the discussion of the demurrer to the evidence which defendant argues should have been given, it is not necessary for us to determine whether or not the peril of plaintiff which culminated in his injury was produced by his own negligence or by that of defendant. Our inquiry must be confined to the question of whether or not the evidence in its aspect most favorable to plaintiff shows that the motorman saw or should have seen his peril in time to have prevented the injury by stopping the car or reducing its speed, had he been in the exercise of ordinary care. From plaintiff's viewpoint the important facts of the situation are these: The speed of the street car was approximately four times that of the coupe, and, when the latter vehicle turned east from the west side of Broadway, thereby evincing the purpose of plaintiff to cross the tracks, the street car must have been from 75 to 100 feet from the place of collision. The coupe, which was nine feet four inches long, traveled approximately twenty feet after the peril became obvious, and therefore Miss Ransom was quite accurate in her statement that the street car was about ninety feet from the point of collision when the coupe initiated the crossing movement.

The expert evidence of plaintiff shows that the car could have been stopped or its speed could have been greatly lessened in that distance, and yet it appears the motorman made no effort to save plaintiff, though he was in a position to observe and to act. The attempt to excuse him on the plea that he had a right to assume, as did plaintiff, that the coupe would clear the crossing, will not stand analysis. Seeing that the coupe first had obtained possession of the crossing at a time when the car was under his control, and could be checked to give the coupe a good clearance opportunity, the motorman was negligent in relying, as he did, on a hair-breadth calculation that omitted all consideration of fortuitous interruptions of the progress of the coupe. Indeed, the motorman had in plain view a situation that would have informed him, had he been reasonably observant and careful, that the passing automobile would retard the progress of the coupe. The line of travel followed by the automobile brought it within nine feet of the east track, the front of the coupe was at or very near the east rail of that track when the collision occurred, and it is apparent

that plaintiff, who could not go ahead of the automobile, or turn sharply enough to the left to go between it and the street car, had to check speed to allow the automobile to go by. The fault of the motorman lay in his unwarranted assumption that plaintiff would get out of the way when all of the appearances indicated that the coupe would be struck if the street car continued at its high speed. It was the duty of the motorman, as soon as he discovered the purpose of plaintiff to cross the track, so to control his car as not to endanger the safety of plaintiff, and he had no right to play a game with death with plaintiff as the stake. The suggestion that the motorman had a right to assume that plaintiff would stop just before entering the zone of danger is overborne by the fact we have mentioned that the car was from 75 to 100 feet away when the contrary intention became apparent. Other witnesses, including the conductor, testified to facts which demonstrate that the motorman must have been cognizant of the purpose of plaintiff, even before the coupe turned towards the crossing. The jury were entitled to believe that the motorman had ample opportunity to avoid the injury, but recklessly disregarded it and negligently ran into plaintiff.

The rules of law we have applied in reaching the conclusion that the evidence of plaintiff presents an issue of negligence on the part of the motorman in the performance of a humanitarian duty he owed plaintiff are recognized and applied in the following cases cited by counsel for plaintiff: *Grout v. Electric Ry. Co.*, 6 St. Ry. Rep. 827, 125 Mo. App., loc. cit. 560, 102 S. W. 1026; *Rose v. Met. St. Ry. Co.*, 113 Mo. App., loc. cit. 607, 88 S. W. 144; *Dahmer v. Railway*, 136 Mo. App. 443, 118 S. W. 496; *Cole v. Metrop. St. Ry. Co.*, 5 St. Ry. Rep. 678, 121 Mo. App., loc. cit. 611, 97 S. W. 555; *McNamara v. Railway Co.*, 133 Mo. App. 645, 114 S. W. 50; *Cole v. Railway Co.*, 133 Mo. App. 440, 113 S. W. 684; *Murray v. Transit Co.*, 3 St. Ry. Rep. 573, 108 Mo. App. 501, 83 S. W. 995; *Ellis v. Railway Co.*, 234 Mo. 657, 138 S. W. 23. Nothing we have said is in conflict with the following cases relied on by defendant: *Boyd v. Railway Co.*, 105 Mo. 371, 16 S. W. 909; *Watson v. Street Ry. Co.*, 133 Mo. 246, 34 S. W. 573; *Holwerson v. Railway Co.*, 157 Mo. 216, 225, 226, 57 S. W. 770, 50 L. R. A. 850; *Reno v. Railway Co.*, 180 Mo. 469, 79 S. W. 464; *Schmidt v. Railway Co.*, 191 Mo. 215, 90 S. W. 136, 3 L. R. A. (N. S.) 196; *Boring v. Street Railway Co.*, 4 St. Ry. Rep. 661, 194 Mo. 541, 92 S. W. 655; *Sanguinette v. Railway Co.*, 196 Mo.

466, 95 S. W. 386; *Porter v. Railway Co.*, 199 Mo. 82, 97 S. W. 880; *Ellis v. Street Ry. Co.*, 7 St. Ry. Rep. 291, 234 Mo. 657, 138 S. W. 23.

We readily concede the motorman was under no duty to stop his car or reduce its speed until it appeared that plaintiff was in danger and either could not or would not extricate himself, but in this case such appearance was manifest at a time when the motorman had a reasonable opportunity to prevent the injury; and to hold that he was under no duty to try to save plaintiff would be to repudiate in toto the humanitarian doctrine which now is so firmly imbedded in our jurisprudence that we could not dislodge it if we would.

The demurrer to the evidence was properly overruled. We find no prejudicial error in the rulings of the court on evidence or in the instructions to the jury. The remittitur cured the verdict of all excessiveness, the cause was fairly tried, and the judgment is affirmed.

BROADBUSH, P. J., concurs.

ELLISON, J. (dissenting). I find myself prevented from concurring in the foregoing opinion on account of the testimony of the plaintiff himself. The conceded facts are that, when his vehicle was struck by the car, it had gotten almost clear of danger. The collision was with the rear part. A bare moment more, and this unfortunate affair would not have occurred. Plaintiff had seen the car coming before he turned across the track. He, of course, thought he could cross before it reached him; and, if we assume that the motorman saw him, he, too, could assume that there was time for the crossing. And there was time, but for a sudden change of plaintiff's movement, which certainly the motorman could not have foreseen. Plaintiff testified that after starting across the track he slowed down the speed to a mere drag. So it is clear that by reason of this act, for which no responsibility could attach to the motorman, the collision occurred. I think, as said by the Supreme Court (*Boyd v. Ry. Co.*, 105 Mo. 371, 16 S. W. 909), that unless motormen "are required to be such expert psychologists as to be able to read the minds of men, and know beforehand when a man in possession of all his mental faculties is going to act in a way other than could be expected of an ordinarily prudent man, there was no evidence to take this case to the jury."

Braffett v. Brooklyn, Queens County and Suburban Railroad Company.

(New York — Court of Appeals.)

CONSTRUCTION AND APPLICATION OF STATUTE (L. 1892, ch. 676, §§ 101 and 104) PRESCRIBING FARES TO BE CHARGED BY STREET RAILROAD CORPORATIONS FORMED BY THE CONSOLIDATION OF TWO OR MORE COMPANIES; PROVISION FOR FIVE-CENT FARE APPLIES ONLY TO RAILROADS WITHIN THE LIMITS OF ANY ONE INCORPORATED CITY OR VILLAGE; NEW YORK (CITY OF); WHEN MERGER OF CITIES AND TOWNS IN GREATER NEW YORK DID NOT CHANGE OBLIGATIONS AND REQUIREMENTS OF STREET RAILROADS THEREIN. — Upon examination of the history of legislation on the subject, *held*, that sections 101 and 104 of the Railroad Law (L. 1892, ch. 676) were not intended to interfere with the fares which existing street railroad companies were entitled to charge, but required as a condition for the exercise of the privilege of expansion in any direction that they should subject not only their newly acquired property but their existing property to the provisions of the statute relative to single fares and transfers. A merger or consolidation does not exempt from conditions imposed in the case of leases or traffic agreements, and the courts should not import such an exemption into the statute unless the phraseology of the statute either excludes it or fails to include it.

Section 104 also provides that "the provisions of this section shall only apply to railroads wholly within the limits of any one incorporated city or village." In 1894, at the time of the consolidation of what is now defendant's road, one of the roads so merged was wholly within the city of

**EFFECT OF CHANGE OF BOUNDARIES OF MUNICIPALITY
UPON FARE OR RIGHT OF TRANSFER.**

In the reported case it was held that the provisions of section 104 of the Railroad Law of the State of New York relative to granting transfers by a railroad company "wholly within the limits of any one incorporated city or village," does not apply to railroad which, before the creation of Greater New York, was partially in the city of Brooklyn and partially in the town of Jamaica, but after the creation of such municipality is entirely within the limits thereof. This decision is not necessarily in conflict with the principle involved in the following cases where an apparently different result was reached. In this case the extension of the city boundaries is not the natural extension caused by the increased population overflowing into adjacent lands, but is a wholesale consolidation of several large cities and other territory.

In *Indiana Ry. Co. v. Hoffman*, 161 Ind. 593, 69 N. E. 399, it appeared that an interurban railway company, under its franchise and contracts with the city of South Bend, was required to issue free of charge to all passengers requesting the same who boarded its cars upon its line within the city limits of such city and whose destination was any point upon any other line of the company within the city limits. As to points of destination outside of the city, it had a right to charge an additional fare. The city extended its limits, and it was

Brooklyn, the other partially in that city but mostly in the town of Jamaica; hence such consolidation did not impose on the new corporation at that time the obligation to transport over the combined line for a single fare. *Held*, that the merger of that city and town thereafter in one municipality did not impose upon the railroad company obligations and requirements from which it was free before such consolidation.

PLAINTIFF appeals from an order reversing a judgment in his favor. Reported 97 N. E. 888.

Ralph G. Barclay and Robert Stewart, for appellant.

Charles A. Collin, William M. Parke and George D. Yeomans, for respondent.

Opinion by CULLEN, Ch. J.:

The action was brought to recover a penalty for violation of sections 101 and 104 of the Railroad Law. The facts in the case are not in dispute, as they were established on the trial either by uncontroverted evidence or by the stipulation of the parties. These facts, so far as is necessary to present the question in issue, are as follows: The Broadway Railroad Company was incorporated in 1858 and constructed and operated a street surface railroad in the city of Brooklyn from the ferry to Fulton avenue.

held that the company was bound to issue a transfer to a passenger boarding its car within the city whose destination was within the new city limits but outside of the limits as they were before the annexation of territory. The court said: "It certainly in reason cannot be asserted that an ordinance adopted by a city must, in its operation, forever be confined to the limits of the municipality at the time it was passed, and cannot become operative in territory thereafter annexed and made a part of the corporation. And with no more force and reason can it be said in this case, under the circumstances, that the agreement of appellant in regard to issuing transfer tickets to passengers is not operative within the limits of the city as thereafter extended."

In *State v. Seattle, etc., St. Ry. Co.*, 7 St. Ry. Rep. 889, 54 Wash. 167, 116 Pac. 638, it was held that a condition in a street railway franchise restricting the amount of fare which might be charged within the limits of the city granting the franchise was applicable to territory thereafter annexed to the city, and the company could not charge an additional fare to such annexed territory. It was further held that, where such a condition in the franchise was unambiguous, the company could not show by parol evidence that it was understood that it should not apply to territory to be annexed.

In *Peterson v. Tacoma Ry. & Power Co.*, 7 St. Ry. Rep. 120, 60 Wash. 406, 111 Pac. 338, it appeared that the city of Tacoma had entered into a contract with the defendant street railway company whereby the latter agreed to carry passengers for a single fare not exceeding five cents and to issue transfers for

The Jamaica, Woodhaven and Brooklyn Railroad Company had constructed a surface railroad along the road of the Jamaica and Brooklyn Plank Road Company from the village of Jamaica in the county of Queens to a point in the city of Brooklyn near Fulton avenue and near the city line of said city, practically the terminus of the Broadway road. The Jamaica company was in 1879, under the authority of chapter 156 of the laws of that year, consolidated with the Jamaica and Brooklyn Plank Road Company. In 1893 the defendant was incorporated as a street surface railroad corporation. On January 12, 1894, the defendant leased the railroads of the two companies mentioned which taken together formed a continuous line of railroad from the ferry at the foot of Broadway, Brooklyn, to the village of Jamaica. On the 16th day of January, 1894, the defendant, having acquired the whole capital stock of each of the two corporations whose roads it had leased, filed a certificate to that effect in the secretary of state's office, and thereupon, under the provisions of section 79 of the General Railroad Law of 1890, chap. 565, the two lessor companies became merged into the lessee. In May, 1909, the plaintiff with his wife boarded a Broadway car on the street of that name in Brooklyn, bound easterly towards Jamaica. The plaintiff paid ten cents, the fare for his wife and himself. He desired to go to Woodhaven and Jamaica avenues, a point in the old town of Jamaica in the county of Queens, and asked for a transfer to that place. This was refused. He was told he could get a transfer at Alabama avenue and Jamaica avenue, a point still within the old city of Brooklyn and county of Kings. He got such a transfer and took another car bound east. When he had gone in that car as far as the dividing line between the counties of Kings and Queens there was exacted from him an additional fare for himself and his wife. He contends that by the two sections

one continuous trip within the city limits; that the defendant was operating, under a franchise granted by commissioners, a line to a place outside of the city limits for passage upon which an extra fare was charged; that thereafter the city of Tacoma extended its limits so as to include this line. It was held that the company was bound to carry passengers within the extended limits for the single five-cent fare. The court said: "The spirit of the contract—we do not have to repudiate any of its words to so hold—was to insure a fixed fare within the limits of the city of Tacoma at all times, for we cannot assume, in the absence of controlling words, that either the railway company or the city intended to settle merely the existing disputes and leave the way open for a continual recurrence of the same troubles, for it is within the

mentioned the defendant was precluded from charging the additional fare. He brings this action to recover the penalty for its exaction. He recovered a judgment in the Municipal Court of the city of New York. The Appellate Division reversed the judgment and ordered a new trial, and it has allowed an appeal from such order to this court.

It appears by the record that the learned court below placed its decision on the authority of its decision in *King v. Nassau Electric Railroad Company*, 128 App. Div. 130, which in turn was partly based on the decision of the same court in *O'Connor v. Brooklyn Heights Railroad Company*, 123 App. Div. 784. In the earlier case it was held that section 101 applied only to the case of a through car, if there were any such, and that the company was not obliged to give a transfer from one car to another car which moved over the remainder of its route. That proposition was overruled by the decision of this court in *Bull v. New York City Railway Company*, 192 N. Y. 361. The section, however, is not applicable to the defendant, for all the defendant's railroad was constructed and in operation several years prior to May 6th, 1884, and there is nothing in the case to show that it has ever acquired the right to extend its road or to construct branches under the provisions of either the General Railroad Act or its predecessors, the Surface Street Railroad Acts of 1884, chap. 252, and 1885, chap. 303.

The plaintiff's right to recovery must, therefore, rest on section 104. In the later case, *King v. Nassau Electric R. R. Co.*, the Appellate Division held that the section did not apply because the defendant in that case was the owner, not the lessor, of the two roads from one to the other of which the plaintiff sought a transfer. From the citation by the court below of that decision

knowledge of all men that the municipalities of this State are growing rapidly, and the same difficulties would necessarily and within a short time beset the participants. It was a contract for continuing peace."

In *People v. Detroit United Ry.*, 7 St. Ry. Rep. 945, 162 Misc. 460, 125 N. W. 700, 17 Det. L. N. 161, an ordinance relative to giving workingmen tickets for passage at certain hours at the rate of eight tickets for twenty-five cents was considered, and it was held that the ordinance applied to territory thereafter annexed to the city. The court said: "It may be asserted as a general proposition, applicable here, that a municipal law or ordinance designed for a city at large operates throughout its natural boundaries, whatever they are, and is not affected by the fact that these are enlarged from time to time."

as an authority for the disposition of this case we understand that court to have held that because the defendant, after the lease of the two roads, acquired the stock of the companies owning those roads and thereupon the constituent companies became merged in the lessee, the requirements of section 104 were no longer imperative, though they would have been had the defendant continued to operate the two roads under the leases. We do not assent to this proposition. If the Railroad Law in the form extant at the time this cause of action arose were a new and original statute the natural construction would be to refer the commencement of section 104, "every such corporation entering into such contract," etc., to the preceding section. But that section (103) deals only with railroad corporations desiring to abandon portions of their routes which are no longer necessary for the operation of the road or the convenience of the public. Hence, we must look somewhere else to find to what corporations the term "such" applies, or ignore the term as superfluous. The explanation of the phraseology of the section is to be found in the history of the legislation on the subject with which the section deals. The prototype of section 104 is found in the Street Surface Railroad Law of 1885, chap. 305, as section 4. That act authorized any street surface railroad company, or any corporation owning or operating a street surface railroad or railroad route, to contract with any other such company or corporation for the use of their respective roads or routes or any portion thereof. It further authorized the lease of such roads. Section 4 then required

"each and every company entering into any contract under the power conferred by this act"

to transport over any portion of the road embraced within the contract for a single fare and give transfers for that purpose. In 1890, chapter 565, the Railroad Law already mentioned, embracing the regulation of railroads of every kind, was enacted. By section 103 of that statute the same authority was given to street surface corporations to contract with other such corporations for their respective roads or routes. Section 104 provided for the submitting of the contract to a vote of the stockholders; and the present section 104 is a literal and exact reproduction of section 105 of that act except that the qualification has been added

"the provisions of this section shall only apply to railroads wholly within the limits of any one incorporated city or village."

This qualification was added by chapter 676 of the Laws of 1892, which amended many sections of the General Railroad Law. By that provision section 103 of the Laws of 1890 was entirely omitted (probably because its provisions were deemed unnecessary, the subject being covered by other sections of the statute applicable to all railroads), and in place thereof was inserted the present section 103. From this review of the legislation it is plain that "such corporation entering into such contract" embraces all corporations which by any form of contract acquire the right to use the road of another corporation. We see no reason why it does not include contracts for consolidation as well as contracts for lease and traffic agreements. Reading sections 101 and 104 together the intent of the legislature is reasonably clear. It did not intend to interfere with the fares which existing street railroad companies were entitled to charge, but it did intend to require as a condition for the exercise of the privilege of expansion in any direction that they should subject not only their newly acquired property but their existing property to the provisions of the statute relative to single fares and transfers. If a company ever extended its line or built a branch, under the provisions of the statute, from that time it was required to transfer passengers over the whole of its routes for a single fare. If it made any contract by which it acquired the right to use the railroad of another company it was required to transport its passengers over the joint route of both companies for the same fare that either was entitled to charge before making the contract. There is absolutely no reason why a merger or consolidation should be exempt from conditions imposed in the case of leases or traffic agreements and the courts should not import such an exemption into the statute unless the phraseology of the statute requires it. We think neither is the fact. A fuller review of this legislation may be found in the opinions rendered by Judge Edward T. Bartlett in the cases of *Griffin v. Interurban Street Ry. Co.*, 179 N. Y. 438, and *O'Reilly v. Brooklyn Heights Railroad Company*, id. 450, where it was held that the language of the present section refers to any railroad company owning or operating any railroad or railroad route within the State. Nor is anything to the contrary of this view to be found in the opinion rendered by Judge Haight in *People v. Brooklyn Heights Railroad Company*, 187 N. Y. 48. All that was there held was that the statute did not apply to an elevated or

steam railroad running on its own right of way which had been leased by a street railroad company. Judge Haight there said:

"The legislature has seen fit to limit the power of street surface railroads to consolidate, lease, contract or operate other street surface railroads by imposing a condition that in case they do so contract they shall transport over their connecting lines passengers for a single fare of five cents and furnish transfers to their own intersecting lines." (p. 55.)

The question, however, still remains whether the defendant is relieved from the requirements of the section by the limitation that it should apply only to railroads wholly within the limits of any one city or incorporated village. In 1894, when the merger or consolidation was effected, the road of the Broadway company was wholly within the city of Brooklyn, in the county of Kings. The road of the Jamaica company was partially in that city but mostly in the town of Jamaica, county of Queens. Therefore, at that time, the consolidation of the roads of the two companies did not impose on the new corporation the obligation to transport over the combined line of both for a single fare. In 1897, however, the three cities of New York, Brooklyn, Long Island City, the county of Richmond and the greater part of the county of Queens, including the town of Jamaica, were consolidated so as to form the present city of New York. Did such consolidation in the creation of the new municipality impose upon the defendant obligations and requirements from which before consolidation it was free? We think not. In the case of what might be regarded as the natural extension of an existing city or village caused by the overflow of increasing population into adjacent territory, it may be that the obligations of a railroad company would increase with the increase of the municipality. The creation of the present city of New York was not at all an extension of that character. By it were combined the old city of New York with a population of 1,800,000, the city of Brooklyn with a population of 1,000,000, and the outlying districts of Queens and Richmond, with a population of 150,000 more. The area of the county of New York is thirty-nine miles, that of Kings seventy-two, of Richmond fifty-nine and of the annexed portion of Queens fifty-eight. Thus the area of the new city is over five times that of the old city of New York and over three times that of the old city of Brooklyn. Though consolidated into a single municipal corporation the autonomy of the several constituent municipalities is maintained

in some degree by the creation of boroughs to which certain local administration is confided. The charter of the new city, section 1538, enacted that the franchises theretofore granted by any of the united and consolidated municipalities should be restricted to their respective limits before the consolidation. It would seem fair that if the privileges were not extended by consolidation neither should the obligations be. It is hardly to be supposed that either the legislature in the enactment of this section of the Railroad Law, or the defendant in the acquisition of the two roads under the provisions of that law, had in contemplation such a vast and radical change in existing conditions as was caused by the creation of the new city. It may be said that the difference between the case of what we have termed the natural expansion of the city and that of the creation of the consolidated city is one merely of degree. This is true, but many questions are merely of that character.

The order appealed from should be affirmed and judgment absolute rendered for the defendant, with costs in all courts.

GRAY, HAIGHT, VANN, WERNER and HISCOCK, JJ., concur; COLLIN, J., concurs in result.

Ordered accordingly.

Hickey, Kaplan and Wltzek v. Brooklyn Heights Railroad Company.

(New York — Appellate Division, Second Department.)

COLLISION OF TROLLEY CAR WITH VEHICLE; EVIDENCE; QUESTIONS FOR JURY; OBLIGATION OF RAILROAD TO PERSON DRIVING ACROSS TRACKS; DUTY TO LOOK BEHIND NOT CONTINUOUS; CHARGE APPROVED. — Action to recover for injuries to a horse and wagon which were struck by the defendant's trolley car on a city street. It appeared that the driver of the wagon, desiring to cross the defendant's tracks, looked behind him and not seeing a car approaching proceeded diagonally across the tracks, and having gone about seventy-five feet, was struck by the defendant's car coming from behind at a high rate of speed. On all the evidence, *held*, that the negligence of the defendant and the contributory negligence of the plaintiff's driver were questions for the jury.

Duty of Driver of Wagon to Look for Approaching Cars. — The duty of the driver of a wagon to look for approaching street cars while driving upon the tracks of a street railway company is discussed in a note to *Wilson v. St. Louis Transit Co.*, 7 St. Ry. Rep. 1.

While the plaintiff's driver was required to use reasonable care to give the defendant the right of way, he had a right to assume that it would operate its cars with reasonable care. Having looked behind him for an approaching car before entering upon the tracks, and discovering none, he had a right to expect that he would be given some warning by the operator of a car subsequently approaching. He was not obliged to look behind him all the time he was crossing the track.

Where there is affirmative evidence that the plaintiff's driver looked behind before attempting to cross the track, and saw no car, it is not error to refuse to charge that if he drove seventy feet upon the track without looking again until he was in a place of danger, he was guilty of contributory negligence.

DEFENDANT appeals from a judgment in favor of the plaintiff. Reported 132 N. Y. Supp. 945.

D. A. Marsh (*George D. Yeomans* with him on the brief), for the appellant.

Ernest P. Seelman, for the respondent.

Opinion by **WOODWARD, J.:**

The plaintiff brings this action to recover damages for the loss of a horse, wagon and harness, due to the alleged negligence of the defendant in operating one of its cars on Third avenue, in the borough of Brooklyn, on the 14th day of November, 1908. The case was submitted to the jury upon a charge fairly presenting the law, and from the judgment entered upon the verdict the defendant appeals to this court, as well as from the order denying defendant's motion for a new trial. It appears from the evidence that the plaintiff's driver was driving along Third avenue just as darkness was settling down on the evening of November 14, 1908. It was raining and foggy, and plaintiff's horse was not getting a good footing on the asphalt pavement. The driver looked to the rear, as he testifies, and saw no car. He then pulled his horse about so as to drive diagonally across the defendant's tracks, intending to get upon the south-bound track and to make use of the Medina sandstone pavement between the tracks for his horse's greater safety in traveling. Just how far plaintiff's driver proceeded after making his first observation does not clearly appear, but from the evidence the inference could be fairly drawn that he made rather an abrupt turn in the direction of the track and drove a considerable distance, fifty to seventy feet, diagonally with the track, and had nearly cleared the north-bound track, on which the

defendant's car was approaching from the rear, when the back wheel of his wagon was struck by the defendant's car, resulting in the demolishing of the wagon, the injury of the harness and the maiming of the horse so that it became necessary to kill him. The car appears to have been running at a high rate of speed, and it did not stop until it had traveled nearly a block beyond the scene of the accident, though this may have been due to the injuries resulting to the controller of the car in the collision. We think, under all of the facts testified to, a question was presented for the jury upon the negligence of the defendant, as well as to the contributory negligence of the plaintiff's driver. From the testimony of the plaintiff's witnesses, the plaintiff's horse and wagon must have been within the direct line of vision of the defendant's motorman while the driver was driving fifty to seventy-five feet, and the plaintiff's equipage had nearly cleared the track at the extreme distance when the collision occurred. There must have been a considerable length of time between the time that the plaintiff's wagon came into view of the motorman and the collision; time enough to have slackened the pace of the car at least, and yet there is not the slightest evidence of any action on the part of the defendant to avert the accident, except that it is in the evidence that the bell of the approaching car was sounded just at the instant before the contact. While it was the duty of plaintiff's driver to use reasonable care to give the defendant the right of way, he had a right to assume that the defendant would operate its cars with a reasonable degree of care, and having looked for an approaching car before entering upon the defendant's tracks, and no car being in sight, he had a right to expect that he would be given some warning of an approaching car after he had come within the view of the operator of such car. Highways are for the use of the general public, and each user owes the duty of reasonable care. The plaintiff's driver was not bound to watch behind him all of the time; he was obviously upon the track with a view to crossing; he had observed that the way was clear when he started; the way was slippery and he was trying to avoid that danger, and if the defendant had used a reasonable degree of care, it is obvious that the accident need not have occurred. At least this view of the evidence was within the province of the jury, and we think its conclusions should not be disturbed.

We do not find reversible error in the charge. The court refused to charge that

"if the jury find that Schroeder, the driver, drove seventy feet after looking, and did not look again until he was in a point of danger or on the track, at this time and place, knowing the danger of the situation and being familiar with the conditions there existing, and that cars come frequently, without making any effort to ascertain whether the car was approaching behind him, and that contributed to the accident, the plaintiff cannot recover."

This language follows closely that which was refused, affording grounds for reversal, in *Belford v. Brooklyn Heights R. R. Co.*, 1 St. Ry. Rep. 624, 86 App. Div. 388, 390, but there the evidence showed that the driver had been upon the defendant's tracks for a distance of 800 feet or more, and that he had not only not looked at all, but that, so far as the evidence went, he had not listened or made use of any of his faculties to ascertain whether a car was approaching or not. Here there was affirmative evidence that the plaintiff's driver looked back to see if a car was approaching when he turned to cross the tracks; that he saw no car at the time, and that he then attempted to drive diagonally over the north-bound track to the south-bound track, and that he had nearly cleared the north-bound track when the collision came. This could not have taken many seconds, for the evidence in the extreme only fixes his forward movement at about seventy-five feet, during the most of which time he must have been in plain view of the approaching car. This is quite a different situation from that involved in the Belford case, where the accident occurred late at night, and the plaintiff had entered upon the track and driven there for 800 feet without making any effort whatever to ascertain whether a car was approaching.

The judgment and order appealed from should be affirmed, with costs.

Present — JENKS, P. J., THOMAS, CARR, WOODWARD and RICH, JJ.

Judgment and order unanimously affirmed, with costs.

State ex rel. Tyrell, Co. Atty., v. Lincoln Traction Co.

(Nebraska — Supreme Court.)

1. **QUO WARRANTO.** — "An information in the nature of a *quo warranto* filed against a corporation by its corporate name admits the existence of the corporation. If the charge be that the corporation is exercising powers not given by its charter, the action proceeds against the corporation to oust it from the use of the usurped power; but, where it is claimed that corporate powers are being usurped by a body which has no corporate existence, then the action must be against the individuals who are usurping corporate rights." *State v. Lincoln Street R. Co.*, 80 Neb. 333, 114 N. W. 422, 14 L. R. A. (N. S.) 336.
2. **CONSOLIDATION OF STREET RAILWAY COMPANIES** — Section 3, art. 11, of the Constitution, which prohibits the consolidation of the stock, property, franchises, or earnings in whole or in part of railroad corporations and telegraph companies owning parallel or competing lines, does not apply to street railway corporations not engaged in general railroad or telegraph business.
3. **ISSUANCE OF STOCKS AND BONDS BY STREET RAILWAY CORPORATION.** — Section 5, art. 11, of the Constitution, which forbids a railroad corporation issuing any stocks or bonds except for money, labor, or property actually received and applied to the purposes for which such corporation was created, does not apply to street railway corporations not engaged in general railroad business.
4. **DISSOLUTION OF CONSOLIDATED CORPORATION.** — The mere fact that the directors of two street railway corporations, which are consolidated by virtue of the provisions of sections 6-12, art. 7, c. 72, Comp. St. 1907, agreed to an exchange of the stocks and bonds and the assets of the constituent corporations, for the consolidated corporation's stocks and bonds the aggregate par value whereof greatly exceeds the value of the tangible assets of the constituent corporations, is not in itself such proof of fraud as will justify a dissolution of the consolidated corporation.
5. **FIXING RATES OR CHARGES.** — The valuation thus placed on the assets of the constituent corporations will not bind the railway commission in estimating the valuation upon which the corporation should earn an income, or in fixing the price the carrier may charge for transporting passengers.
6. **FRANCHISE; CANCELLATION OF BONDS AND STOCK.** — A franchise to be and to do as a public service corporation is held in trust for the public as well as for the profit of the stockholders, and it is competent for a court of general jurisdiction, having jurisdiction of the subject-matter and of

Consolidation of Street Railways. — As to the consolidation of street railways, see *Nellis on Street Railways* (2d Ed.), §§ 101-103.

Monopoly. — As to monopolistic contracts between street railway companies, see the note to *Evansville, etc., Ry. Co. v. Evansville, etc., Elec. Ry.*, p. 326.

the parties in interest, to cancel bonds and stocks issued without consideration by such a corporation, where, to permit them to gain currency, will seriously impair its ability to discharge its duty to the public.

7. **CANCELLATION OF BONDS AND STOCK.** — But if in a consolidation of constituent street railway companies which theretofore satisfactorily served the public, all of their tangible property is conveyed to the consolidated corporation and subsequently improved, the mere fact that the stock and bond issues of the constituent corporations were doubled by the consolidated corporation, without greatly adding to the tangible assets, will not justify a cancellation of that stock.

And if to cancel one class of that stock will take from part of the stockholders the consideration for their agreement to consolidate the constituent corporations and will not interfere with the consideration received by other stockholders, none of the stock should be canceled if the consolidation be permitted to continue.

8. **QUO WARRANTO PROCEEDINGS; PLEADING; BURDEN OF PROOF.** — In proceedings in *quo warranto* prosecuted by the county attorney or the Attorney-General, the respondent should either disclaim or justify exercising the challenged franchise, and, in the latter event, should plead the precise authority for his or its conduct.

And if the plea of justification is traversed by the reply, the burden is upon the respondent to establish his right.

9. **JUDGMENT; WHEN NOT BAR TO QUO WARRANTO PROCEEDINGS.** — A judgment responding to the sole issues, confirming the respondent's right to be and to exercise the franchise of operating a street railway, is no bar to subsequent *quo warranto* proceedings challenging the respondent's right to exercise the franchise of manufacturing, selling, and distributing electric current for illumination and power purposes, or operating a heating plant in the same city; nor did the State split its cause of action by failing to include in its first information a complaint with relation to the exercise of the last-described franchise.
10. **APPEAL; SEVERABLE ISSUES.** — The respondent having failed to sustain the burden of proof cast upon it by the issues joined and the law, and the charges in the information being severable, the judgment will be affirmed as to those issues which the evidence discloses were properly determined, and reversed as to those upon which there is a failure of proof.

(Syllabus by the Court.)

RELATOR in *quo warranto* proceedings appeals from judgment for respondents.
Reported 134 N. W. 278.

J. B. Strobe and *F. M. Tyrrell*, for appellant.

C. S. Allen and *Hainer & Smith*, for appellees.

Opinion by Root, J.:

This is an appeal by the State from a judgment in the respondent's favor on the issues joined in *quo warranto* proceedings.

In January, 1909, the Lincoln Traction Company and the Citizens' Railway Company, corporations, were separately operating lines of street railway in the city of Lincoln. The traction company also controlled a heat, light and power plant within that city. At this time the Citizens' Railway Company had outstanding \$415,000 capital stock, which the railway commission subsequently found represented the investment of money and services of the reasonable value of \$399,000. This corporation was organized about 1905, and there is uncontradicted evidence tending to prove that the increase in the market value of materials used in the construction of that railway at least equaled the depreciation thereof by use intermediate the organization of this corporation and February, 1909.

The traction company in January, 1909, had outstanding \$700,000 of common stock, \$189,000 of bonds, and a floating debt of \$61,000, or gross liabilities of \$1,280,000. The amount of money invested by this corporation and its predecessors in interest in the properties of this corporation cannot be so definitely ascertained because the traction company in 1909 was the successor in interest of several street railway companies that some twenty years previously constructed and subsequently operated distinct railway systems in that city. By an inevitable process of evolution, the original equipment of those railways was discarded, the ways improved, and the motor power changed from horse to electricity. In September, 1907, the railway commission found that the original cost of the properties of the traction company was \$1,660,000, and that \$606,000 had been expended in additions and improvements. We are not advised by the record whether any part of this \$2,266,000 represents money expended for such ordinary maintenance as should be charged to operating expenses. If so, to that extent the expenditure would be no more of an investment than the money paid for wages or taxes. It seems, however, that the railway commission found that at the time of the hearing the total replacement value of the street railway was \$1,100,000, and that the company's expert had fixed that valuation at \$1,151,672. As we understand the record, the traction company also had invested about \$350,000 in subsidiary heat, light and power organizations. While the evidence is not definite, we are of the opinion that the heating plant was constructed and is ostensibly operated by a separate corporation. Whether the light and power industry is owned by a distinct corporation, separate from the street railway

company, we are not definitely advised by the proof; but our impression is that the respondent assumes ownership of and the right to enjoy those franchises without the intervention of any other corporation or other person. The traction company was then earning net upon all of its properties \$116,000 per annum.

February 1, 1909, the directors of these corporations assuming to act under the provisions of section 6 *et seq.*, art. 7, c. 72, Comp. St. 1907, entered into a contract of consolidation, by the terms of which all of the property tangible and intangible of the constituent corporations was to become the property of the new corporation, which was also to be known as the Lincoln Traction Company. The authorized bond and stock issue of the new corporation is as follows: \$1,500,000 of bonds, \$250,000 of which were appropriated to retire the bonds issued by the elder traction company and the floating indebtedness; 1,500,000 of preferred stock entitled to a cumulative dividend of 6 per cent. per annum; and \$2,000,000 of common stock entitled to the residue of the net earnings of the company; \$770,000 of the new bonds were to be exchanged for the \$700,000 preferred stock of the elder traction company. Holders of the \$330,000 common stock of the elder company were to receive two shares of preferred stock and four shares of common stock in the consolidated corporation for every share of their common stock. The holders of the \$415,000 stock issued by the Citizens' Railway Company received a like amount of the preferred stock of the consolidated company and \$332,000 of the common stock of that corporation. Provision was also made, in accordance with the requirements of the statute, to ascertain the value of and to pay in cash for any stock of either constituent corporation which the holder refused to exchange for stock in the consolidated corporation. The agreement was executed in triplicate, one copy whereof was filed in the office of the secretary of state, and one copy in the office of the county clerk of Lancaster county, and one copy was retained by the consolidated corporation. The agreement was accepted by more than two-thirds of the stockholders of the constituent corporations, and, so far as we are advised, no stockholder or creditor of either corporation has taken any exception to the proceedings. The result of this transaction was to increase by \$770,000 the bonded debt of the combined corporations, to increase by \$375,000 the preferred stock, and the common stock was increased \$1,322,000. In other words, before consolidation the gross stock and bonds liability of the constituent

companies was \$1,695,000, and, immediately after, that liability aggregated \$3,747,000, an increase of \$2,052,000.

There is considerable evidence concerning the value of the combined properties, and, as might be expected, the opinions are not harmonious, nor, in the view that we take of the case, is that fact material. The sole respondent is the consolidated corporation sued in its corporate name. By this proceeding the State is estopped in this action to question the corporate existence of the respondent, nor has it made those persons parties upon whom a judgment of ouster could operate. *State v. Uridil*, 37 Neb. 371, 55 N. W. 1072; *State v. Lincoln Street R. Co.*, 80 Neb. 333, 114 N. W. 422, 14 L. R. A. (N. S.) 336.

The State invokes article 11 of the Constitution to sustain its contention that the stock and bond issues should be canceled and the consolidation adjudged null and void. Among other things, section 3 of article 11, *supra*, forbids the consolidation of the stocks, property, franchises or earnings of two or more railroad corporations or telegraph companies owning competing or parallel lines, and section 5 of that article provides that no railroad corporation

"shall issue any stock or bonds, except for money, labor or property actually received and applied to the purposes for which such corporation was created; and all stock, dividends, and other fictitious increase of the capital stock or indebtedness of any such corporation shall be void."

In *City of Lincoln v. Lincoln Street R. Co.*, 67 Neb. 469, 483, 93 N. W. 766, it was suggested, but not determined, that these provisions of the Constitution do not apply to street railway companies. In the instant case we are of opinion that the point is fairly presented and should be determined. No such limitations appear in the Constitution of 1866. It is a matter of common knowledge that many of the provisions of our Constitution were taken from the 1870 Constitution of Illinois. Sections 3 and 5, article 11, of the Constitution of Nebraska are quite similar to sections 11 and 13, article 11, of the 1870 Constitution of Illinois. In 1870 the agitation which gave birth to the granger laws of the western States was active, and the people of Illinois were determined that competition should continue between the common carriers for hire of freight and passengers. These conditions existed in a more acute form in Nebraska in 1875, when our present Constitution was adopted. The evils growing out of the circulation

of railroad stocks and bonds that had been issued without consideration or for a grossly inadequate consideration were also known in 1870 and in 1875. But, so far as we are advised, street railways were not during those years considered an inviting field for exploitation, and the people of Nebraska gave that subject no more thought than to adopt section 4 of article 11, which forbids the General Assembly to grant the right to construct or operate a street railroad within the limits of any city, town or incorporated village without the consent of the local authorities having control of the streets and highways of the municipality. As we are advised, but one street railway had been constructed in this State in 1875.

In section 72 *et seq.*, c. 25, Rev. St. 1866, may be found comprehensive provisions for the incorporation by general law of railroad companies. But it was not until 1877 that the Legislature enacted statutes referring specifically to the incorporation of street railway companies. Laws 1877, p. 135. It is not improbable that theretofore such corporations might have been formed under the provisions of section 123 *et seq.*, c. 25, Rev. St. 1866, relating generally to corporations, yet in 1867 (Sp. Laws 1867, p. 76), the territorial Legislature granted a special charter to the Omaha Horse Railway Company to construct and operate a street railway in the city of Omaha and within a radius of five miles of its limits. The Legislature by the Act of February 25, 1875, purported to grant to the first corporation that should build and operate a street railway in any of the cities in Nebraska exclusive franchises for twenty-five years. Laws 1875, p. 204 (Complete Session Laws, p. 884). In 1875 Omaha was the only city in Nebraska containing sufficient population to justify the maintenance of a street railway. At that time there were no evil practices with respect to street railways to be remedied in Nebraska and no reason to expand by construction the popular definition of the word "railroad." In its broadest significance that word includes a street railway, but its meaning depends upon the context and general intent of the written law in which it is used. *City of Chicago v. Evans*, 24 Ill. 52. Because the administrative branch of the government by a practical construction of a revenue law had construed the word "railroad" to mean street railways, the Supreme Court of Florida so held. *Bloxham v. Consumers' E. L. & Street R. Co.*, 36 Fla. 519, 18 South. 444, 29 L. R. A. 507, 51 Am. St. Rep. 44. But it is said in substance in that case, by

Liddon, J., that the word generally applies to commercial railways engaged in the transportation for long distances of freight and passengers, whereas the words "street railway" apply solely to railways laid upon the surface and grade of the street and so constructed as not to exclude the public from the use of that part of the street.

In *State v. Duluth Gas & Water Co.*, 76 Minn. 96, 107, 78 N. W. 1032, 1034 (57 L. R. A. 63), Mitchell, J., in classifying street railways and railroads, said:

"Speaking generally, a street railway is local, derives its business from the streets along which it is operated, and is in aid of the local travel upon those streets, while a commercial railway usually derives its business, either directly or indirectly, through connecting roads, from a large area of territory, and not from the travel on the streets of those cities, either terminal or way stations, along which they happen to be constructed and operated. In fact, so far from being an aid or advantage, they are a positive impediment, to the travel on such streets."

See also *Carli v. Stillwater Street R. & T. Co.*, 28 Minn. 373, 10 N. W. 205, 41 Am. Rep. 290; *Minneapolis & St. P. S. R. Co. v. Manitou Forest Syndicate*, 101 Minn. 132, 112 N. W. 13; *Louisville & P. R. Co. v. Louisville City R. Co.*, 2 Duv. (Ky.) 175; *Lincoln Street R. Co. v. McClellan*, 54 Neb. 672, 74 N. W. 1074, 69 Am. St. Rep. 736.

The terms of a constitution should be construed according to their plain and ordinary acceptation, unless it is evident they were used in a legal or technical sense. *State v. Bacon*, 6 Neb. 286; *State v. Lancaster County*, 6 Neb. 474; *Hamilton Nat. Bank v. American Loan & Trust Co.*, 66 Neb. 67, 92 N. W. 189; *Wilcox v. People*, 90 Ill. 186, 196.

Considering the mischief which article 11 of the Constitution was adopted to remedy, the general history of the State in 1875, and giving the words in sections 3 and 5 of that article their ordinary meaning, we are of opinion that those sections were not intended to, do not purport to, and do not as a matter of law relate to, street railways. These constitutional provisions, therefore, do not authorize the court to dissolve the respondent or to cancel any part of its capital stock.

The relator, however, contends that, if it be conceded that the fundamental law does not authorize a judgment of dissolution, yet for other reasons all of the common stock should in this proceeding be canceled. To sustain this assertion the relator argues that,

since the aggregate value of the tangible property of the constituent companies does not amount to the sum of the par value of the preferred stock and the bonds of the consolidated corporation, the directors and stockholders of the constituent and the consolidated corporations committed a fraud upon the public by issuing and delivering the common stock in controversy, that it impairs the credit of the consolidated corporation, permits its affairs to be controlled and managed by men whose interest in its welfare is speculative, and will materially interfere with the proper maintenance and extension of street car service and legitimate rate reductions.

We do not question the right of a court in a proper action to cancel corporate stock issued and delivered without consideration, or in some instances under such circumstances as to perpetrate a fraud, and this is particularly true of *quasi*-public corporations, vested by law with power to be exercised for the public welfare as well as for the stockholders' profit. The law condemns such *ultra vires* acts of those corporations as will seriously impair their ability to properly discharge their public duties. *McCarter v. Pitman, Glassboro & Clayton Gas Co.*, 74 N. J. Eq. 255, 69 Atl. 211.

But in a proceeding to cancel such watered stock, if the court's judgment is not controlled by statute, the proofs relied on to establish the illegality of the stock should be clear to justify a cancellation, and the fact that property exchanged for stock is not worth in the market the par value of that stock will not, ordinarily, sustain a finding of fraud. In the instant case the relator's evidence tends to prove that the value of these properties did not in February, 1909, exceed \$2,000,000 in value, while the respondent's evidence tended to prove that the properties, tangible and intangible, were then worth \$3,300,000. *Memphis & L. R. Co. v. Dow*, 120 U. S. 287, 7 Sup. Ct. 482, 30 L. Ed. 595; *Sioux City, O. & W. R. Co. v. Manhattan Trust Co.*, 92 Fed. 428, 34 C. C. A. 431; *Wells v. Northern Trust Co.*, 195 Ill. 288, 296, 63 N. E. 136. If we accept the State's proof, there is no such discrepancy in values as to justify a judgment canceling the stock. But, however this may be, the statute under which the consolidation is said to have been consummated does not in direct language or by fair intendment provide that the stock and bond issue of the consolidated corporation shall not exceed the combined issues of the constituent corporations, nor that the property of the consolidated corporation shall equal in value the par value of its stock and bond

issue. This statute invites, rather than restricts, the inflation of stocks and bonds. If the consolidation was consummated, a new corporation was created. *Ohio & M. R. Co. v. People*, 123 Ill. 467, 14 N. E. 874.

Should the common stock of the new corporation be canceled, it would be impossible to place the stockholders of the constituent companies in their former position, because the older corporations for most purposes ceased to exist with the creation of the new corporation, and the agreement between the stockholders would be partially annulled. The owners of the common stock in the constituent companies were willing to exchange for the stock of the consolidated corporation upon the terms agreed to. Is it within the province of the court to say that they shall trade on other terms? Connected with the contract to exchange was an agreement to permit the holders of preferred stock to barter their holdings for the consolidated corporation's bonds. Would the owners of the common stock of the constituent corporations have been willing to permit that substitution had they known that the terms of the agreement with respect to their stock could not be enforced and would not be respected? It is evident that the court cannot by any process of scaling down the common stock place the holders in the position they occupied before the consolidation. So far as the respondent's ability to serve the public, it owns all of the property devoted by its predecessors to that purpose and has expended over \$200,000 in improving its power plant and in extending its railway, and it is within the power of the railway commission to compel such additional expenditures as may be necessary to afford the public the service it is entitled to from the respondent, and its earnings are ample to pay for such improvements.

Nor will the valuation by implication fixed by the promoters of the consolidation concerning the value of the property of the constituent corporations and of their stocks and bonds bind the railway commission in determining in a proper case the investment upon which the respondent's stockholders should receive a return in the way of dividends, or the exact amount of the charges that may be exacted for transporting passengers. *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 757, 19 Sup. Ct. 804, 43 L. Ed. 1154; *Covington & Lexington Turnpike Road Co. v. Sanford*, 164 U. S. 578, 17 Sup. Ct. 198, 41 L. Ed. 560. We therefore conclude that the relator has not made out a case justify-

ing the court in these proceedings to direct the cancellation of the common stock.

This brings us to the relator's final contention that the respondent should be ousted from the privileges of distributing and selling electric current for illumination and power purposes and distributing and selling heat to private consumers. The respondent suggests that, inasmuch as the articles of incorporation of the Citizens' Railway Company are not in evidence, we should presume that they authorize the exercise of those privileges. But the burden was not on the State to produce this proof.

Where an information in *quo warranto* presented by the law officer of the county or of the State charges the respondent with the unlawful exercise of corporate franchises, the answer should be either a disclaimer or a justification. In the latter event the facts to exonerate the respondent should be pleaded. 32 Cyc. 1455; *State v. Tillma*, 32 Neb. 789, 49 N. W. 806.

And if the information does not disclose that the State is demanding a forfeiture of franchises at one time legal, the burden is on the respondent. *State v. Davis*, 64 Neb. 499. 90 N. W. 232; 16 Encyc. Pl. & Pr. 481.

The respondent answered that its remote assignor, the Lincoln Electric Railway Company, acquired light and power franchises; that in 1900 the city of Lincoln granted the earlier traction company franchises for those purposes, and in 1906, when the judgment, in *State v. Lincoln Street R. Co.*, 80 Neb. 333, 114 N. W. 422, 14 L. R. A. (N. S.) 336, was rendered the respondent therein had been for several years exercising those franchises. It is contended that the respondent is not acting *ultra vires* in the matters complained of, that the judgment in the Caldwell Case is a bar to this action not only because of the things adjudged, but that to hold otherwise will permit the State to split its cause of action, and that by inaction the State is estopped to maintain this branch of its case. None of the ordinances or charters pleaded are in evidence. If they were, an interesting question as to the power of a street railway to accept and enjoy a heating, power or lighting franchise would be presented. The prayer of the information is for a dissolution of the respondent, or, if that relief be not granted, that its common stock and bond issue be canceled

"and for such other relief as the court may find necessary to render effectual its said judgment."

Whether the relief contended for in the argument should be granted under this prayer is not discussed in the briefs and will not be determined. The district judge filed a written opinion giving his reasons for the judgment, and no mention is made of the heat, lighting or power franchise; but his discussion relates solely to dissolving the respondent. In the journal entry, however, the finding is general in the respondent's favor, and the information is dismissed without reservation, so that it is probable as a matter of law that the judgment confirms the respondent in the right to exercise those franchises. The discussion of this subject is not satisfactory, and we prefer not to dispose of the law question in this state of the record. There is some evidence tending to prove that the heating plant was constructed by a distinct corporation, and that all of its stock is owned by the Lincoln Traction Company. But a few words of general argument are found in the briefs with respect to this branch of the case.

In *Nebraska Shirt Co. v. Horton*, 3 Neb. (Unof.) 888, 93 N. W. 225, we held that unless authorized by statute a corporation has no power to subscribe to the capital stock of another corporation. And the rule is applied to a banking corporation in *Bank of Commerce v. Hart*, 37 Neb. 197, 55 N. W. 631, 20 L. R. A. 780, 40 Am. St. Rep. 479. Section 9, art. 7, c. 72, Comp. St. 1907, authorizes street railway companies to subscribe to the stock of another street railway company whose lines of railway connect with those of the subscribing company; but we have not been cited to any statute authorizing street railway corporations to subscribe to the stock of corporations organized for the purpose of transacting any business other than a street railway. We find no reference in either brief to the law on this branch of the case.

As we understand the record, the respondent failed to sustain the burden of establishing its right to exercise heat, light or power franchises, and to this extent the judgment is not sustained by sufficient evidence. The respondent pleads the judgment, in *State v. Lincoln Street R. Co.*, 80 Neb. 333, 114 N. W. 422, 14 L. R. A. (N. S.) 336, in bar; but an inspection of the record in that case, which we find in the bill of exceptions, discloses that the sole franchise there challenged was the right of the respondent to exist, or to operate a street railway in the city of Lincoln. No mention is made in the pleadings or judgment to light, power or heat franchises. The testimony to support the respondent's right to exercise the franchise of a street railway is not necessary to sustain the

other, so not only was there no adjudication of the subject-matter of the instant case, but there was no splitting of causes of action. 23 Cyc. 439; *State of Maine v. United States*, 36 Ct. Cl. 531.

Nor are we willing, in the state of this record, to say that the State is estopped by its laches from prosecuting these parts of its complaint. We think these issues should not be determined by us in the state of the record. Some other matters, we deem immaterial to the merits of the case, are referred to in the answer and in the briefs; but we do not believe we are justified in extending this opinion by further reference thereto.

The judgment of the District Court is affirmed in so far as it refuses to dissolve the respondent, or to cancel its bonds or common stock; but, as to all other issues joined by the pleadings, the judgment is reversed and the cause remanded. Each party to pay its own costs in this court.

Judgment accordingly.

REESE, C. J., not sitting.

Schliesleder v. Milwaukee Electric Ry. & Light Co.

(Wisconsin — Supreme Court.)

1. **DUTY OF PEDESTRIAN CROSSING STREET RAILWAY TRACK.** — If one purposing to cross a street railway track uses his senses of sight and hearing both ways at a point where a person of ordinary care would naturally and reasonably expect to observe an approaching car in such proximity and under such circumstances that it might probably reach the contemplated place of crossing before he could make it, and neither hears nor sees one and then proceeds, within his calculation in that regard, he is not guilty of want of ordinary care by holding to his course unless an approaching danger is thereafter brought efficiently to his attention.
2. **SAME; CONTRIBUTORY NEGLIGENCE.** — *Held*, that under the circumstances of this case the plaintiff failed to use ordinary care in crossing in front of a moving car, and was guilty of contributory negligence.

PLAINTIFF appeals from judgment dismissing complaint. Reported 134 N. W. 144.

Duty of Pedestrian to Look and Listen Before Crossing Track. — The duty imposed upon a pedestrian to look and listen for approaching street cars before crossing the track of a street railway company is discussed in a note to *Wilson v. St. Louis Transit Co.*, 7 St. Ry. Rep. 1.

STATEMENT OF FACTS BY COURT.

Action to recover compensation for a personal injury. Plaintiff was struck by a street car and injured. The accident happened in daytime on a street where there was little travel. He went from his place to a nearby shop to deliver a garment, intending to take the street car on his way back. There was a double track line on the street. After doing his errand he lingered inside the shop, keeping watch for the car he desired to take. It was to come from the right on the farthest track. He had a plain view of the track for the distance of a block or more away. His location was in a corner building with a corner entrance. From a window in the rear end of the shop he saw the car coming a block away and immediately proceeded to reach the point where he was to take passage. He knew the car would make the crossing before stopping, requiring him to travel in straight lines twice the width of the street — about 130 feet — or in a diagonal line about 100 feet. He assumed he would need to hurry and so started on a run in the shorter direction. After going about one-half the distance and reaching the first rail of the nearby track, he looked for the coming car and observed it about half a block away. He did not look long enough to see how fast it was coming, but thought he had time to reach the opposite side of the next track and the point where the car would stop by the time it reached such place. He proceeded then at a walk without taking further observation of the car. He heard rumbling along the track but proceeded regardless thereof. After traveling about one-half the remaining distance and being about to make the last step which would place him on the far side of the track the car was coming on and out of its reach, it struck him. When he was but a few feet from the car he stepped in front of it. The motorman saw him as he approached the track and supposed, for a time, he would make the crossing or observe the car and keep out of its pathway. When there was about fifty feet left the motorman saw there was danger and then did all he could to stop. The jury found on the evidence that the motorman was not able to prevent the accident because the appliance for stopping the car was out of repair; also found that ordinary care was not exercised to signal the approach of the car, and that defendant's want of ordinary care proximately produced the injury. As to plaintiff's conduct the jury found that his failure to look in

the direction of the coming car before entry upon the second track proximately contributed to his injury; that when he stepped upon the second track the car was not so near and running at such rate of speed that a person of ordinary care, circumstanced as plaintiff was, should have anticipated that a collision with it would result unless the speed thereof were materially reduced; and that plaintiff was not guilty of want of ordinary care proximately contributing to produce the injury. Other findings were made which, together with those referred to, would have entitled plaintiff to judgment, if the finding, either as made by the jury or as changed by the court, did not convict plaintiff of fatal contributory negligence. The court on motion changed the two findings before referred to on that subject made by the jury in favor of the plaintiff to findings in favor of the defendant and rendered judgment accordingly, dismissing the complaint with costs.

Rubin & Lehr (Horace B. Walmsley, of counsel), for appellant.

Van Dyke, Rosecrantz, Shaw & Van Dyke, for respondent.

Opinion by MARSHALL, J.:

Counsel for appellant cite with confidence *Tesch v. Milwaukee R. Co.*, 108 Wis. 593, 84 N. W. 823, 53 L. R. A. 618; *Bain v. Northern Pac. Ry. Co.*, 120 Wis. 412, 98 N. W. 241; *Grimm v. Mil. Elec. Ry. Co.*, 6 St. Ry. Rep. 464, 138 Wis. 44, 119 N. W. 833, and *Sparks v. Wis. Cent. Ry. Co.*, 139 Wis. 108, 120 N. W. 858, to support their contention that the trial court was manifestly wrong in concluding, with aid of the jury finding, that appellant failed to look in the direction of the coming car before entering upon the second track, proximately contributing to his injury; and notwithstanding their finding that a person of ordinary care, circumstanced as he was just before he stepped upon the second track, would not ordinarily have anticipated that the car would strike him unless the speed thereof was materially increased, that appellant should have so anticipated, was guilty of fatal contributory negligence, and changed the findings accordingly.

Neither of the cited cases establishes the principle contended for by appellant. They are to the effect that if one purposing to cross a street railway track uses his senses of sight and hearing both ways at a point where a person of ordinary care would naturally and reasonably expect to observe an approaching car in

such proximity and under such circumstances that it might probably reach the contemplated place of crossing before he could make it, and neither hears nor sees one and then proceeds, within his calculation in that regard, he is not guilty of a want of ordinary care by holding to his course unless an approaching danger is thereafter brought efficiently to his attention; that is, having so listened or looked, or both, in case of there being opportunity therefor, such a person may proceed without taking another observation; but in neither case was it intended to invade the rule that to step upon a railroad track without looking both ways and listening for the dangerous proximity of a car, and doing so at the last opportunity therefor in case of any reasonable probability, from the viewpoint of one so circumstanced, of the dangerous proximity of a car, is want of ordinary care as a matter of law. The exception to that rule contended for so as to fit the facts of this case would fatally invade it—destroy a doctrine as regards the duty in such cases that has become elementary in the law of negligence.

The instances relied on were very exceptional, and decided, as they were, because exceptional. Care has to be constantly exercised in administering the law of negligence, not to fence in a principle intended to furnish a guide for trial courts, so far as one is feasible, by such numerous new exceptions, and extensions of old ones to accommodate new situations, or view old ones viewed through the vista of a changed conception of man's duty to man and man's duty of self care, as to destroy the rule itself. Such a method of administering the law would rob it entirely of its vaunted, and properly administered, real scientific character, making it a mere method of compulsory arbitration and vindicating the claim sometimes made, that in the law of negligence each case is a law unto itself.

What has been said, keeping in mind that here the appellant started to run in the first place because the car was so near, showing that quick movements were thought to be necessary to enable him to seasonably reach his place for boarding the car; that when he looked before entering upon the first track, though he had, from the time he first looked, been going on a run, presumably, twice as fast as at a deliberate walk, and had traversed, perhaps, two-thirds the required distance to clear the far track, the car had made one-half the distance to his point of crossing; and the fact that he only stepped twice or three times, taking no more than a second or two, after he entered the pathway of the car before it struck him, and

the still further fact that the car only went a few feet after the collision before coming to a full stop — one can but appreciate how very foreign the cited cases are from the one in hand.

In the first case the person looked and did not see any car, though there was a clear view for some 150 feet, except for a part of the distance where there was interference from a standing car, within which area of interference a car ran from a point beyond the clear space in the brief period between the observation and one made a moment or two after. There was no car dangerously near when the first view was taken and no opportunity to see one thereafter before the collision.

The second case did not involve a crossing accident.

In the third case the person was not a pedestrian — that is an important element here. He had about eighty feet to go after observing a car 900 feet or more away and before reaching his point of interference with the track a stop was necessary to take on severally passengers. He was occupied from the time he saw the car till the collision in turning with his horse and sleigh, which movement caused the sleigh to engage the track when it was immediately struck.

The last case did not involve a crossing accident.

So it will be seen that neither of the citations have even a remote bearing on this case. In each of two, under the peculiar circumstances, there was room to reasonably infer that the injured person might fairly, after performing the duty to look, have come to the conclusion that he could enter and clear the track before dangerous approach of a car. In one instance no car was in sight at all and the man only had some forty feet to go, while in the other the person had about eighty feet to travel while the car traveled about eleven times that far, and had to make, as the observer had reasonable ground to believe with certainty, a stop to take on several passengers, which of itself would give time to safely make the contemplated movement. Even under those peculiar circumstances, an exception to the rule of look and listen before entering upon the track was not easily found.

Here the appellant supposed, as we have seen, at the start, he would need to hurry to make the crossing. His second observation ought rather to have confirmed than to have negatived that view, yet he relapsed to a deliberate walk with the car only half a block away, he having traveled at the most some two-thirds his distance since seeing it a block away, and that too without taking any view

to see at what speed the car was moving. Evidently, appellant was thinking only of getting to the place for boarding the car in time, not of keeping out of its pathway. He seems to have depended entirely upon the motorman not to obstruct his pathway.

Counsel present the case on the part of complainant as if, had the court not changed the answers plaintiff would have been entitled to judgment, overlooking the fact that, in answer to the sixth question, the jury found that his failure to take a second look for an approaching car proximately contributed to his injury, not appreciating that the finding was not, merely, that such failure contributed to the injury, but did so proximately. We must assume the trial court instructed the jury respecting the significance of the term "proximately." Involved therein was the element of reasonable anticipation, making the omission fatal negligence. In other words, amplifying the finding, it is to the effect that appellant failed to look in the direction of the coming car just before entering upon its pathway at such time and in such circumstances that a man of ordinary care should reasonably have apprehended that his conduct might probably endanger his personal safety. It was a finding of efficient contributory negligence and as plainly so as the answer which the court changed acquitting appellant of such negligence. In other words, the jury found both ways on the important issue, so that in no event could a judgment have been based thereon in favor of appellant.

Little need be said on the subject discussed at some length respecting under what circumstances the court should decide an issue of fact raised by the pleadings. It has no discretion in the matter one way or the other in the finality. If the case warrants such a disposition, then the judicial arises to act if challenged in respect to the matter in a proper way, and justifies it whether requested or not. The duty arises only when the truth of the matter, in the judgment of the court, is so manifest from the evidence as to leave no reasonable ground to find otherwise. Whether such situation exists in any instance where the question is raised is strictly of judicial cognizance, and as plainly so as any duty which a judge has to perform under his oath of office. The impatience manifested now and then, because of an exhibition of judicial stamina which enables one to promptly, firmly and considerately perform that duty, is entirely out of place. Such impatience, often leading to harsh criticism, springs from a false conception of our judicial system, or a disregard of it, for some

reason or other, which operates, from a proper viewpoint, to turn the finger of criticism upon the false conceptor. The system is grounded on the written law — placed there among the fundamentals by vote of the people when they acted in the formation of the government; where it must remain and be vindicated on all proper occasions till removed in the same considerate, significant manner of its adoption, or as therein authorized.

The trial judge, in this case, evidently approached the performance of his duty to act on the motions to change the verdict, with full appreciation of such duty. That he discharged that duty considerably cannot be doubted. That trial administrative efforts of that nature are in an environment more favorable for a right conclusion than is afforded by reading the printed record, has been said over and over again, and not too often. The very nature of the situation, sound public policy and established principles of law as well, require that trial judges in deciding such matters should have the encouragement of consciousness that the result of their efforts will not be disturbed unless clearly wrong from the viewpoint of the appellate court, due heed being given to such trial judge's more favorable opportunity to determine the matter.

In view of the foregoing, no efficient reason is perceived for disturbing the decision changing the answers. The trial court may well have thought the finding of contributory negligence against appellant, in answer to a question which did not comprehensively disclose to the jury the effect of it, was their most intelligent unbiased conclusion, and with that undisturbed and undisturbable as it was, in view of the undisputed fact that appellant stepped in front of the car when it was almost to him and he plainly heard the noise of its coming — that a judgment acquitting him of contributory negligence could not have any foundation in the evidence.

Complaint is made because of the number of questions submitted to the jury. According to a long line of decisions there was no harmful error committed in that field. That is all that need be said. That the trial court did not follow the frequent advisory admonitions of this court, there is some room to claim. To closely follow the scheme of the code, as many times explained by this court, is to win renown in trial jurisdictions. The verdict was composed of thirteen questions. All issues covered by the pleadings, of which there was evidence for consideration by the jury, could have been covered, singly, by six or seven questions. The additional number tended to confuse, and possibly did so,

resulting in the inconsistency in the verdict we have referred to. Every material issuable fact controverted on the evidence should be covered, each by its appropriate question, framed to present it clearly and with as few words as practicable. As a rule, every additional question, either covering a mere evidentiary matter or a controverted fact in issue in a second form, or splitting up such an issue into minor features, tends to defeat the very purpose of the special verdict law. However, it would take an extreme case of mere unnecessary questions to constitute harmful error. That such is the case, however, should not promote inattention to the proper framing of verdicts.

The judgment is affirmed.

Galloway v. Detroit United Ry.

(Michigan — Supreme Court.)

1. **INJURY TO PASSENGER; COLLISION OF TAXICAB WITH STREET CAR; CONCURRENT NEGLIGENCE OF TWO COMMON CARRIERS.** — Where one suffers an injury from the collision of taxicab with a street car through the concurrent negligence of two common carriers, the negligence of the one upon whose conveyance the injured person is a passenger cannot be imputed to the passenger so as to bar his recovery against the other.
2. **SAME; DIRECTED VERDICT FOR DEFENDANT.** — To entitle a defendant to a directed verdict there must have been no evidence tending to show its negligence.

PLAINTIFF brings error from judgment for defendant. Reported 134 N. W. 10.

STATEMENT OF FACTS BY THE COURT.

Plaintiff hired a taxicab from the Bailey Auto Company of the city of Detroit and directed the driver to convey himself and daughter to Grosse Pointe. He gave no further directions to the driver and did not attempt to control his actions either in a selection of the route or in the matter of speed. At the corner of Jefferson and Field avenues in said city, defendant maintains a Y

Imputation of Negligence of Driver of Automobile to Passenger Therein. — The question whether the negligence of the driver of an automobile is imputable to a passenger riding therein is discussed in a note to *Kneeshaw v. Detroit United Ry.*, p. 615. See also Huddy on Automobiles (3d Ed.), §§ 113 and 114.

upon which it turns its Trumbull avenue cars. Those cars run easterly for some distance upon the southerly Jefferson avenue track. At Field avenue they Y up in a northerly direction, then turn, and proceed west on the northerly Jefferson avenue track. When the taxicab in which plaintiff was a passenger approached Field avenue it was following a Trumbull avenue car at a distance of about one-half block, running with the right-hand wheels outside the southerly rail of the south or east-bound track. The left-hand wheels of the machine were, of course, between the rails of that track. When the street car reached the Y at the junction of Field and Jefferson, it stopped and almost immediately thereafter started to back around the Y up Field avenue. It had backed but a few feet when it came into collision with the right hind wheel of the taxicab, which at the moment had turned out and was attempting to pass the car to the left. As a result of the collision the taxicab was turned part way around. It dashed over to the north curb, struck and demolished a fire hydrant, and upset, pinning its occupants beneath it. This action is brought by the plaintiff to recover compensation for injuries sustained by him as a result of the collision. The charge was, in part, as follows:

"It is an open matter for you to say whether the handling of the car caused the accident, or whether the handling of the cab caused the accident. And I charge you now absolutely that, if the taxi made the accident, there can be no recovery in this case. It must be caused by the D. U. R. alone to bind them, for they are the defendants. * * * When you get into your jury room and select your foreman, the usual practice is to take a ballot. And in an accident case like this, or in a negligence case, for we use that term, you would vote guilty or not guilty. It does not mean guilty of crime. It is not a criminal matter. But it means guilty of negligence. Guilty or not guilty, and if you can agree on not guilty, you will come in and find no cause of action. And if you find guilty, that would mean that the D. U. R. is guilty over and above anything that happened. That nobody else caused it; that they were guilty. * * * It is not for the court, and with the fact that, if the accident was caused by the taxicab driver, there can be no recovery, and if caused solely by the railway there could be a recovery, I will leave the case solely to you."

A verdict under the foregoing instructions having been rendered in favor of defendant, plaintiff reviews his case in this court by writ of error.

John T. Nichols (*James G. McHenry*, of counsel), for appellant.

Corliss, Leete & Joslyn (*A. B. Hall*, of counsel), for appellee.

Opinion by BROOKS, J.:

Counsel for defendant frankly concedes that in instructing the jury that plaintiff could not recover unless he showed that the driver of the taxicab acted without negligence, and that his injuries were due solely to the negligence of the defendant, the learned circuit judge was in error.

It seems now to be settled, in this State at least, that, where one suffers an injury through the concurrent negligence of two common carriers, the negligence of the one upon whose conveyance the injured person is a passenger cannot be imputed to the passenger so as to bar his recovery against the other. *Cuddy v. Horn*, 46 Mich. 596, 10 N. W. 32, 41 Am. Rep. 178; *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 652.

But it is urged on behalf of defendant that this verdict should not be disturbed because (it is claimed) the court should have granted defendant's motion for a directed verdict upon the ground that plaintiff had failed to show any negligence on the part of the defendant which contributed to cause the injury to plaintiff.

Plaintiff produced evidence which (if true) tended to show that defendant by its agents stopped its car and suddenly, without warning, backed it up the Y across the northerly portion of Jefferson avenue, at a time when the conductor, instead of being upon the back end of the car and maintaining a proper lookout, was in the forward portion of the car where he could not see the approaching taxicab.

This testimony was sharply contradicted by witnesses on behalf of defendant, but this is not a proper occasion to discuss the weight of the evidence. To entitle the defendant to a directed verdict, there must have been *no evidence* tending to show its culpability in the premises.

We are unable to agree with counsel for defendant in his contention.

The judgment must be reversed, and a new trial ordered.

Otto v. Milwaukee Northern Ry. Co.

(Wisconsin — Supreme Court.)

1. **STARTING OF CAR WITH JERK.** — Where street cars are equipped with modern appliances it is not to be expected that they will be started with a violent jerk.
2. **SAME; NEGLIGENCE; PROOF.** — The mere sudden starting of an electric car equipped with modern appliances may be sufficient proof of actionable negligence.
3. **PERSONS BOARDING CARS TO SEE PASSENGERS OFF; LICENSEES; RIGHT TO ORDINARY CARE.** — Persons boarding cars to see friends off are licensees and entitled to be treated by those in charge of cars with ordinary care.
4. **SAME; CONTRIBUTORY NEGLIGENCE.** — Where a person, in order to aid her friends to board a car, carried a basket in one hand and some clothing in the other, and after they entered the car stepped upon the first tread to enable her to place the basket and clothing upon platform, the conductor not being in sight, and while she was in this position the car started with a sudden jerk, without any warning, throwing her to the ground, she was not negligent as a matter of law.
5. **DUTY OF COMPANY TOWARD PERSONS MOUNTING CARS.** — It is the duty of a street railway company to use reasonable diligence to discover whether a person who has stepped on a car has mounted to the platform or stepped to the ground before starting.
6. **INJURY TO LICENSEE; ORDINARY CARE; EVIDENCE.** — In an action by a licensee for injuries received by being thrown from a car step by the sudden starting of the car, a rule of the company requiring its servants to exercise the highest degree of care is not applicable, since a licensee is only entitled to ordinary care.
7. **SAME; EXPERT EVIDENCE.** — The question as to whether plaintiff's arm was fractured by a fall from a street car is not a subject for expert evidence.
8. **DAMAGES.** — Where the plaintiff, a married woman fifty-five years of age, sustained an ordinary fracture of the radius of the left arm near the wrist, which was treated by a surgeon six or seven times, and substantially recovered in a few weeks, a verdict for \$2,000 should be reduced to \$1,200.

DEFENDANT appeals from judgment for plaintiff. Reported 134 N. W. 157.

STATEMENT OF FACTS BY THE COURT.

Plaintiff accompanied her son, his wife and two children and the wife's sister, to assist them, particularly the wife and children, to take passage on defendant's car. All but plaintiff intended to

Sudden Start of Car. — As to the liability of a street railway company for injuries arising from a sudden start of the car, see 2 St. Ry. Rep. 250; 3 St. Ry. Rep. 474; 4 St. Ry. Rep. 1049.

board the first car going their way. She carried a basket in one hand and some baby clothes in the other. As a car was seen approaching she efficiently signaled it to stop. Upon the car coming to a stand the party proceeded to enter; the man carrying a grip leading. When all were aboard but plaintiff, she stepped upon the first tread to enable her to place the basket and clothes on the platform. As she was in the act of doing, or had just done, so, the conductor not being present to assist or in sight from her location, so far as she observed, the car, without any signal having been given, suddenly started with a jerk precipitating her to the ground, breaking her arm, and considerably disturbing other members of the party.

The cause was submitted to the jury, resulting in a verdict holding defendant liable for negligent breach of duty to plaintiff in starting the car in the manner and under the circumstances mentioned, causing injury to her without any efficient contributory fault, and assessing her damages at \$2,000. Judgment was rendered accordingly.

Flanders, Bottum, Fawsett & Bottum (James G. Flanders, of counsel), for appellant.

W. B. Rubin (H. B. Walmsley, of counsel), for respondent.

Opinion by MARSHALL, J.:

This is not a case within the class illustrated by *Wickett v. Wis. Cent. Ry. Co.*, 142 Wis. 375, 125 N. W. 943, and the like, dealing with a situation created by a person entering a railroad car as a licensee to see another off on a journey, and the railroad company's servant, not knowing or having reasonable ground to anticipate the entry is with the intention of going back before the starting time, efficiently signals for the start, resulting in such person being injured in his effort to leave the car. Had respondent here reached the platform before the car started and then returned to the lower step and dropped from it by reason of the car suddenly starting, such cases might cut some figure.

Neither is the case before us within the class illustrated by *Boston Elev. Ry. Co. v. Smith*, 168 Fed. 628, 94 C. C. A. 84, 23 L. R. A. (N. S.) 890, and similar cases which deal with the situation of a person who has boarded a car to the platform, and the car is started with the usual disturbance so that before he has time to reach a seat he is injured by being thrown about somewhat.

Just as plainly this is not within the class illustrated by *Hill v. Ry. Co.*, 124 Ga. 243, 52 S. E. 651, 3 L. R. A. (N. S.) 432, and the like dealing with a situation of a person who has boarded a car to see some one off and is injured in trying to leave on account of the car starting without previous signaling, as was customary, to give a person so circumstanced opportunity to return safely to the outside.

Independently of the particular location of respondent at the time the car started, precipitating her to the ground, the case is not within the class illustrated by *Boston Elev. R. Co. v. Smith*, *supra*, and the like, therein referred to, relied upon by counsel for respondent, dealing with ordinary reasonably necessary jerking of an electric car in starting; (1) because they have reference to the effect of such ordinary jerking after a person has reached the platform, whereas here the respondent was on the lower step of the car where a sudden start would naturally imperil one's safety; and, (2) because the evidence shows that there was something more than ordinary jerking. There was a violent start,—one that disturbed, abnormally, passengers who were seated. Moreover, while it may be that some years ago an electric car, ordinarily, when properly handled, started with a jerk so such movement was to be expected, that is not the case now, necessarily, since by use of modern improvements, with which the proof shows the car in question was equipped, no such violent movement of the car was necessary so far as the manipulation of the appliance itself was concerned.

For the reason stated the instruction asked to the effect that the mere sudden starting of an electric car is not in itself sufficient proof of actionable negligence,—that affirmative proof is necessary of an unusual jerk, and that mere statements of the witness that the start was violent or sudden is not sufficient, so far as good law, does not apply to the case. Here the proof was that the car could be started without any jerk, but was in fact started so suddenly as to throw a seated person violently back and endanger one who was on his feet of falling unless holding to something for support.

There is little use in going further by way of reviewing cases cited by either side. It is doubtful if any of them throw any light on this case as regards similarity of facts, or in principle bear on it, except by way of illustrating and declaring what is freely conceded by respondent, that it is such common custom, submitted to

by passenger transportation companies, for persons to board cars to see relatives and friends off, and assist them when necessary, as in this case, that in doing so they are licensees and entitled to be treated by those in charge of cars with ordinary care.

Respondent was not guilty of any want of ordinary care, as matter of law, merely because she stepped upon the lower tread of the car. Defendant is not excusable for starting the car while she was in that position because its servants had no reason to anticipate that she did not do so as a passenger. Had she been such, to have suddenly started the car while she was so circumstanced would, at the best for appellant, have admitted of a reasonable inference of want of due care, if those in charge of the car knew, or ought reasonably to have known of her situation. Obviously, it is the business of a railroad company to use reasonable diligence to discover whether a person who has stepped on a car has mounted the platform or stepped to the ground before starting. It seems there was room in the evidence for the jury to conclude that there was a fatal omission of defendant in that regard.

True, respondent was badly incumbered, having neither hand free to help or save herself in case of her equilibrium being disturbed by a motion of the car or otherwise. But it cannot well be held that a person is guilty of a want of ordinary care, as matter of law, in stepping upon the lower tread of a car or proceeding to the platform with both hands engaged in carrying parcels. On the whole, it seems that there is no sound basis in the record for holding that the trial court was clearly wrong in submitting the question of actionable fault of appellant and that of contributory fault of respondent, to the jury.

Complaint is made because the court admitted in evidence a rule of the company for the guidance of its servants, requiring them to exercise the highest degree of care in handling cars to avoid injuring themselves or others. Obviously, that had nothing to do with the case. The law, not any rule of the company, was the test of defendant's duty. Moreover, no such duty as that indicated by the rule is legally required as regards a mere licensee. Why the trial court permitted the introduction of a matter so very foreign to the case is not perceived. Moreover, why the illegitimate character of the evidence was intensified by the court, upon objection being made, remarking: "I cannot see that that does anything more than declare what the law would declare, but I think I will overrule the objection to that." The jury may well

have gotten therefrom the idea that the law required the high standard of care mentioned in the rule as regards the personal safety of a mere licensee like respondent, which, of course, is not the fact. The court evidently emerged from the delusion in that regard before the close of the trial, since we find the jury were very emphatically instructed that appellant owed the respondent the duty only of exercising ordinary care for her personal safety. Whether that wholly cured the error so as to render it non-prejudicial is not free from difficulty.

Error is assigned because the court permitted a doctor, who attended respondent, when on the stand to give evidence as to the nature of her injury as he found it and the course and result of his treatment, to testify that the fracture of her arm might have been caused by her falling from a street car. No justification appears for allowing that. It was not a subject for expert evidence. True, there was no question but that respondent's arm was broken by a fall from the car, as alleged; so the error was probably not harmful. But such error and others in this case, which are so plain that it seems they ought not to have occurred, lead us to remark that the beneficial policy established by the Code and so often vindicated by the court of disregarding as inconsequential all errors which do not prejudicially affect the substantial rights of the adverse party, in that had they not occurred the result might, within reasonable probabilities, have been more favorable to him, should not lead to inattention at the trial and promote the commission of error. It should rather stimulate careful rather than inconsiderate administration.

Complaint is made because the jury were instructed, in effect, that the defendant owed respondent the duty of ordinary care. Why such complaint is made is not appreciated. Of course such duty was owing to respondent. If defendant did not know of her perilous situation, or have such reasonable ground to know it as to be chargeable therewith, that merely bears on whether there was a breach of duty in starting the car. It does not displace the duty itself.

Further complaint is made because the court instructed the jury that if plaintiff was entitled to recover at all, her damages should be fixed at such sum as to fully compensate her for all damages she sustained by the injury, not exceeding in amount the sum of \$5,000.

Why was such an instruction given? This court has, as counsel

for appellant suggest, pretty plainly advised against such a practice. *Hupfer v. Nat. Distilling Co.*, 127 Wis. 306, 313, 106 N. W. 831. The law placed no such limit as a guide for the jury. The pleading placed no such limit. True, the prayer was for \$5,000, but that did not govern the amount of the recovery. It might have been more if the evidence warranted it notwithstanding the prayer. Why refer to the matter at all, especially in such a case where the danger is ever present of overestimating reasonable recoverable damages? Often a jury award, in such a case, is reduced by the trial judge and by this court, and sometimes by the latter after a reduction in the initial jurisdiction, while necessity for disturbing the verdict because of inadequacy very seldom occurs.

Jurors are liable, unless carefully cautioned, to be moved by sympathy, and this is said in no spirit of criticism. The steadying hand of a thoughtful, practical, appreciative judicial head is no more needed in any field of trial work than that of such cases as this.

Why needlessly use language in charging a jury, which has been treated with disfavor here and is plainly liable to convey a false prejudicial notion? The jury might well have inferred they were at liberty on the evidence to place the damage as high as \$5,000, if they thought best. What other conclusion could they reasonably have come to? They must have thought that the limit of \$5,000 was mentioned for some purpose of an obligatory nature.

So far as the result of the trial was to find appellant guilty of actionable negligence, it is thought no clear prejudicial error occurred which was not cured before verdict.

Turning to the amount of the damages, \$2,000, in view of the situation of respondent it looks large. The nature of the charge seems to account for it. She was a married woman about fifty-five years of age. Much evidence was elucidated going to show that she was incapacitated for work for a considerable period and that her ability in that regard had not been fully restored at the time of the trial. That evidence does not seem to have been produced merely to show infirmity in the arm with attendant pain, caused by the accident. It was not directed particularly to that but to the effect of the injury upon respondent's working power as if that were part of her loss. That may well have misled the jury, since such loss was not hers but her husband's. The jury were not carefully instructed so as to guard against danger from evi-

dence of that kind, but rather the contrary, in being told that they would find for plaintiff full loss not to exceed \$5,000. True, the court instructed in general language not to include any element of lost earning power, but such element was not expressly excluded, so it is not certain that it was not included, as the jury understood the matter.

The injury consisted of an ordinary fracture of the radius of the left arm near the wrist. It was treated promptly and scientifically, and, of course, at the cost of the husband. There is no definite evidence that there was any other injury than that mentioned. It was painful, but not unusually so. It ran the ordinary course of such an injury to a substantial recovery in a few weeks. She walked to the place where she was treated and returned without assistance. She was treated by a surgeon some six or seven times. A careful scrutiny of the evidence fails to disclose anything indicating that the injury was attended with any very material special difficulty. It was ordinary of its kind. Reasonable compensation for suffering, past and future, so far as discovered by the jury to a reasonable certainty, was the utmost she was entitled to, not pay for expense or restoration of the arm or reimbursement for lost earning power. Compensation upon the basis of a full equivalent in dollars for pain and suffering was impossible. An attempt to award it would have been unjust. *Guinard v. Knapp, Stout & Co.*, 95 Wis. 482, 490, 70 N. W. 671. The \$2,000 was equivalent to an annuity for the woman of about \$13 per month for life. We cannot escape the conclusion that had there not been unguarded language used the assessment might have been as low as \$1,200, and that an unprejudiced jury, properly instructed, in case of another trial might, within reasonable probabilities, assess as low a sum. It seems that to permit respondent to take judgment for any greater sum than that regardless of the wishes of appellant, would violate the right of trial by jury. *Rueping v. C. & N. W. R. Co.*, 123 Wis. 319, 101 N. W. 710; *Heimlich v. Tabor*, 123 Wis. 565, 102 N. W. 10, 68 L. R. A. 669.

The judgment is reversed, and the cause remanded with directions to allow plaintiff to take judgment for \$1,200 and costs, if she elects to do so by motion therein on notice to the opposite counsel within sixty days after the remittitur reaches the court below, and in case of such election not being so made then for a new trial.

Indianapolis Traction & Terminal Co. v. Matthews.

(Indiana — Supreme Court.)

1. **MASTER AND SERVANT; COMPLAINT IN ACTION TO ENFORCE COMMON-LAW LIABILITY OF EMPLOYER.** — In an action by an employee to enforce a common-law liability against the employer, facts must be alleged in the complaint showing the existence of a duty on the part of the employer to the employee, the omission to perform which caused the injury complained of. But the characterization of an act or omission as negligent is not sufficient to show both a duty and a violation thereof.
2. **SAME; INJURY TO MOTORMAN; COMPLAINT IN ACTION AT COMMON LAW; FELLOW SERVANTS.** — A complaint in an action at common law to recover for injuries to a motorman, which alleges that while the plaintiff was running a car along the tracks of the defendant at or near its shops the defendant negligently threw an interurban car out on the track and caused it to collide with the car operated by the plaintiff, shows nothing more than the acts of fellow servants of the defendant, for which it is not liable at common law.
3. **SAME; DUTY OF COMPANY TO FURNISH PROPER LIGHTS AND APPLIANCES; PROPER USE THEREOF.** — A street railway company is only required to exercise ordinary care to furnish proper lights and other appliances, and the proper use, lighting or display thereof is the duty of the employee.
4. **LIABILITY OF COMPANY FOR ACTS OF FELLOW SERVANTS.** — A street railway company is not liable merely because a fellow employee negligently uses appliances or operates a car in such a way as to occasion injury to another employee.

DUTY OF STREET RAILWAY COMPANY AS TO LIGHTS ON CARS.

As a general proposition it is the duty of a street railway company running cars at night to so illuminate such cars that the motorman as well as pedestrians and other persons lawfully using the street may, with reasonable care, avoid a collision.

Connecticut. — *Currie v. Consolidated Ry. Co.*, 81 Conn. 383, 71 Atl. 356.

Indiana. — *Indianapolis St. R. Co. v. Taylor*, 39 Ind. App. 592, 80 N. E. 436; *Nelson v. Chicago, etc., Ry. Co.*, 6 St. Ry. Rep. 841, 41 Ind. App. 397, 83 N. E. 1019.

Illinois. — *Donelson v. East St. Louis, etc., Ry. Co.*, 235 Ill. 625, 85 N. E. 914; *Calumet v. Electric St. Ry. Co. v. Lynholm*, 70 Ill. App. 371; *Canfield v. North Chicago St. R. Co.*, 98 Ill. App. 1.

Kentucky. — See *Whitman's Admr. v. Louisville Ry. Co.*, 134 Ky. 6, 119 S. W. 165.

Michigan. — *Rascher v. East Detroit, etc., R. Co.*, 90 Mich. 413, 51 N. W. 463, 30 Am. St. Rep. 447.

5. **ASSUMPTION OF RISKS; COMPLAINT IN ACTION FOR INJURY TO EMPLOYEE; EVIDENCE.** — An employee assumes the risk of all obvious defects or dangers open to ordinary careful observation or such as are or would be known by the exercise of ordinary care.

When he seeks to recover damages for injury caused by the alleged negligence of the employer, he must allege that he had no knowledge of the defects or danger complained of, or his complaint will not withstand a demurrer for want of facts.

To sustain such allegation the evidence must show, not only that he had no knowledge of such defect or danger, but could not have known the same by the exercise of ordinary care.

6. **ASSUMPTION OF SUPERADDED RISKS** — An employee who ascertains that the ordinary hazards of his environment have been augmented by abnormal conditions produced by the negligence of his employer or other causes, and continues in the employment without making any objection and without receiving any promise that the abnormal conditions will be remedied, is deemed as a matter of law to have assumed the risks thus superadded.
7. **MOTORMAN; ASSUMPTION OF RISK OF ATMOSPHERIC CONDITIONS.** — Motormen and other persons in charge of street cars assume the risk of inclement weather conditions, such as storms, rain, snow, ice and fogs.
8. **SAME; ASSUMPTION OF RISK; PRESUMPTION OF KNOWLEDGE OF EMPLOYEE.** — In the absence of averments to the contrary a motorman is presumed to know his employer's mode of conducting its business.
9. **INSTRUCTIONS; CORRECTION OF ERRONEOUS INSTRUCTIONS.** — Instructions which omit one or more essential facts or elements necessary to a recovery are erroneous where a verdict is directed.

Missouri. — *Buren v. St. Louis Transit Co.*, 104 Mo. App. 224, 78 S. W. 680; *Clover v. Joplin, etc., Ry. Co.*, 140 Mo. App. 413, 124 S. W. 43; *Maness v. Joplin, etc., Ry. Co.*, 149 Mo. App. 259.

New York. — *Gildea v. Metropolitan St. Ry. Co.*, 58 App. Div. 528, 69 N. Y. Supp. 568, aff'd, 171 N. Y. 660; *Trieber v. New York, etc., Ry. Co.*, 134 App. Div. 661, 119 N. Y. Supp. 439, aff'd, 201 N. Y. 520, 94 N. E. 1099.

Pennsylvania. — *Cox v. Schuylkill Valley Trac. Co.*, 4 St. Ry. Rep. 968, 214 Pa. St. 223, 63 Atl. 599. See also *Tompkins v. Scranton Traction Co.*, 3 Pa. Super. Ct. 576.

Rhode Island. — *Hinchey v. Rhode Island Co.*, 7 St. Ry. Rep. 318, 30 R. I. 520, 76 Atl. 350.

South Carolina. — *Briggs v. Durham Tract. Co.*, 61 S. E. 373.

Tennessee. — See *Memphis City Ry. Co. v. Logue*, 81 Tenn. 32.

In *Currie v. Consolidated Ry. Co.*, 81 Conn. 383, 71 Atl. 356, the court said: "When running at night, it must be provided with such means of illumination as may be requisite, in connection with the light, if any, to be expected from other sources, to enable the motorman to see far enough ahead to do whatever ordinary care may demand in order to avoid a rear end collision with any other vehicle upon the railway track."

In *Clover v. Joplin, etc., Ry. Co.*, 140 Mo. App. 413, 124 S. W. 43, the court said: "When running a street car at night, the exercise of ordinary care

Such erroneous instructions cannot be corrected by another which correctly states the law. This can only be done by withdrawing the erroneous instructions from the jury.

Instructions which are not within the issues are erroneous.

10. **FELLOW SERVANTS; WHO ARE.** — A motorman running a car on the main track and another employee of the company engaged in switching an interurban car from the shops to such track are fellow servants.

DEFENDANT appeals from a judgment for the plaintiff. Reported 97 N. E. 320.

F. Winter, W. H. Latta, M. E. Foley, Ralph K. Kane and Thomas E. Kane, for appellant.

George W. Galvin, Shirts & Fertig and Sullivan & Knight, for appellee.

Opinion by HONKS, J.:

This action was brought by appellee to recover damages for personal injury resulting from a collision of two cars, which at the time were being run over the street railroad lines of appellant in the city of Indianapolis. Appellee, who was at the time of the collision an employee of appellant as motorman and had charge of one of said cars as motorman, bases his right to recover upon the

would require the company to keep a light upon the car which would enable the motorman to see ahead a sufficient distance, that in case he should discover any one upon the track he might give notice by sounding the gong or otherwise."

In *Trieber v. New York, etc., Ry. Co.*, 134 App. Div. 661, 119 N. Y. Supp. 439, aff'd, 201 N. Y. 520, 94 N. E. 1099, the court said: "A jury would have little difficulty in saying that a motorman who ran a car after dark without a headlight was negligent."

The negligence of the motorman of a street car in running without a headlight is considered in connection with the speed of the car and sounding of the gong in determining whether he was guilty of negligence; running at a fair rate of speed with no headlight on the car and sounding no gong is sufficient evidence of negligence to carry the case to the jury. *Calumet Electric St. Ry. Co. v. Lynholm*, 70 Ill. App. 371; *Rascher v. East Detroit, etc., R. Co.*, 90 Mich. 413, 51 N. W. 463, 30 Am. St. Rep. 447. In *Hinchey v. Rhode Island Co.*, 7 St. Ry. Rep. 318, 30 R. I. 520, 76 Atl. 350, the court said: "Whether a rate of speed, in the absence of positive regulation, is proper or excessive, depends upon the circumstances. A rate of speed which would be allowable in the day-time or at night with a brightly lighted car, with a headlight in operation, would be grossly excessive for a close box freight car on a dark night, without a headlight, and with no warning given of its approach."

common-law liability. The complaint was in two paragraphs. A separate demurrer for want of facts to each paragraph thereof was overruled by the court. Answer by general denial. A trial of said cause resulted in a general verdict for appellee. The jury also answered interrogatories submitted to them by the court. Over a motion of appellant for a judgment in its favor on the answers to the interrogatories, notwithstanding the general verdict and a motion for a new trial, judgment was rendered on the general verdict in favor of appellee.

The first and second errors assigned call in question the action of the court in overruling the separate demurrer to each paragraph of the complaint. Appellee claims that the judgment was rendered on the second paragraph of the complaint, and that, even if the court erred in overruling the demurrer to the first paragraph, the ruling was harmless. The averments of said second paragraph of complaint show: That, upon the line of appellant's street railroad tracks on West Washington street,

"it has and had its car shops wherein it repairs its own cars and the cars of divers other street and interurban railway companies; and many spur tracks or switches connected with said track in Washington street entered said shops from said street, and were used by defendant in moving cars in and out of said shops from and to said track in said street. * * *

That on the day of the injury

"he was the motorman of a car of said defendant which was propelled along and over West Washington street, in the city of Indianapolis, and was in the

It is negligence to run a street car along the streets of a city on a dark and stormy night at the rate of fifteen miles an hour without a headlight and without sounding a gong or whistle. *Nelson v. Chicago, etc., Ry. Co.*, 6 St. Ry. Rep. 841, 41 Ind. App. 397, 83 N. E. 1019. Where a car at ten o'clock at night runs at full speed with no lights and without giving any warning of its approach, the negligence of the company is a question for the jury. *Guldea v. Metropolitan St. Ry. Co.*, 59 App. Div. 528, 69 N. Y. Supp. 568, aff'd, 171 N. Y. 660. The running of a car down a grade rapidly with its lights out is negligence for the consideration of the jury, where the car injured a person crossing the track. *Cox v. Schuylkill Valley Tract. Co.*, 4 St. Ry. Rep. 968, 214 Pa. St. 223, 63 Atl. 599.

There is not sufficient evidence of negligence where an injury to the driver of a wagon which was run into by a car crossing the tracks at night, where the evidence simply showed that prior to the collision the lights on the car were extinguished by the trolley pole leaving the wire, thus depriving the car of light and power. *Higgins v. St. Louis & Sub. Ry. Co.*, 197 Mo. 300, 5 St. Ry. Rep. 671, 95 S. W. 863.

line of his duty as such motorman and at his proper place in the front vestibule of said car, and ran the same along said West Washington street at or near the shops of said defendant where it had cars under repair, and where it was receiving and discharging repaired cars of other street railway companies. That said plaintiff was due in front of said shops in the propelling of his car at about the hour of seven o'clock and eight minutes A. M., which was well known to defendant, and he was required to pass said shops and the said switches and cuts entering said shops along and over the tracks on said West Washington street. That upon said morning the atmosphere was extremely foggy, and objects could not be discerned or discovered at any great distance in front of the car being operated by said plaintiff, and cars on said switches and entering on said main track from said shops could not be seen or discerned by plaintiff in front of the car so operated by him without the display of strong signal lights on such cars, or without a conductor or flagman at the intersection of such tracks to give warning of their approach, all of which the defendant at the time well knew. That plaintiff was moving said car along and over said tracks of defendant at or near said shops in a careful and cautious manner, when said defendant negligently and carelessly threw a car of the Terre Haute, Indianapolis & Eastern Traction Company out upon the main track over which this plaintiff was operating said car, and carelessly and negligently caused said interurban car, which was sixty feet long and weighed many tons, to collide with the car being operated by this plaintiff. That defendant carelessly and negligently failed to give plaintiff any notice or warning of the approach of said interurban car, carelessly and negligently failed to provide or display any signal light thereon, and carelessly and negligently backed the same out of said shops on said main track in such fog and into collision with plaintiff's car in charge of one person only, who was operating the motor at the far end of the car, and carelessly and negligently failed to employ a conductor on said car or any assistant or flagman at the intersection of said main track and switch, and carelessly and negligently failed to employ a sufficient force of men on said interurban car and in and about

Where there is a municipal ordinance requiring street cars to have headlights after sunset, the absence of such a light makes a *prima facie* case of negligence. *Maness v. Joplin, etc., Ry. Co.*, 149 Mo. App. 259. But where the ordinance requires only colored signal lights in front and rear of the car, and such lights are carried, it is not negligence *per se* not to have a headlight. *McGee v. Consol. St. R. Co.*, 102 Mich. 107, 60 N. W. 293, 26 L. R. A. 300, 5 Am. Electl. Cas. 462.

A company is bound to equip its cars with signal lights so as to avoid injury to its employees. Leaving such lights at a curb for the employees of the company to secure and install is not a performance of its duty to equip the cars. *Carter v. McDermott*, 29 App. D. C. 145, 10 L. R. A. (N. S.) 1103.

Where a collision occurs between street cars by reason of the failure of the motorman of one car to turn on the lights of a block-light system, such motorman is deemed a fellow servant of the motorman upon the other car so that the latter cannot recover for injuries caused by such negligence. *Berg v. Seattle, etc., R. Co.*, 5 St. Ry. Rep. 858, 44 Wash. 14, 87 Pac. 34, 120 Am. St. Rep. 968.

the said shop and switches to safely move the said car out of said shop and onto said main track, and without such conductor, assistant or flagman such person could not give warning to plaintiff of the approach of said interurban car and could not know of the approach of plaintiff's car in time to avoid collision, and by reason of all and singular the said negligent acts and omissions of defendant and not otherwise the said collision occurred, and without such negligence plaintiff would not have been injured."

It also alleged, in substance, in said second paragraph of complaint that

"said interurban car had been received from the Terre Haute, Indianapolis & Eastern Traction Company for repair by appellant at its said shops, and that appellant was in the act of returning said car to said traction company, that said interurban car was not intended or fitted for use upon appellant's street railway, but was much larger, heavier and higher than the cars used by appellant and operated by appellee, and was so constructed that, when it came into collision with the car operated by plaintiff, the bumper or cross-beam of said interurban car passed over the bumper or cross-beam of the car which appellee was operating, and crushed the light framework inclosing the vestibule in which appellee was standing, and caught and injured him."

For the purpose of determining the questions presented by the demurrer to each paragraph of the complaint, it must be assumed from the allegations therein that the repair and storage of its own cars and of the cars of other street and interurban railway companies was a part of the work and business of appellant which it was authorized to do. It is insisted by appellant that each paragraph of the complaint

"fails to allege facts showing the existence of any duty owed by it to appellee, the omission to perform which operated to bring about the accident and consequent injury complained of,"

and that each of said paragraphs is insufficient for that reason.

In an action by an employee to enforce a common-law liability against the employer, facts must be alleged in the complaint showing the existence of a duty on the part of the employer to the employee the omission to perform which caused the injury complained of. *Pittsburgh, etc., R. Co. v. Lightheiser*, 163 Ind. 247, 251-253, 71 N. E. 218, 660, and cases cited; *Robertson v. Ford*, 164 Ind. 538, 546, 74 N. E. 1; *Pittsburgh, etc., Co. v. Peck*, 165 Ind. 537, 540, 542, 76 N. E. 163, and cases cited; *Chicago, etc., Co. v. Barker*, 169 Ind. 670, 675, 676, 83 N. E. 369, 17 L. R. A. (N. S.) 542, and authorities cited; *Chicago, etc., Co. v. Lain*, 170 Ind. 84, 88-91, 83 N. E. 632, and cases cited; *Cleveland, etc., Co. v.*

Morrey, 172 Ind. 513, 519-522, 88 N. E. 932, and cases cited. If said second paragraph alleged facts from which the law would imply the duty of appellant to do or not to do what it is alleged it negligently did or negligently failed to do, then a violation or breach thereof may be shown by an allegation that it negligently did or failed to do what was necessary to discharge such duty. But the characterization of an act or omission as negligent is not sufficient to show both a duty and a violation thereof. *Chicago, etc., R. Co. v. Lain, supra*, 170 Ind. 88-91, 83 N. E. 622, and cases cited; *Cleveland, etc., R. Co. v. Morrey, supra*, 172 Ind. 521, 522, 88 N. E. 932, and cases cited; *Pittsburgh, etc., R. Co. v. Peck*, 165 Ind. 537, 540, 541, 76 N. E. 163, and cases cited.

It is alleged in each paragraph of the complaint

"that plaintiff was moving said car over and along said tracks of defendant at or near said shops in a careful and cautious manner when said defendant negligently and carelessly threw a car of the Terre Haute, Indianapolis & Eastern Traction Company out upon the main track over which this plaintiff was operating said car, and carelessly and negligently caused said interurban car to collide with the car being operated by this plaintiff."

We judicially know that an incorporated street railroad company, like appellant, can only operate its cars by and through its employees and the averment in each paragraph of the complaint that the "defendant negligently and carelessly threw an interurban car," etc., "out upon the main track," etc.,

"and carelessly and negligently caused said car to collide with the car being operated by this plaintiff,"

gives rise to the presumption that the alleged negligent act was that of a fellow servant in the absence of averments showing the contrary. *Southern, etc., R. Co. v. Elliott*, 170 Ind. 273, 284, 82 N. E. 1051, and cases cited; *Indianapolis, etc., R. Co. v. Johnson*, 102 Ind. 352, 354-357, 26 N. E. 200, and cases cited. Said allegations in regard to the manner in which the interurban car was run out on the main track and its collision with appellee's car show nothing more than the acts of fellow servants of appellee for which under the rules of the common law appellant is not liable. *Southern, etc., R. Co. v. Elliott, supra*, 170 Ind. 284, 82 N. E. 1051; *Indianapolis, etc., R. Co. v. Johnson, supra*, 102 Ind. 354-357, 26 N. E. 200, and cases cited; *Chicago, etc., R. Co. v. Barker*, 169 Ind. 670, 676, 677, 83 N. E. 369, and cases cited, 17

L. R. A. (N. S.) 542, 546, 547; *Indianapolis, etc., R. Co. v. Foreman*, 162 Ind. 85, 89-92, 69 N. E. 669, 102 Am. St. Rep. 185, 188, 190; *Wabash, etc., R. Co. v. Hassett*, 170 Ind. 370, 375, 376, 83 N. E. 705, and cases cited; *Chicago, etc., R. Co. v. Hamilton*, 42 Ind. App. 512, 85 N. E. 1044; *Railey v. Garbutt*, 112 Ga. 288, 37 S. E. 360; *Roland v. Tift*, 131 Ga. 683, 63 S. E. 133, 20 L. R. A. (N. S.) 354; *Toner v. Chicago, etc., R. Co.*, 69 Wis. 188, 31 N. W. 104, 33 N. W. 433; *Adams v. Iron Cliffs Co.*, 78 Mich. 271, 272, 276, 288-290, 44 N. W. 270, 18 Am. St. Rep. 441; *New York, etc., R. Co. v. Bell*, 112 Pa. 400, 407-410, and cases cited on pages 404-407, 4 Atl. 50; *Buck v. New Jersey Zinc Co.*, 204 Pa. 132, 53 Atl. 740, 60 L. R. A. 453; *Brown v. Minneapolis, etc., Co.*, 31 Minn. 553, 18 N. W. 834; *Roberts v. St. Paul, etc., R. Co.*, 33 Minn. 218, 22 N. W. 389.

It is the theory of said second paragraph of the complaint that it was not only the duty of appellant to furnish proper lights and other appliances for said interurban car, but also to see that they were properly used, that such lights were properly lighted and displayed. This is not the rule, however, for the employer is only required to exercise ordinary care to furnish proper lights and other appliances, and the proper use, lighting, or display thereof is the duty of the employee, and not a duty the master owes the employee. *Berg v. Seattle, etc., R. Co.*, 44 Wash. 14, 19, 20, 22, 87 Pac. 34, 120 Am. St. Rep. 968; *Kaare v. Troy, etc., Co.*, 139 N. Y. 369, 378 (3), 34 N. E. 901; *Simpson v. Central, etc., R. Co.*, 5 App. Div. 614, 39 N. Y. Supp. 464; *Collins v. St. Paul, etc., R. Co.*, 30 Minn. 31, 14 N. W. 60; *Kelly v. New Haven, etc., R. Co.*, 74 Conn. 343, 50 Atl. 871, 57 L. R. A. 494, 92 Am. St. Rep. 220; *Whittlesey v. New York, etc., R. Co.*, 77 Conn. 100, 58 Atl. 459, 107 Am. St. Rep. 21; *Trimble v. Whittin Machine Works*, 172 Mass. 150, 51 N. E. 463; *Harley v. Buffalo, etc., Co.*, 142 N. Y. 31, 36 N. E. 813; *Ludlow v. Groton, etc., Co.*, 11 App. Div. 452, 42 N. Y. Supp. 343; *Clark v. Ritner-Conley Co.*, 39 App. Div. 598, 57 N. Y. Supp. 755; *Griffiths v. Gidlow*, 3 Hurlst. & N. 646, 27 N. J. Eq. (N. S.) 404; *St. Louis, etc., R. Co. v. Needham*, 63 Fed. 107, 11 C. C. A. 56, 25 L. R. A. 833; *New Pittsburgh, etc., Co. v. Peterson*, 136 Ind. 398, 401-406, 35 N. E. 7, 43 Am. St. Rep. 327; *New Pittsburgh, etc., Co. v. Peterson*, 14 Ind. App. 634, 43 N. E. 270; *Standard Pottery Co. v. Moudy*, 35 Ind. App. 427, 435-437, 73 N. E. 188; *Ft. Wayne, etc., Co. v. Parsell*, 168 Ind. 223, 230, 79 N. E. 439, and cases cited; *Indianapolis, etc.,*

R. Co. v. Kinney, 171 Ind. 612, 622, 85 N. E. 954, 23 L. R. A. (N. S.) 711, and cases cited; *Chicago, etc., Co. v. Barker*, 169 Ind. 670, 676, 677, 83 N. E. 369, 17 L. R. A. (N. S.) 542, and cases cited; 2 Labatt, Master & Servant, §§ 604, 607, 610. Moreover, it will be observed that the allegation in said second paragraph is that appellant "negligently failed to provide or display any signal light" on said interurban car. The allegation that appellant "failed to provide any signal light thereon" may be true, and yet there may have been on said car signal lights or lanterns proper for all purposes provided by the owner thereof.

While an employer is bound to exercise ordinary care to furnish an employee a safe place to work, and to exercise ordinary care to keep it in that condition, he is not liable to his employee for the negligence of his coemployees in respect to the details of the work, nor is he bound to protect his employee against the mere transitory perils that the execution of the work occasions, nor is he liable merely because a fellow employee negligently handles or uses appliances or tools or negligently fails to use the same, or negligently operates machinery or a car or cars in such a way as to occasion injury to another employee. *Bedford, etc., Co. v. Bough*, 168 Ind. 671, 689, 80 N. E. 529, 14 L. R. A. (N. S.) 418, and cases cited; *Southern, etc., R. Co. v. Harrell*, 161 Ind. 689, 697-700, 68 N. E. 262, 63 L. R. A. 460, and cases cited; *Haskell & Barker Car Co. v. Przedziankowski*, 170 Ind. 1, 10, 11, 83 N. E. 626, 14 L. R. A. (N. S.) 972, 127 Am. St. Rep. 352, and cases cited; *Wabash R. Co. v. Hassett*, 170 Ind. 370, 375, 376, 83 N. E. 705; *Chicago, etc., R. Co. v. Barker*, 169 Ind. 670, 676-679, 83 N. E. 369, and cases cited, 17 L. R. A. (N. S.) 542, 546, 550; *Shatrau v. Sullivan*, 201 N. Y. 567, 94 N. E. 609; *Mullin v. Genesee, etc., Co.*, 202 N. Y. 275, 95 N. E. 689, 691. As we have already said, a duty of the employer to the employee cannot be implied from the mere allegation that the act was negligently done or omitted, but the facts from which the law will imply the existence of the underlying duty must be alleged directly and positively, and not by way of recital or by the averment of conclusions. It avails nothing as against a demurrer for want of facts to aver conclusions or plead facts by way of recital. *Chicago, etc., R. Co. v. Lain*, 170 Ind. 84, 88-90, 83 N. E. 632, and cases cited; *Cleveland, etc., Co. v. Morrey*, 172 Ind. 513, 522, 88 N. E. 932; *Chicago, etc., Co. v. Barker*, 169 Ind. 670, 679-685, 83 N. E. 369, and cases cited, 17 L. R. A. (N. S.) 542, 546-550, and note, pages 542-545.

It is further objected to said paragraphs of complaint that no facts are averred showing that the injury complained of was not the result of a risk which appellee assumed, and that the negligence complained of was not the negligence of a fellow servant; citing *American, etc., Co. v. Hullinger*, 161 Ind. 673, 683-685, 67 N. E. 986, 69 N. E. 460, and authorities cited; *Cleveland, etc., R. Co. v. Parker*, 154 Ind. 153, 56 N. E. 86; *Lake Shore, etc., R. Co. v. Stupak*, 108 Ind. 1, 8 N. E. 630; *Peerless Stone Co. v. Wray*, 143 Ind. 574, 42 N. E. 927.

It is settled by said cases and the cases cited therein that the employee assumes the risk of all obvious defects or dangers open to ordinary careful observation or such as are or would be known by the exercise of ordinary care (*Wabash R. Co. v. Ray*, 152 Ind. 392, 399-401, 51 N. E. 920, and cases cited), and, that, when he seeks to recover damages for injury caused by the alleged negligence of the employer, he must allege that he had no knowledge of the defects or danger complained of, or his complaint will not withstand a demurrer for want of facts. To sustain such allegation, however, the evidence must show, not only that he had no knowledge of such defect or danger, but could not have known the same by the exercise of ordinary care. *Consolidated, etc., Co. v. Summit*, 152 Ind. 297, 299, 300, 53 N. E. 235, and cases cited; *American, etc., Co. v. Hullinger*, 161 Ind. 673, 674, 675, 683-685, 67 N. E. 986, 69 N. E. 460, and cases cited; *Ind., etc., Co. v. O'Brien*, 160 Ind. 266, 270, 65 N. E. 918, 66 N. E. 742; *Indianapolis, etc., Co. v. Foreman*, 162 Ind. 85, 100, 101, 69 N. E. 669, 102 Am. St. Rep. 185; *Southern, etc., R. Co. v. Harrell*, 161 Ind. 689, 695-700, 68 N. E. 262, 63 L. R. A. 460, and cases cited; *Indiana, etc., Co. v. Livezey*, (App.) 94 N. E. 732, 734, 745. Neither of said paragraphs of complaint avers a want of knowledge on the part of appellee of the existence of the dangers of which he complains. The averment of want of knowledge on the part of the employee must be as broad as the allegation of knowledge on the part of the employer. *Cleveland, etc., R. Co. v. Morrey*, 172 Ind. 513, 518, 519, 88 N. E. 932, and cases cited; *Indianapolis, etc., Co. v. Foreman*, 162 Ind. 85, 97, 69 N. E. 669, 102 Am. St. Rep. 185; *Louisville, etc., R. Co. v. Sandford*, 117 Ind. 265, 19 N. E. 770, and cases cited; *Louisville, etc., R. Co. v. Corps*, 124 Ind. 427, 24 N. E. 1046, 8 L. R. A. 636, and cases cited.

An employee who either before or after he commences the performance of the contract of employment has ascertained, or ought

in the exercise of ordinary care to have ascertained, that the ordinary hazards of his environment have been augmented by abnormal conditions produced by the negligence of his employer or his employer's representatives or other causes, and had accepted or continued in the employment without making any objection, and without receiving any promise that the abnormal conditions, however caused, will be remedied, is deemed as a matter of law to have assumed the risk thus superadded, and to have waived any right which he might otherwise have had to claim an indemnity for injuries resulting from such risk. The increased danger caused by the negligence of the employer becomes, when it is known, one of the risks of the employment so far as the employee is concerned.

"In a large number of cases recovery has been denied on the assumption that abnormal risks caused by the improper manner in which the instrumentalities are used are as much within the scope of this doctrine as those caused by the defective quality or attributes of the instrumentalities themselves."

1 Labatt on Master and Servant, § 274, pp. 639-641, section 274, and cases cited; section 276, pp. 651, 652; section 277, note 1, pp. 652-656; section 278, pp. 653-656, and cases cited in note 1, pp. 656-659; 14 Am. & Eng. Ency. of Law (2d Ed.) 118, 119, 124, 125; *Louisville, etc., R. Co. v. Sanford*, 117 Ind. 265, 266-269, 19 N. E. 770, and cases cited; *Brazil, etc., Co. v. Hoodlet*, 129 Ind. 327, 333, 27 N. E. 741; *Wabash R. Co. v. Ray*, 152 Ind. 392, 399-401, 51 N. E. 920, and cases cited.

It is said in Thompson on Negligence (2d Ed.) § 4625:

"A railroad employee who without objection or protest takes service under rules which do not provide for notice to employees upon trains of the movement of other trains assumes the risk and dangers, on the theory that every employee who operates a train must beware of trains moving in the other direction, without notice of their whereabouts, and assumes the risks and dangers of a system of rules which is based upon that theory. *Little Rock, etc., R. Co. v. Barry*, 84 Fed. 944, 56 U. S. App. 37, 28 C. C. A. 644, 43 L. R. A. 349. If the master has adopted no rules for the protection of his servants, a servant who knows that fact assumes the risk incidental to such failure. *Gulf, etc., R. Co. v. Williams*, (Tex.) 39 S. W. 967."

In *Louisville, etc., R. Co. v. Sanford*, 117 Ind. 265, 19 N. E. 770, an action to recover damages for the death of an employee caused by the alleged negligence of the employer, it was claimed that the complaint was insufficient because facts were not alleged showing that the employee did not assume the risk of the danger which caused his death. The court said, commencing on page 266:

"Employees assume all the ordinary risks incident to the employment, but they assume no extraordinary risks caused by the employer's breach of duty, unless they have knowledge of the unusual danger caused by the breach and voluntarily continue in the company's employment. If, with this knowledge, they do continue, then the increased danger becomes an incident of the service which they assume, and for liability from which the master is exonerated. Indianapolis, etc., *R. Co. v. Watson*, 114 Ind. 20 [14 N. E. 721, 15 N. E. 824, 5 Am. St. Rep. 578]. The knowledge of the danger adds it as one of the incidents of the employment which the employee assumes. It becomes a danger which his continuance in the master's service makes an incident of the service, and, when it takes this character, the master is no longer bound to answer for the employee's safety, so far as it is imperiled by the danger voluntarily and knowingly assumed. The knowledge, in conjunction with the continuance in the service, operates as a waiver of the right to make the master responsible. 'It is,' says Mr. Beach, 'the rule applicable to this matter that if the servant, when the defect or danger is brought to his knowledge — when he discovers that the machinery, buildings, premises, tools, or any other instrumentalities of his labor are unsafe or unfit, or that a fellow servant is careless or incompetent — continues in the employment, without protest or complaint, he is deemed to assume the risks of such danger, and to waive any claim upon his master for damages in case of injury.' Beach, *Cont. Neg.*, § 140. This puts the rule exonerating the master on the true ground. He is exonerated because the employee himself assumes the danger as increased, and, as he voluntarily assumes it, the master is relieved. The parties change positions. The employee assumes the risk that, if it were not for his knowledge, his employer would be compelled to assume. The duty which the employer is under is materially affected by the element of knowledge, and, unless a duty is shown, of course, there can be no actionable negligence, since a duty lies at the foundation of every right of action grounded on the negligence of a defendant. It must follow, in order to show a breach of duty creating a cause of action for its breach, that it is necessary to aver that the employee was ignorant of the default of the employer which increased the perils of the service. The plaintiff in such a case is the actor, and must show a complete cause of action, and, to do this, he must aver facts showing that the danger which augmented the risks of his service was not known to him. In at least two cases this court has explicitly affirmed this doctrine. *Lake Shore, etc., Co. v. Stupack*, 108 Ind. 1 [8 N. E. 630]; *Indiana, etc., R. W. Co. v. Dailey*, 110 Ind. 75 [10 N. E. 631]. * * * All the authorities agree that negligence on the part of the employer is not to be presumed, and that it rests on the plaintiff to aver and prove every fact essential to the existence of actionable negligence. * * * In stating what the employee must prove, a recent writer asserts that he must establish that he did not know, and had not equal means with the master of knowing, that the machine or appliance was defective. Proof and Pleading in Accident Cases, § 21. * * * Employees engaged in any business, however dangerous its character, have a right to assume that their employer will not subject them to any unknown extraordinary danger. The employer, however, is bound to do more than use ordinary care and diligence to provide for their safety, but this requires that he shall do all that the nature of the employment will permit to accomplish this

object. But if he fails to do his full duty, and the employee has reasonable and adequate knowledge of the failure, and continues in the service, he assumes the risk resulting from this failure."

Engineers, conductors, brakemen on trains, and motormen and other persons in charge of street cars assume the risk of inclement weather conditions, such as storms, rain, snow, ice, and fogs and atmospheric conditions, as among the risks of their employment. *Martin v. Chicago, etc., R. Co.*, 118 Iowa 148, 160, 91 N. W. 1034, 59 L. R. A. 698, 703, 96 Am. St. Rep. 371, 380; *O'Bannon v. Louisville, etc., R. Co.*, 6 S. W. 434, 9 Ky. Law Rep. 706; *Adkins v. Atlantic, etc., R. Co.*, 27 S. C. 71, 2 S. E. 849.

Appellee is presumed to know those things of which he had actual knowledge, or which by the exercise of ordinary care he could have known. In the absence of averments to the contrary, he is presumed to know appellant's mode of conducting its business along that part of its tracks located opposite the car barns and shops on West Washington street, including the manner appellant's cars and the cars of other street and interurban railroads were run by it from said West Washington street tracks into appellant's said repair shops to be repaired, and, when repaired, the manner they were run out of said shops onto said West Washington street track, and as a part of his employment assumed the risk of the manner in which said cars were operated, and also the ordinary and usual dangers surrounding the situation, as well as of all other dangers of which he had knowledge or could have had knowledge by the exercise of ordinary care, although a safer method might have been followed in moving said cars and in conducting its said business. Under the averments of said paragraphs, the fog and its attendant conditions and perils were as much within the knowledge of appellee as appellant, and, in the absence of sufficient averments of want of knowledge of the dangers with which he was confronted by reason of the existence of the fog and the perils created thereby, he is held to have assumed the risk as an incident of the employment. *Cleveland, etc., R. Co. v. Morrey*, 172 Ind. 513, 518, 519, 88 N. E. 932; *Wabash, etc., R. Co. v. Ray*, 152 Ind. 392, 399-401, 51 N. E. 920, and cases cited; *Indianapolis, etc., Co. v. Foreman*, 162 Ind. 85, 69 N. E. 669, 102 Am. St. Rep. 185; *Louisville, etc., R. Co. v. Sandford*, 117 Ind. 265, 19 N. E. 770; *Cleveland, etc., R. Co. v. Parker*, 154 Ind. 153, 56 N. E. 86, and authorities cited; *Louisville, etc., Co. v. Corps*, 124 Ind. 427, 24

N. E. 1046, 8 L. R. A. 636, and cases cited; *Jenney Electric, etc., Co. v. Murphy*, 115 Ind. 566, 18 N. E. 30, and cases cited; *Hewitt v. Flint, etc., R. Co.*, 67 Mich. 61, 76, 34 N. W. 659; *Lynch v. Saginaw, etc., T. Co.*, 153 Mich. 174, 177-181, 116 N. W. 983, 21 L. R. A. (N. S.) 774, and cases cited; *Kelley v. Chicago, etc., R. Co.*, 53 Wis. 74, 80, 9 N. W. 816; *Naylor v. Chicago, etc., R. Co.*, 53 Wis. 661, 664, 11 N. W. 24; *Behm v. Armour*, 58 Wis. 1, 15 N. W. 806; *Wood v. Heiges*, 83 Md. 257, 268, 34 Atl. 872; 20 Am. & Eng. Ency. of Law (2d Ed.) p. 118, and cases cited in note 1, p. 119, and cases cited in notes 1 and 2.

The question is as to the sufficiency of said paragraph of complaint to withstand the demurrer for want of facts, and as was said in *Louisville, etc., R. Co. v. Sandford*, 117 Ind. 265, 19 N. E. 770,

"the question comes to us as one of pleading, and not of evidence. Material facts must be directly stated in a pleading, but may be inferred from testimony and from circumstances when the question is as to the measure and sufficiency of proof. Inferences are admissible and controlling when the question is one of proof, but not so where the question is one of pleading."

It follows that the court erred in overruling the demurrer to the second paragraph. As the first paragraph of the complaint is insufficient for the same reason as the second, the court erred in overruling the demurrer to that paragraph.

Complaint is made of the action of the court in admitting in evidence over appellant's objection the testimony of appellee in regard to his financial condition at the time he was injured, and after his discharge from the hospital, and also as to whether any officers or representatives of appellant visited him while in the hospital. As the cause must be reversed for other errors, it is not necessary to determine as to the admissibility of such evidence further than to call attention to what is said on this subject in *Vandalia Coal Co. v. Yemm*, 92 N. E. 49, 52, 54, and cases cited, and *Monongahela, etc., Co. v. Hardsaw*, 169 Ind. 147, 151-153, 81 N. E. 492.

Appellant complains of instructions 1, 2, 4, 5, 7, 8, 9, 11 and 13, given by the court at the request of appellee. By instructions 1, 2, 7 and 9 the court directed the jury to return a verdict in favor of appellee if it found a certain state of facts to exist. The omission of one or more essential facts or elements necessary to a recovery by a party in whose favor the verdict is directed renders

such an instruction erroneous. *Chicago, etc., R. Co. v. Glover*, 154 Ind. 584, 57 N. E. 244; *Rahke v. State*, 168 Ind. 615, 621, 81 N. E. 584, and cases cited; *American, etc., Co. v. Bucy*, 43 Ind. App. 501, 504, 505, 87 N. E. 1051, and cases cited; *Steele v. Michigan Buggy Co.*, (App.) 95 N. E. 435, 438, and cases cited. Each of said instructions 1, 2, 7 and 9 ignored the rule of assumed risk, an essential element, and for this reason, if for no other, was erroneous. *Chicago, etc., R. Co. v. Glover*, 154 Ind. 584, 586-588, 57 N. E. 244, and cases cited; *Grand Trunk, etc., R. Co. v. Melrose*, 166 Ind. 658, 670, 671, 78 N. E. 190, and cases cited; *Pennsylvania, etc., R. Co. v. Ebaugh*, 152 Ind. 531, 53 N. E. 763; *American, etc., Co. v. Bucy*, 43 Ind. App. 501, 503-505, 87 N. E. 1051; *Indiana, etc., Co. v. Buffey*, 28 Ind. App. 108, 116, 62 N. E. 279.

Such erroneous instructions cannot be corrected by another which correctly states the law. This can only be done by withdrawing the erroneous instructions from the jury. *Lake Shore, etc., R. Co. v. Johnson*, 172 Ind. 548, 551, 88 N. E. 849, and cases cited; *Chicago, etc., R. Co. v. Glover, supra*, 154 Ind. 587, 57 N. E. 244, and cases cited; *Chicago, etc., Co. v. Fretz*, 173 Ind. 519, 534, 90 N. E. 76; *American, etc., Co. v. Bucy, supra*, 43 Ind. App. 505, 87 N. E. 1051; *Steele v. Michigan Buggy Co.*, (App.) 95 N. E. 435, 438 (11) (12), and cases cited.

Instructions 4, 7, 9 and 11 were erroneous because each ignored the rule at common law already stated in this opinion,

"that an employer is not liable to the employee for the negligence of his co-employees in respect to the details of the work, nor is he bound to protect his employee against the mere transitory perils that the execution of the work occasions, nor is he liable merely because a coemployee negligently handles appliances or tools, or negligently fails to use the same or negligently operates machinery or a car or cars in such a way as to occasion injury to another employee."

The backing said interurban car was a duty the employee owed the employer, and not one the employer owed the employee, and to such acts the fellow-servant rule applies. *Chicago, etc., R. Co. v. Barker*, 169 Ind. 670, 676-679, 685, 83 N. E. 369, 17 L. R. A. (N. S.) 542, and cases cited; *Southern, etc., R. Co. v. Martin*, 160 Ind. 280, 286, 289, 66 N. E. 886; *St. Louis, etc., R. Co. v. Needham*, 63 Fed. 107, 11 C. C. A. 56, 25 L. R. A. 833.

Said instruction 2, held erroneous for ignoring the rule of

assumption of risk, is also open to the same objections as said instructions 4, 7, 9 and 11.

Instructions 8, 9 and 11 were concerning the duties of appellant to make rules and its liability if such rules were inadequate. It is not charged in either paragraph of complaint that appellee was injured by reason of any failure on the part of appellant to give proper or adequate rules, or because of the violation by appellant of any of its own rules. The allegations of neither paragraph of the complaint involve a cause of action the neglect of appellant to establish general rules and regulations for the conduct of its employees or the violation of the same. Such questions are not therefore within the issues. *Connelly v. Minneapolis, etc., R. Co.*, 38 Minn. 80, 82, 35 N. W. 582; *Voss v. Delaware, etc., R. Co.*, 62 N. J. Law 59, 41 Atl. 224; *Jemming v. Great Northern R. Co.*, 96 Minn. 302, 305, 104 N. W. 1079, 1 L. R. A. (N. S.) 696; *Donahue v. Northwestern, etc., Co.*, 103 Minn. 432, 441, 115 N. W. 279; *Morrow v. St. Paul, etc., R. Co.*, 65 Minn. 382, 67 N. W. 1002; *Chicago City R. Co. v. Bruley*, 215 Ill. 464, 74 N. E. 441; *Whittlesey v. New York, etc., R. Co.*, 77 Conn. 100, 58 Atl. 459, 107 Am. St. Rep. 21, 23; 13 Encyc. Pl. & Pr. 900. Said instructions were not within the issues, and were erroneous for that reason. *Indiana, etc., Co. v. Maurer*, 160 Ind. 25, 30-32, 66 N. E. 156; *Evans v. Gallentine*, 57 Ind. 367.

Other objections are made to the foregoing instructions, but, as they are erroneous for the reasons already given, it is not necessary to consider the same.

Complaint is made by appellant of instruction 7, given by the court of its own motion. Said instruction contains the following language:

"It was the duty of the defendant to provide signal lamps for use in the operation of its road, and, if you find from the evidence that such signal lamps were provided, then the defendant complied with its duty in this respect, and it is for you to determine from the conditions shown by the evidence to have existed at the time and place of the accident whether it was negligence upon the part of the defendant company to fail to display said lamps and to see that they were lighted, and it is also for you to determine under the evidence whether said lamps were lighted and displayed at the time of the accident."

This instruction was erroneous, because, under the rules of the common law, appellant's duty was discharged when signal lamps were furnished, and the proper display, use and lighting thereof by the employees of appellant in the discharge of their duties was

for such employees, and their failure to properly use such lamps would not make appellant liable. The proper use of such appliances was a duty of the employee. *Berg v. Seattle, etc., R. Co.*, 44 Wash. 14, 19, 20, 22, 87 Pac. 34, 120 Am. St. Rep. 968; *Colins v. St. Paul, etc., R. Co.*, 30 Minn. 31, 14 N. W. 60; *Kelly v. New Haven, etc., Co.*, 74 Conn. 343, 50 Atl. 871, 57 L. R. A. 494, 92 Am. St. Rep. 220; *Whittlesey v. New York, etc., R. Co.*, 77 Conn. 100, 58 Atl. 459, 107 Am. St. Rep. 21; *Kaare v. Troy, etc., Co.*, 139 N. Y. 369, 378(3), 34 N. E. 901; *Standard Pottery Co. v. Moudy*, 35 Ind. App. 427, 435-437, 73 N. E. 188, and cases cited; *Ft. Wayne, etc., Co. v. Parsell*, 168 Ind. 223, 230, 79 N. E. 439, and cases cited; *Indianapolis, etc., Co. v. Kinney*, 171 Ind. 612, 622, 85 N. E. 954, 23 L. R. A. (N. S.) 711, and cases cited; *Chicago, etc., R. Co. v. Barker*, 169 Ind. 670, 676, 677, 83 N. E. 369, 17 L. R. A. (N. S.) 542.

Complaint is made by appellant of other instructions given, as well as of the refusal of the court to give a number of instructions requested. What we have said concerning the instructions held erroneous and as to the law of this case renders their consideration unnecessary as they are governed thereby. Appellant insists that the court erred in overruling its motion for judgment in its favor on the answers to the interrogatories, notwithstanding the general verdict. We cannot say under the rule applicable to such motions that the court erred in overruling the same.

Judgment reversed, with instructions to sustain appellant's motion for a new trial, and to sustain appellant's demurrer to each paragraph of the complaint, and for further proceedings not inconsistent with this opinion.

Cox, J., took no part in this opinion.

VOL. 8—11

Luby v. Morris County Traction Co.

(New Jersey — Supreme Court.)

1. **USE OF AND RIGHTS IN STREETS BY RAILWAY COMPANIES AND OTHERS.** — Street railway companies have no superior or predominate right to the use of the highways in which their cars run over the rights of other persons on foot or with vehicles, except that, because the cars are confined to the tracks, others using the highway must give way to them when occasion requires.
2. **DUTY TO PERMIT PASSAGE OF CARS.** — A correlative duty devolves upon others using the highway to permit the passage of street railway cars when they observe or are informed that such passage is required.
3. **WARNING OF APPROACH OF CARS.** — Such timely warning of the approach of a trolley car must be given as will enable others using that portion of the highway covered by its tracks to avoid danger from it.
4. **DUTY OF TRAVELER NOT TO OBSTRUCT TRACK; CONTRIBUTORY NEGLIGENCE.** — While it is the duty of others not to obstruct the track, yet a violation of such duty does not necessarily constitute such contributory negligence as will relieve the trolley company from responsibility for an accident which might have been avoided by the exercise of due care upon the part of the company.
5. **DRIVING OF NOISY WAGON AND FAILURE TO HEAR GONG; CONTRIBUTORY NEGLIGENCE.** — An instruction to the effect that if the plaintiff drove along and upon the street railway track in a noisy wagon, so that he could not hear the gong of defendant's car approaching from behind, the plaintiff cannot recover, is erroneous, because the driving of a noisy wagon along and upon a street railway track does not in itself necessarily constitute such contributory negligence as will relieve the defendant from responsibility for an accident which might have been avoided by the exercise of due care upon the part of the defendant.
(Syllabus by the Court.)

PLAINTIFF appeals from judgment for defendant.

William W. Cutler, of Morristown, for appellant.

Vreeland, King, Wilson & Lindabury, of Newark, for appellee.

Relative Rights of Street Cars and Vehicles. — As to the relative rights of street cars and the public in streets, see 2 St. Ry. Rep. 170; 3 St. Ry. Rep. 390, 412; 5 St. Ry. Rep. 240.

Application of Last Clear Chance Doctrine to Collision Between Street Car and Vehicle Driven Along Track. — For a discussion of the application of the "last clear chance" doctrine to the case of a collision between a wagon driven along a street railway track and street car, see the note to *Mather v. Metropolitan St. Ry. Co.*, p. 477.

Opinion by TRENCHARD, J.:

This suit was brought by the owner of a wagon and a team of horses to recover damages sustained by their being struck by a street railway car operated by the defendant company. The trial in the District Court resulted in a verdict for the defendant. This appeal brings up for review the judgment entered thereon.

At the trial the plaintiff contended, and his evidence tended to show, that his team was being driven along Speedwell avenue, in Morristown, along and upon the street railway track, and that, while in that position, and without warning, the defendant's car, approaching from behind, ran into the rear of the wagon, demolishing it, and injuring both of the horses, one of them so severely that it had to be killed. The defendant disputed the plaintiff's account of the accident; its evidence tending to show that it was due to the carelessness of the plaintiff's driver in suddenly and without warning turning into the track in front of the car. The defendant seems also to have contended at the trial, and here contends, that, even if the plaintiff's account of the accident is true, he cannot recover because the driver was negligent in driving a noisy wagon along and upon the track. There was evidence that the team was trotting and that the wagon made a noise. The only reason for reversal argued is . . .

"that the trial judge charged the jury that the plaintiff could not recover if the plaintiff was driving upon the track in a noisy wagon, so that he could not hear the gong of the approaching trolley car."

It seems that the learned trial judge so charged in effect, and the question of the propriety of that instruction must be determined in the light of the following familiar principles of law.

Street railway companies have no superior or predominate right to the use of the highways in which their cars run over the rights of other persons on foot or with vehicles, except that, because the cars are confined to the tracks, others using the highway must give way to them when occasion requires. *Buttelli v. Electric Co.*, 59 N. J. Law 302, 36 Atl. 700.

A correlative duty, therefore, devolves upon others using the highway to permit the passage of street railway cars when they observe or are informed that such passage is required. *Buttelli v. Electric Ry. Co.*, 59 N. J. Law 302, 36 Atl. 700; *Adams v. Camden & Sub. Ry. Co.*, 1 St. Ry. Rep. 544, 69 N. J. Law 424, 55 Atl. 254.

Such timely warning of the approach of a trolley car must be given as will enable others using that portion of the highway covered by its tracks to avoid danger from it. *Consolidated Traction Co. v. Haight*, 59 N. J. Law 577, 37 Atl. 135.

While it is the duty of others not to obstruct the track, yet a violation of such duty does not necessarily constitute such contributory negligence as will relieve the trolley company from responsibility for an accident which might have been avoided by the exercise of due care. *Consolidated Traction Co. v. Haight*, 59 N. J. Law 577, 37 Atl. 135; *Camden, etc., Ry. Co. v. Preston*, 59 N. J. Law 264, 35 Atl. 1119.

In the light of these principles, it will be seen that the instruction to the effect that if the plaintiff drove along and upon the track in a noisy wagon, so that he could not hear the gong of the defendant's car approaching from behind, the plaintiff could not recover, was erroneous. The driving of a noisy wagon along and upon a street railway track does not in itself necessarily constitute such contributory negligence as will relieve the defendant from responsibility for an accident which might have been avoided by the exercise of due care by the defendant. Yet such was the effect of the instruction. Even if the wagon was noisy, the question of the driver's contributory negligence was still for the jury, and it could not lawfully be withdrawn from them, as was done in effect. The circumstance that the wagon was noisy would make it more difficult for the defendant to give the driver notice, but a noisy wagon is not debarred from the use of the public streets.

The judgment under review will be reversed, and a *venire de novo* awarded.

Wavle v. Michigan United Rys. Co.

(Michigan — Supreme Court.)

1. **PEDESTRIAN KILLED AT PRIVATE CROSSING; EVIDENCE; CONTRIBUTORY NEGLIGENCE QUESTION FOR JURY.** — In an action for the death of a pedestrian struck and killed by a car at a private crossing, evidence examined and held, that the question of the negligence of the deceased was properly submitted to the jury.

Duty to Look and Listen. — For a discussion of the duty of a person approaching a street railway track to look and listen for cars before crossing the same, see the note to *Wilson v. St. Louis Transit Co.*, 7 St. Ry. Rep. 1.

2. **OPERATION OF CARS; DUTY TO GIVE SIGNALS AT CROSSINGS.** — Although the statute does not impose upon street railway companies the positive duty to give signals at highway or other crossings, it is nevertheless bound to operate its cars with reference to known conditions.
3. **DUTY OF TRAVELER TO LOOK AND LISTEN BEFORE CROSSING TRACK.** — It is the duty of a traveler to look and listen before attempting to cross the tracks of an interurban street railroad.
4. **DUTY OF INTERURBAN CAR TO GIVE WARNING AT PRIVATE CROSSING.** — An interurban car is not bound to give warning at a private or farm crossing when its approach can be seen by those using the crossing.
5. **SAME; EVIDENCE.** — Where a public crossing is near a private crossing, evidence as to whether warning of the approach of a car was given at the public crossing is material as affecting the contributory negligence of a person struck and killed at the private crossing.
6. **DAMAGES.** — A widow, although able to support herself, is entitled to recover for the death of her husband the amount which she was accustomed to receive and might be expected to receive if he had lived.

DEFENDANT brings error from judgment for plaintiff. Reported 135 N. W. 914.

Sanford W. Ladd, of Detroit, for appellant.

Frank L. Dodge, of Lansing, and *A. A. Bergman*, of Mason, for appellee.

Opinion PER CURIAM:

* * * * *

Plaintiff, the widow of deceased and administratrix of his estate, recovered against defendant a verdict and judgment for \$1,477.92 for damages for the negligent killing of her intestate. There was a motion for a directed verdict for defendant; no motion for a new trial. Defendant's railroad is operated by electric power, and, so far as the fact is here important, it owns its right of way. According to its schedule, its cars pass over the line each half hour; there being two regular north-bound and two regular south-bound cars. Plaintiff's intestate was struck and killed by a north-bound car June 18, 1910, upon a private, or farm, crossing on his own farm, through which the road is laid. The time was about 7.45 p. m. Some of the witnesses say the time was about 8.20, local time.

We discuss, first, the question whether a verdict should have been directed for defendant, upon the ground that plaintiff's intestate was guilty of contributory negligence as matter of law. If he was negligent, it was because he did not look or listen for an

* Portion of opinion immaterial to street railways omitted.

approaching car before going upon the track. The farmhouse upon the land is upon the east side of a highway running nearly north and south. The barn and other outbuildings are on the west side of this highway. The defendant's right of way and track are on the west side of the highway and cross the barnyard. To reach the barn and outbuildings it was necessary to cross the railroad track. The crossing is planked; there is a board fence across the right of way north and south of the crossing; and there are cattle guards at each end of the crossing. A gate opens into the barnyard from the west end of the right of way. Fourteen rods south of this private crossing a highway is crossed by the railroad tracks. From the private crossing to the south the railroad runs straight, or nearly so, for a mile or more. On the day in question plaintiff's intestate had supper shortly after 6 o'clock, local time, and he and the witness Miller had then gone over to the barn. It was in returning to, or towards, the house that plaintiff's intestate was killed. The car was running very fast; its speed being estimated by witnesses at from fifty to seventy miles an hour. Two persons saw the collision, the plaintiff's witness miller and the motorman in charge of the car. The witness Miller testified that he was two or three steps east of the gate, which was closed, and twenty-five or thirty feet from the track, when he saw plaintiff's intestate, who was ahead of him, on the track between the rails, and that he appeared to be taking the step which would carry him east of the rails, when the car struck him. He (Miller) was in a position where he could see the car, and did see it — the whole of it — coming when it was at or about at the highway crossing fourteen rods away. He further testified that, looking down the track to the south, a car could be seen for about a mile, but could not be seen for a mile from the barnyard. He does not state whether plaintiff's intestate did or did not pay any attention to the car, or look to see if a car was coming; he does testify that he first noticed him when he was on the track. The motorman testified that when he first saw plaintiff's intestate he was on the west side of the track, about to step on the track. He was looking to the east, directly across the tracks. The car was then about sixty feet from him. He blew the whistle, put the air into emergency, reversed the car. Plaintiff's intestate jumped to the east as the whistle sounded, and did not at any time look towards the car. There is further undisputed testimony tended to prove that a person as tall as was plaintiff's intestate could, by looking down the track, see a

car approaching from the south for a distance of a mile or more. But testimony was produced tending to prove that it was dark, or nearly dark, when the collision occurred, and that no headlight, or other light, was displayed upon the front end of the car; that no whistle was sounded for the said private crossing; that no person saw the deceased at or just before the instant when he passed upon the track. The witness Miller says the interior of the car was lighted and the headlight was not lighted. It is obvious that, if it was so dark that the approaching car could not be seen for any considerable distance, the fact that it could be seen for a long distance in the daytime is not necessarily decisive of the question of the due care of deceased. The position from which the witness Miller saw the car was not the position occupied by the deceased; and the fact that Miller saw the lighted car, and the deceased did not see it, is a fact not necessarily decisive of the question of the due care of the deceased. Negligence of deceased, as matter of law, cannot be found from the testimony of the motorman. It was not error to submit the question to the jury, unless, as appears to be contended by counsel for defendant, it was the duty of the deceased to, in any event, keep out of the way of defendant's cars. This contention will be noticed later on.

The subject next presented in the brief is that of defendant's negligence, and the argument is limited, as to the facts, to the alleged failure to sound a whistle or gong. Testimony for plaintiff tended to prove that no whistle or other signal was sounded at the highway crossing, and that signals had customarily been given at that place. Testimony for defendant tended to prove that the car was equipped with a heavy whistle, and that when it was approaching, and while it was south of the highway crossing, two long and two short blasts were given. The jury was instructed:

"The defendant company had a right, in the exercise of due care and in accordance with law, to run its cars over its tracks at such speed as they choose. If you find from a preponderance of the evidence that there was a lighted headlight on this car, and if a whistle was sounded a quarter of a mile or less before reaching the Wavle public crossing, then plaintiff cannot recover, because there was no negligence on the part of the defendant company."

Defendant presented the following requests:

"(8) I instruct you that under the evidence in this case the defendant is not guilty of any negligence, in so far as the blowing of the whistle or sounding of the gong is concerned.

"(9) I instruct you that under the evidence in this case the defendant was

not in duty bound to give any signal for the private crossing where the plaintiff's intestate was struck and killed.

"(10) I instruct you that under the evidence in this case the defendant owed no duty to the plaintiff's decedent, at the private crossing, to give a signal at the public crossing immediately south of the private crossing in question.

"(11) I instruct you that under the evidence in this case the defendant owned the private right of way over which its cars are operated by the defendant company, without condition, at the point where the accident in question occurred, and that the plaintiff's decedent had a mere license to cross said private right of way over the premises of this defendant, subject to the operating of cars by the defendant as a common carrier.

"(12) I instruct you that under the evidence in this case the defendant had a warranty deed, placing the fee to the right of way over which its cars are operated in the defendant company, without condition, at the point where the accident in question occurred, and that the plaintiff's decedent had a mere license to cross said private right of way over the premises of this defendant, subject to the operating of the cars by the defendant as a public carrier; and I further instruct you that it was the duty of plaintiff's decedent, Charles Wavle, in crossing the track under said license, to keep out of the way of the cars operated by this defendant."

None of these were given.

The statute does not impose upon defendant the positive duty to give signals at highway or other crossings. It is nevertheless bound to operate its cars with reference to known conditions. For example, it would be a reckless act if it ran a car over its road in the night, at a high rate of speed, displaying no light and giving no signals. It is wholly impracticable and unreasonable to require the cars to be brought under complete control every time a highway or private crossing is reached. Somewhere lies the course of reasonable prudence, marked out generally by experience, and variable as peculiar and unusual conditions are presented. Defendant's cars are equipped with headlights, and customarily these are lighted at night. They are equipped with whistles, and these are blown, customarily, at public crossings. The whistle is not customarily blown at private or farm crossings. We find no reason for saying that the method of operation indicated is not generally prudent. The cases are few in which courts have held, or have refused to hold, that the rules generally applicable to the operation of cars upon a steam railroad are also applicable to the operation of cars upon an electric interurban railroad, upon a private right of way. The danger of travel is much the same upon either kind of road, so far as passengers are concerned, and is quite the same to those going upon the tracks.

The duty of one traveling upon the highway to look and listen before attempting to cross the tracks of an interurban railroad was declared, with references to numerous cases in which steam railroads were parties, in *Folkmire v. Michigan United R. Co.*, 157 Mich. 159, 121 N. W. 811. Recognizing this duty of the traveler are the cases of *Snow v. Indianapolis, etc., Ry. Co.*, (Ind. App.) 93 N. E. 1089; *Mann v. Belt Ry.*, 128 Ind. 143, 26 N. E. 819; *Electric Street R. R. Co. v. Lohe, Adm'r*, 68 Ohio St. 101, 67 N. E. 161, 67 L. R. A. 637; *Robinson v. Rockland, etc., R. Co.*, 3 St. Ry. Rep. 329, 99 Me. 47, 58 Atl. 57; *Phillips v. Washington, etc., R. Co.*, 104 Md. 455, 65 Atl. 422, 10 Ann. Cas. 334; *Cable v. Spokane, etc., R. Co.*, 50 Wash. 619, 97 Pac. 744, 23 L. R. A. (N. S.) 1224. See note to *Pilmer v. Boise Traction Co.*, 15 L. R. A. (N. S.) 254.

In the operation of steam railroads, the whistle is not usually sounded upon the approach of a train to a private or farm crossing; and a failure to sound it is not usually regarded as evidence of negligence. We see no reason for holding that the duty is greater when an electric interurban car is operated through the country, and the approach of the car to the crossing can be seen by those using the crossing.

But whether the failure to sound a whistle at the public crossing, if there was such failure, violated any duty owed to the plaintiff's intestate, upon his farm with its private crossing, is a question we think must be answered in the negative. Whether the whistle was in fact sounded at the public crossing was material, as affecting the question of contributory negligence, because the public crossing was so near the private crossing. In other words, it would have been competent for defendant to prove, if it could, that the whistle was sounded so near to the private crossing as to inform those using it, or about to do so, that a car was approaching. It does not follow that a failure to sound the whistle at the highway crossing would be a breach of any duty which defendant owed to plaintiff's intestate at his private crossing on his farm, even if it were true that the custom of whistling at the highway was known to those living in the vicinity thereof.

It has been held by this court that the failure of a railroad company to perform the positive statutory duty to sound the whistle at a highway crossing may be the foundation of an action against the company by one who had knowledge that the law required the whistle to be blown, and who relied upon the performance of the

duty, although the injury complained about was received at a private crossing in the vicinity. *Sanborn v. Railroad Company*, 91 Mich. 538, 52 N. W. 153, 16 L. R. A. 119, and cases cited in the opinion. In this case it was said in the majority opinion:

"It is contended on behalf of the defendant that the omission of this duty cannot support an action on behalf of one who was not injured at the crossing; and there are not wanting cases which sustain this contention, under statutes somewhat similar to the one under consideration. We do not, however, think that this is the proper construction to be placed upon this statute. The statute imposes a positive duty upon the railroad company to sound its whistle and to ring its bell at a certain point. It is a well-known fact that not only those about to cross the railroad track, but those in the immediate vicinity, lawfully there, are frequently induced to rely upon the performance of this statutory duty. If they do so, and without fault of their own suffer an injury, we see no reason why the statute should not be so construed as to protect them. We think the true construction to be that, while a failure to give a signal required by law will not avail a trespasser in an attempt to charge the road, one lawfully in a position where such negligent omission may constitute the direct and proximate cause of the injury to him is entitled to aver such negligent act as the basis of the action."

In other jurisdictions, the question has been presented and the decisions, not harmonious, have been rested upon the construction given the particular statute and the evident legislative intent expressed therein. Some phases of the subject are discussed, and references are made to numerous authorities, in the case of *Lepard v. Michigan Central R. Co.*, 166 Mich. 373, 130 N. W. 668, in the absence of a statute, the duty of defendant to sound a whistle before propelling a car over a public highway, assuming there is such a duty, arises out of the fact that it is about to cross the highway, at speed, of which fact others, having equal right to use the highway, and desiring to do so, should in prudence be warned. It is the relation of the owners of the car to the highway and its use, and to the passengers on the car, which creates and defines the duty. Outside of those relations it owes no duty to signify an intention to cross a highway. Failure to perform the duty is negligence as matter of law only when injury results therefrom to some one to whom the duty is owing.

We are of opinion, therefore, that the court, upon the pleadings and testimony in this case, should have given defendant's ninth and tenth requests to charge, and that the question of defendant's negligence should have been made to depend upon whether, first, it was so dark that a headlight on the car ought to have been burning (the

car not being easily discernible by reason of the darkness); and, second, whether a headlight, or other sufficient light, was burning when the collision occurred.

Some criticism, which we think is not warranted, is made of the use in the charge of the term "preponderance of the evidence."

Defendant offered to prove that on previous occasions plaintiff's intestate had paid no attention to the car or to signals given, when his conduct had been discovered by the motorman; that he was careless in crossing the track ahead of cars; that shortly before the collision he was spoken to by one of the defendant's employees respecting his carelessness, and about a particular instance of it, with a warning. The testimony was excluded. It is said that it was competent as affecting the question of contributory negligence. No authority is cited. Whether such testimony should have been admitted to rebut a presumption that plaintiff's intestate looked and listened before going upon the track, if no one observed his conduct when he was approaching the track, is a question we prefer not to decide without argument, especially as the point may not be presented upon a new trial.

The court permitted the stenographer, who had taken the testimony at the coroner's inquest, to read from her notes, in the absence of the jury, the testimony, or some of it, so taken, for the benefit of counsel for the plaintiff. How this proceeding prejudiced the defendant is not pointed out, and is not apparent.

A special question was submitted to the jury by defendant, viz.:

"Did the fence at the private crossing of Charles Wavle make it impossible for the plaintiff's decedent to see the car approaching from the south, while he was between the fences at said private crossing?"

Upon the undisputed testimony the question should have been answered in the negative. The jury, having been out for some hours, reported themselves not agreed upon an answer to the question. The court thereupon withdrew it from their consideration. Whether the question was answered in the affirmative or negative, it would not be controlling of the general verdict. The court committed no error in withdrawing the special question. *Grimme v. Fraternal Aid Assn.*, 167 Mich. 240, 132 N. W. 497.

It appears to be the contention of plaintiff in error that it appeared from the testimony that the deceased did not himself work his farm, but at and before the time of his death, received from a cropper, or renter, two-thirds of the proceeds of the farm,

and because his widow, the administratrix, had, after his death, continued the relation with the cropper, there was no evidence of any pecuniary loss to her as a result of the death of her husband. Testimony — and there was considerable admitted — to prove damages was received over objection and exception, and the court refused to charge the jury in conformity with the theory stated, or precisely with any theory advanced for defendant. We do not think it is important to set out the testimony objected to or the repeated requests to charge which were refused. Plaintiff's intestate, as we infer, owned forty acres of land and leased eighty other acres. There was testimony tending to prove that he superintended the farm in a way, did chores, prepared wood for fuel, and was otherwise active about the place. He was seventy-two years old and had an expectancy of life of about seven years. Our attention has not been directed to the testimony, if there is any, showing whether the plaintiff widow is entitled to retain possession of the farm or the leased lands; and we are satisfied that the testimony received to prove damages was much of it incompetent for that purpose. The statute aims at securing for those dependent upon the deceased indemnity for the pecuniary loss suffered by his death. It appears that plaintiff's intestate was the head of his house and manager of his affairs, and that plaintiff was supported and might expect to be supported by him for a time at least. That she may be able to support herself is not a fact precluding a recovery. But to the extent that what she was accustomed to receive, and might be expected to receive, from him has been lost as the result of his death, she is entitled to recover. The testimony should have been limited to such as tended to prove the accustomed contributions, the likelihood of their being continued and the portion or value of them lost to plaintiff.

We have stated and decided what appear to be the important questions which the record presents. We overrule the contention of appellant that owners of private crossings must, at all times and under all circumstances, protect themselves from injury from defendant's cars. We hold that it is negligent to operate such cars after dark without a proper headlight, or such other lights or warnings as will enable those using such private crossings to discover the approach of a car.

The judgment is reversed, with costs to the appellant. For the purpose of taxing costs the record will be treated as containing 350 pages.

Tolleman v. Sheboygan Light, Power & Ry. Co.

(Wisconsin — Supreme Court.)

1. **PASSENGER STANDING ON STEP STRUCK BY TROLLEY POLE AND INJURED; EVIDENCE; NEGLIGENCE; CONTRIBUTORY NEGLIGENCE.** — Plaintiff, the car being filled to its capacity, stood upon a step within the vestibule, and after riding some distance the swaying of the crowd, caused by the motion of the car, forced him outward so that he collided with a trolley pole at the side of track and was thrown to the ground. The conductor was near the middle of the car when it stopped to receive passengers and did not leave his place, but gave the signal to start when some one on the rear platform said all right. Evidence examined and *held*, that the defendant was negligent, and that the plaintiff was not guilty of contributory negligence as a matter of law.
2. **SAME; NEGLIGENCE OF CONDUCTOR.** — Where a conductor knows that a passenger is standing in a dangerous position on a step of the car and fails to warn or remove him he is guilty of a negligent act.
3. **SAME; INTERVENING CAUSE; PROXIMATE CAUSE.** — The surging or swaying of the passengers in the vestibule against the plaintiff, whereby he was pushed outward beyond the side of the car, was an incident that resulted from the running of the car, and not from any independent agency. The proximate cause of the accident was the negligence of the conductor in failing to warn or remove the plaintiff from his position of danger.

DEFENDANT appeals from judgment for plaintiff. Reported 134 N. W. 406.

STATEMENT OF FACTS BY THE COURT.

On the evening of December 24, 1909, the plaintiff as a passenger boarded one of the interurban cars of the defendant railway company. The car was filled to its capacity, and the rear vestibule was crowded and plaintiff stood upon a step within the vestibule. After riding some distance the swaying of the crowd against the plaintiff, caused by the swinging motion of the car, forced plaintiff outward so that he collided with a trolley pole at the side of the track and was thrown to the ground. This action was brought to recover damages for injuries sustained. The following special verdict was returned by the jury:

"First question: While being carried as a passenger on defendant's car and standing on the lower step thereof, at the time and place stated in the

Contributory Negligence of Passenger Riding on Step. — The question of the contributory negligence of a passenger riding on the steps of a street car was discussed in a note to *Trussell v. Morris County Traction Co.*, 7 St. Ry. Rep. 542.

complaint, did a trolley pole of defendant's railway collide with plaintiff's body and cause him to be thrown from the car to the ground and injured? Answer: Yes.

"Second question: From the time when plaintiff got on the car until he was injured, was it so crowded with passengers that he could not obtain a seat in it by the exercise of ordinary care and effort on his part? Answer: Yes.

"Third question: If the conductor had exercised the degree of care which it was his duty to exercise for the safety of passengers, would he have discovered that plaintiff was standing on the car step and have removed him therefrom before the car started from station number seven (7)? Answer: Yes.

"Fourth question: If the second question be answered yes, then answer this: If the conductor had exercised the degree of care specified in the third question, would he have seen plaintiff on the car step and have informed him, before the car started, that he could not obtain a seat in it? Answer: Yes.

"Fifth question: If, after starting from station number seven (7), the conductor had exercised the degree of care stated in the third question, would he have discovered plaintiff on the car step and have removed him therefrom before plaintiff was injured? Answer: Yes.

"Sixth question: In erecting so near to its railway track as were, at the time plaintiff was injured, the two trolley poles with which his body came in contact, did the defendant company fail to exercise that degree of care which it was the duty of that company to exercise for the safety of passengers riding on its cars? Answer: Yes.

"Seventh question: If the third, fourth, fifth and sixth questions, or any one or more of them, be answered yes, then answer this: Was the negligence the existence of which is found by your answers to the third, fourth, fifth and sixth questions, or by your answer or answers to any one or more of them, the proximate cause of plaintiff's injury? Answer: Yes.

"Eighth question: If your answer to the seventh question be yes, then state particularly what was the negligence which constituted such proximate cause. Answer: That negligence the existence of which is found by the answers to the third, fourth and fifth questions.

"Ninth question: Before the car started from station number 7, did plaintiff know that he could not obtain a seat in it? Answer: No.

"Tenth question: If the answer to the ninth question be no, then answer this: By the exercise of ordinary care on his part would plaintiff have learned before the car started from that station that he could not get a seat in it? Answer: No.

"Eleventh question: By the exercise of ordinary care on his part would plaintiff have discovered, before his injury occurred and in time to have prevented it by any means available to him, that while standing on the car step his body might collide with a trolley pole? Answer: No.

"Twelfth question: Was there on plaintiff's part any failure to exercise ordinary care which contributed to cause his injury? Answer: No.

"Question No. 12½: If plaintiff had not been pushed or pressed outward, as he testified that he was, by some other passenger at the rear of the car, would plaintiff have collided with the trolley pole by which he was thrown from the car step? Answer: No.

"Thirteenth question: If the court shall be of the opinion that plaintiff is

entitled to a judgment in his favor, what sum will reasonably compensate him for his injuries? Answer: Twelve hundred dollars."

Upon such verdict judgment was entered in favor of the plaintiff, from which judgment defendant appeals.

Bowler & Bowler, for appellant.

Collins & Collins, for respondent.

Opinion by BARNES, J.:

The complaint charged that the defendant was negligent in not supplying sufficient seating capacity, in consequence of which plaintiff was obliged to stand on the step of the rear platform of the car; that defendant was negligent in placing the poles which supported the trolley wires too close to the track, and that plaintiff was pushed outward by the crowd on the rear platform swaying against him, owing to the motion of the car, and was injured by coming in contact with one of the trolley poles. The jury found that the defendant was negligent in placing the trolley pole as close to the track as it was placed, but in effect found that this negligence was not the proximate cause of plaintiff's injury. The court submitted three other questions to the jury bearing on the negligence of the defendant, and in answer thereto the jury found that in the exercise of ordinary care the conductor should (1) have discovered and removed plaintiff from the car step before the car started; (2) that the conductor should have informed plaintiff before the car started that he could not obtain a seat; and (3) that after the car started the conductor should have discovered the plaintiff on the step and should have removed him therefrom before he was injured. The jury found that each of these alleged negligent acts was the proximate cause of the injury. No amendment of the complaint was asked or allowed, and the appellant asserts that it was error to permit a recovery on a charge of negligence not relied on in the complaint. If the pleader had any intention of charging these acts of negligence, he did not make a very happy use of language to express such intent, and under the very liberal rules that have been adopted for the construction of pleadings it is difficult to read out of the complaint any charge of negligence against the conductor, unless it is found in the averment that defendant failed to furnish plaintiff with a seat, something that defendant ad-

mittedly could not do without depriving some other passenger of the seat which he occupied.

It has often been held that a defendant in a personal injury action is entitled to know what specific act or acts of negligence the plaintiff seeks to charge him with so that he may prepare his defense. *Odegard v. North Wis. Lumber Co.*, 130 Wis. 659, 676, 110 N. W. 809; *Miller v. Kenosha Electric Ry. Co.*, 135 Wis. 68, 73, 115 N. W. 355. This rule manifestly operates to promote justice and fair play and we have no intention of departing therefrom in any case where failure to observe it operates to the disadvantage of the defendant on the trial.

In the present case substantially all of the evidence on which these findings were based was given by the conductor, and it is difficult to see how the defendant was injured by failure to plead more specifically the negligent acts found by the jury. The conductor said he was near the middle of the car when it was brought to a stop at station No. 7 by the motorman to let on passengers, and that he did not leave his place, but gave the signal to start when some one on the rear platform said all right. No showing was made on the motion for a new trial that defendant had or could produce any additional evidence that would or could have any bearing on these questions, and it was not claimed in this court that any such evidence would be forthcoming if a new trial were granted.

If the conductor knew of plaintiff's dangerous position and failed to warn or remove him, he would be guilty of a negligent act. If he did not know, and if the jury might find that he was negligent because he failed to learn, we would have a case of negligence established as to either situation, and nothing that could be presented in the way of additional evidence on the point involved could affect this question. So, while we think that the court should have ordered the complaint to be amended and should have given the defendant an opportunity to make a showing of surprise if it could, before submitting the questions complained of to the jury, it is apparent in the present case that the failure to observe the formality of amending the complaint did not harm the defendant in any way, and for this reason there should be no reversal on this ground.

There was sufficient evidence to warrant the jury in finding that the defendant was negligent. The car was apparently overcrowded and so were the vestibules, and passengers were standing

on the steps leading into the rear vestibule. It was about 6 o'clock on December 24th, long after dark at this time of the year. In this situation the car stopped to let on still more passengers at station No. 7. There were seven passengers to take the car at this place. Two of them climbed onto the rear fender, and the plaintiff got on the lower step of the car. The other four were unable to crowd on at all. The conductor knew of the proximity of the trolley poles to the track and of the danger therefrom to passengers who might be overhanging the car. He should have known of the propensity of the average passenger to crowd onto a car if it were possible to get a foothold, rather than to walk or wait for another car. Under these circumstances, and considering the high degree of care which a carrier must exercise for the safety of its passengers, the jury might well have reached the conclusion that the conductor did not exercise ordinary care when he failed to satisfy himself before starting the car that his passengers occupied safe positions.

It is further insisted that plaintiff was guilty of contributory negligence and that it should be so held as a matter of law. The jury having found in favor of the plaintiff, we must assume that the evidence most favorable to him on this issue was found to be true. His evidence in substance was that when he stepped onto the lower step of the platform, he supposed he would be able to get into the car and that he had no intention of riding on such step, or of riding at all unless he could get in a safe place on the car, but that the car started immediately after he got on the step, and that he was obliged either to ride in this position or jump off the moving car; that he grasped the stanchions on either side of the steps and was struck before the car came to a stop and before he had any opportunity to get off. It might be mentioned in this connection that plaintiff was evidently no gymnast, being seventy-five years of age. Upon this evidence the jury might acquit the plaintiff of contributory negligence.

Lastly, it is argued that there was an intervening efficient cause which occasioned plaintiff's injury and, therefore, there can be no recovery. This alleged cause was the surging or swaying of the passengers in the vestibule against the plaintiff, whereby he was pushed outward more than ten inches beyond the side of the car. There is proof to the effect that this swaying was caused by the motion of the car. It is a matter of common knowledge that cars will sway in going around curves, as well as from other causes, and

that persons standing therein will be affected by such motion. Surely this is one of the things which would ordinarily occur and which would tend to make a position such as plaintiff occupied extremely dangerous. The pressure against plaintiff was an incident that resulted from the running of the car and not from any independent agency disassociated from its operation. So we think the rule invoked does not apply to the facts in this case. *Jackson v. Wisconsin Telephone Co.*, 88 Wis. 243, 60 N. W. 430, 26 L. R. A. 101. This particular element of danger was one which defendant should have seen and provided against.

Judgment affirmed.

Doyle v. La Crosse City Ry. Co.

(Wisconsin — Supreme Court.)

1. **LINEMAN; SHOCK FROM SPAN WIRE; EVIDENCE; NEGLIGENCE.** — In an action for injuries to a lineman alleged to have been shocked by contact with a span wire and injured by falling to the ground, evidence examined and held insufficient to show negligence on the part of the defendant.
2. **SAME; WANT OF ORDINARY CARE.** — The defendant is not liable unless the presence of the electricity in the span wire was the result of its want of ordinary care.
3. **CARE REQUIRED IN USE OF ELECTRICITY.** — Greater care is demanded of persons handling electricity than of those who handle mere ordinary substances.

DEFENDANT appeals from judgment for plaintiff. Reported 134 N. W. 364.

Lineman Shocked from Span Wire. — In *Nellis on Street Railways* (2d Ed.), § 438, it is said: "It is well settled that the degree of care required of an employer is measured by the danger of the forces employed. So that what would be sufficient care and foresight in one case would, perhaps, be utterly inadequate in another; and, while generally the law requires simply reasonable care and foresight by the employer in the selection and provision of appliances for the use of the employee, that care and prudence must be apportioned to what may properly be expected of him under the circumstances, and increases in a corresponding ratio with the danger and hazard necessarily connected with the use of the appliances. A company operating an electric street railway is guilty of gross negligence toward a lineman in failing to insulate a "span" wire which is so located as to render it liable to come in contact with the trolley wire and become charged with electricity, exposing those who touch it to death or serious injury."

STATEMENT OF FACTS BY THE COURT.

This is an action brought to recover for personal injuries sustained by the plaintiff while in the employ of the defendant, resulting from a fall from one of the defendant's trolley poles, which pole the plaintiff was preparing for the use of the defendant for trolley purposes. The negligence claimed by the plaintiff is that the defendant allowed a span wire, with which the plaintiff accidentally came in contact, to become charged with electricity, by reason of which the plaintiff received a shock which precipitated him to the ground. The defendant denied that the span wire was charged with electricity, and claimed that the plaintiff fell to the ground accidentally, or by reason of his own negligence. The plaintiff at the time of the accident, September 16, 1909, was an experienced lineman who had been engaged in electrical work in the construction of trolley lines and in other capacities for about twelve years. He had been employed by the defendant about ten days prior to the time of the accident. The defendant owned and operated a double-track street railroad in the city of La Crosse, operated by an electric current of 550 volts, supplied by overhead trolley. The power house of the company was located immediately across the street from the pole where the accident happened. On the day of the accident the plaintiff was at work getting cross-arms ready for new poles, at about 8 o'clock in the morning, when the defendant's superintendent, Shaw, instructed him to put cross-arms on three or four poles on the east side of Third street, immediately opposite the power house. The plaintiff started about this task with a helper named Peterson. They commenced work upon the pole where the accident happened, which was nearly opposite the power house. This was a pole which had been recently put in place, and there were no cross-arms upon it. The only wire attached to it was a guy wire, which extended easterly to the ground. It was attached to the pole about six inches below the point where the lower cross-arm was subsequently placed by plaintiff. To the east of this new pole was an older pole, which was still in use, and supported the span wire in question, which extended across the street at this point and supported the trolley wires. This span wire was made of seven or eight strands of twisted galvanized iron, and passed the new pole about four inches away from and to the south of it, and about four inches below the point where the guy wire was attached to the new pole. From this span wire were sus-

pended three insulated hangers, to which three trolley wires were attached. Two of these trolley wires seem to have been the wires over the tracks of the railway, and the other over the track which led into the house. The hangers or insulators by which the trolley wires were attached to the span wire were the Ohio Brass Company's hangers, and are supposed to be thoroughly insulated, so that the electric current cannot escape from the trolley wire to the span wire. The plaintiff was equipped with spurs and a safety belt, and mounted the pole to a point where he could conveniently handle the cross-arms, and put them in the gains which had been cut in the pole for the purpose. His assistant, Peterson, passed to him the cross-arms, and the plaintiff put them in position. While the plaintiff was putting the cross-arms in position Peterson stood very near him upon the top of the elevated wagon called the "Jim wagon," which was used by the defendant in the repairing and construction of its lines, and the platform of which was about sixteen feet from the ground. He had his arm over the span wire in question. After the plaintiff had placed the cross-arms in position and bolted them he proceeded to pull the metal braces, which were upon the cross-arm, down in order to screw them in position. Before this work was accomplished, one Sewojski, the defendant's assistant superintendent, came to the place and got onto the Jim wagon and told the plaintiff to stop his work there and go to Onalaska and cut off some wires upon a certain pole there and leave Peterson to finish up the job he was then engaged in. The plaintiff testifies that he then took off his safety belt, put his right hand upon the guy wire, and reached up his left hand to the south cross-arm in order to see whether it was plumb with the north cross-arm, and that while he was doing this his left hand came in contact with the span wire, which was just in front of his breast, and an electric current gripped him, and that is all that he remembers until he woke up in the hospital. The fact is undisputed that he fell from the pole. The helper, Peterson, denies that the plaintiff touched the span wire, and says that he fell as he was starting to get down by reason of his spurs not taking hold of the pole. Plaintiff was very seriously injured.

The jury returned the following verdict:

"Q. 1. Was the span wire in question charged with a dangerous current of electricity at the time that plaintiff was directed to work upon the pole from which he fell? A. Yes. Q. 2. If you answer question No. 1 'Yes,' then was such condition of the span wire due to defective and insufficient insulation of

one or more of the hangers supporting the trolley wire attached to such span wire? A. Yes. Q. 3. If you answer question No. 2 'Yes,' then could the defendant in the exercise of ordinary care have discovered and repaired such condition before directing the plaintiff to go to work upon said pole? A. Yes. Q. 4. If you answer question No. 2 'Yes,' then was such condition of the wire the proximate cause of plaintiff's injury? A. Yes. Q. 5. Was the plaintiff wanting in the exercise of any ordinary care which contributed to his injury? A. No. Q. 6. If the court shall finally determine that the plaintiff is entitled to recover, at what sum do you assess his damages? A. \$12,000."

The court denied successive motions made by defendant for judgment notwithstanding the verdict, to change the answers to a number of the questions in the verdict, and enter judgment thereon as so changed, and to set aside the verdict and for a new trial, and rendered judgment on the verdict for the plaintiff, from which judgment the defendant appeals.

George H. Gordon and Woodward & Lees, for appellant.

Morris & Hartwell, for respondent.

Opinion by WINSLOW, C. J.:

The plaintiff's claim is that he took hold of the guy wire with his right hand in order to assist himself upward, and that as he raised his left hand to adjust the cross-arm the hand came in contact with the span wire immediately in front of him, and that he received a shock of 550 volts, which gripped him, contracted his muscles, and then released him and let him fall to the ground. It is urged that this story is incredible; but we have not been able to come to that conclusion. It is true it was flatly denied by the evidence of the plaintiff's helper, Peterson, and it is true that the jury would have been amply justified in concluding from the evidence that the plaintiff fell from the pole without any electric shock; but we are not convinced that the plaintiff's version is impossible.

Our difficulty has been to discover any justification for the finding that the defendant was guilty of negligence. Granting that there was in the span wire at the moment of the accident a 550-volt current of electricity which found its way to the ground through plaintiff's body, when he touched the span wire with his left hand while his right hand was grasping the guy wire, still the defendant is not liable unless the presence of the electricity in the span wire was the result of its want of ordinary care.

The negligence found was that there was defective insulation of

one or more of the hangers which the defendant ought to have discovered and repaired before the accident.

It is true that greater care is properly demanded of persons who are handling so dangerous an agency as electricity than of those who handle mere ordinary substances, yet the criterion of ordinary care is the same; it is such care as the majority or great mass of mankind exercise under the same or similar circumstances. *Nagle v. Hake*, 123 Wis. 256, 101 N. W. 409.

In the present case there is no evidence tending to show negligence by the defendant, unless it be the evidence tending to show the presence of electricity in the span wire. Even if that condition existed, however, it does not necessarily follow that the defendant was guilty of want of ordinary care. If it appeared without dispute that the span wire had been put up on the previous day by competent workmen, using approved material and appliances, and that it was to all appearances in perfect condition, we suppose none would claim that there would be any sufficient ground for a finding of negligence. There are limits to human endeavor. Even if we exercise the greatest care in our power, accidents will sometimes unaccountably happen. The risk of such accidents all must assume. In the present case it seems, as far as the evidence shows, that there was nothing in the construction or appearance of the wire or the hangers that would even suggest that the insulation had become defective. The hangers were of an approved pattern in common use. They were composed of a copper "ear" with a groove on the top surface into which the trolley wire fitted and was fastened. From this a bolt two or three inches in length, constructed of some very tough, hard, nonconducting substance, extended upward into the iron ear which is attached to the span wire, and over this bolt, screwed on to the top of the ear, is a metal cap which keeps the insulated bolt in place. So long as the nonconducting bolt is intact and the cap is screwed on, even though it be not fully screwed in place, there is no possibility of the trolley wire or the ear in which it rests coming in contact with the span wire, or the metal part of the hanger.

It appears that two of the hangers on the span wire in question had been in place two or three years, and one had been in place from five to seven years. There is no evidence that any of them had ever been loose or out of order in any way. They appeared to be all right on the morning in question. The plaintiff himself testifies that when he reached the top of the pole he looked around

and saw that things were all right; the insulators and the trolley wire looked all right; he noticed the feed wire running across the street above the trolley wires to the top of the old pole, and the insulator was all right there. He was but a few feet from all these fixtures. It seems to be established beyond peradventure in the case, therefore, that there was absolutely nothing to indicate any defect in the insulation of any charged wire at that place on the morning in question, and that, on the contrary, every appliance had the appearance of being in perfect order. As said before, it does not appear that any of the appliances at this place had ever been out of order, or that the span wire had ever been known to be charged before.

This being the case, there can be but one possible ground of negligence claimed, namely, that the defendant had failed to exercise due care in inspecting the wires and insulators. If there were proof that such hangers became frequently out of repair, and allowed the current to escape to the span wire, it might perhaps be claimed that there was evidence enough to go to the jury on the question whether the defendant was negligent in not making more frequent inspections.

But there is no such evidence. On the contrary, the plaintiff himself says that from his experience as a lineman he did not know that such insulators frequently became leaky or defective, and that he never saw one become defective so that it would leak. He admitted that he had been a trolley lineman for years.

Another lineman of long experience with trolley wires, named Gibbons, called as a witness by the plaintiff, testified that he had known of the cap of a hanger becoming loose by reason of the trolley passing under it day by day; that he had known such things to happen at several places; that he could not say how long such hangers had been on before they became loose (it might be six months or a year, or at the end of ten years); that he could specify no time within which he had known a hanger to become loose; that the loosening of the cap would not necessarily destroy the insulation; that it might last for several years in that condition, giving perfect insulation.

This is practically all of the testimony on the subject of the length of time which ordinarily elapses before the loosening of a hanger takes place from use, and it will be readily seen that there is absolutely no testimony that hangers frequently become loose or defective so as to permit the escape of electricity; in fact, the only

reasonable inference to be drawn is that it is generally, if not always, a matter of years. Now the testimony is undisputed that the company made a thorough test of the whole line twice a year, in spring and fall, going over and tightening up all the hangers, and that the whole line was gone over in the spring of 1909 to see that the insulation was perfect and nothing loose.

In view of the lack of any evidence tending to show that more frequent inspection was customary with other companies, or was called for by the fact that the hangers easily or frequently became defective from use, and the further undisputed fact that there was absolutely nothing to indicate any defect in any of the hangers in question at the time of the accident, we do not think that the jury was entitled to find any want of ordinary care on the part of the defendant in the present case.

This view of the case obviates the necessity of the examination of any further questions.

Judgment reversed, and action remanded for a new trial.

McCoy v. Minneapolis, St. P., R. & D. Electric Traction Co.

(Minnesota — Supreme Court.)

CONSTRUCTION OF ROADBED ACROSS HIGHWAY; LIABILITY OF COMPANY FOR MAINTENANCE OF TEMPORARY WAY AROUND OBSTRUCTION; INJURY TO TRAVELER OVER TEMPORARY WAY; EVIDENCE. — Defendant, to facilitate public travel upon a highway over and across which it was constructing its railroad grade, in which work it completely obstructed the highway, voluntarily acquired from an adjoining landowner the right of passage over his land, and impliedly, if not expressly, invited the public to make use of the substituted way. It is *held* that defendant was under legal obligation to keep and maintain the way so provided in reasonably safe condition for public use.

Evidence considered, and *held* to support the verdict.

(Syllabus by the Court.)

DEFENDANT appeals from order denying a motion for judgment or new trial after verdict for plaintiff. Reported 134 N. W. 293.

Boutelle & Chase and *R. T. Boardman*, for appellant.

Albert Schaller, for respondent.

Repair of Highway. — The obligation of a street railway company to repair its roadbed, tracks and appliances is discussed in *Nellis on Street Railways* (2d Ed.), § 372.

Opinion by BROWN, J.:

Action for personal injuries, in which plaintiff had a verdict, and defendant appealed from an order denying its alternative motion for judgment or a new trial.

The facts, briefly stated, are as follows: Defendant was engaged in constructing its roadbed as it extended over and across a public highway. The railroad right of way crossed the highway at right angles, and the excavations thereon completely obstructed the highway during the work of construction. The cut through the highway was fifty feet wide and about ten feet deep. To avoid interrupting travel upon the highway, defendant's chief engineer acquired from an adjoining landowner the right of passage for teams over his property for a short distance north and parallel with the railroad, thence across the right of way, and back to the highway; and people traveling upon the highway made use of this passageway around the obstructions. There was no other highway within several miles which the public could have used pending defendant's work, and those having occasion to travel upon this one were of necessity compelled to pass over the temporary way provided for them by defendant. On the day in question plaintiff and his son approached the railroad grade upon the highway, and upon reaching the right of way drove their team upon the way so provided by defendant, and when within about seventy feet from the place where defendant's excavations were going on a steam shovel, operated by an independent contractor in grading the railroad, was started in motion, and a sudden and violent exhaust of steam and noise from the machinery frightened the horses, causing them to plunge forward, throwing the wheels of the wagon into a rut in the improvised roadway, upsetting the wagon, and throwing plaintiff to the ground, causing the injuries here complained of. Plaintiff brought this action for damages, charging in his complaint that defendant was negligent in not providing a reasonably safe way around the obstructions created by it in the highway, and in causing the horses to become frightened by carelessness in the operation of the steam shovel. The court instructed the jury that no recovery could be had for negligence in the operation of the steam shovel, because of the fact that it was being operated by and was under the control of an independent contractor, but further charged that if the failure of defendant to provide a reasonably safe passage around the excavations concurred with the sudden noise from the steam shovel, and the combination of both was the

proximate cause of the accident, then plaintiff could recover. Plaintiff had a verdict for \$640.

The assignments of error present the questions (1) whether the evidence supports the verdict; and (2) whether the court erred in its instructions to the jury.

1. We have examined the record with care, and reach the conclusion that the evidence sufficiently supports the verdict in all essential respects. That plaintiff's team became frightened by the sudden and violent noise from the steam shovel, causing the horses to plunge forward, drawing the wheels of the wagon into the rut in the traveled way, and that this combination was the proximate cause of plaintiff's injuries, is clear from the evidence. The only serious question in the case is whether defendant is chargeable with negligence in respect to the condition of the passageway leading around the obstructions in the highway. We come directly to that question.

2. The question of the rights, duties, and obligations of a railroad company in situations like that here presented — when in the construction of its road over and across a public highway it wholly obstructs travel thereon pending the completion of its work — is not, for reasons hereafter to be stated, necessarily involved, and we do not consider it. Counsel for defendant earnestly contended on the oral argument that, since the company possessed no power to lay out public highways, it could not be required to provide a passageway over private property for the accommodation of the traveling public, and, further, since the public authorities had not required that defendant provide a substituted way, that no duty rested upon it to do so, and hence that no liability exists because of the unsafe condition of the substituted way in fact provided by defendant. There can be no serious question that in situations like that here presented the company owes some duty to the traveling public. Just what the duty is we need not, for the following reasons, determine at this time.

It was conceded by defendant, both on the oral argument and in its brief, that the obstruction of the highway was illegal, and might have been enjoined by proper proceedings for the purpose, and, further, that it was within the power and authority of the public officials having jurisdiction of the highway to have required of defendant, as a condition to the right to obstruct the highway during the completion of its work, the construction of a temporary way around the same, and, if such a requirement had

been made, that defendant would have been liable for any injury occurring in consequence of its failure of compliance therewith. But counsel insisted that since no such order was ever made, and defendant possessed no authority to lay out a public highway, it is not liable. We are unable to concur in this contention. At the time defendant entered upon the highway, or soon thereafter, it recognized an obligation on its part to provide a passage around the obstruction created by it, and voluntarily undertook to provide the same. It anticipated action by the public authorities, and acquired of an adjoining landowner the right of passage over his farm. Having assumed the obligation without specific orders or directions from the public authorities, the duty of exercising reasonable care to provide a safe way applied to the same extent as though its action had been in compliance with and pursuant to public command. Its duty in the premises would be the same in either case. What the situation would have been, had it appeared that defendant had been duly commanded by public authorities and was unable to secure the right from the landowner, is therefore of no consequence. Defendant voluntarily performed in its own way a duty which it recognized, and which it could have been required to perform in some manner, though perhaps not in this particular manner. That defendant acquired this right of passage for the benefit of the public is clear from the evidence, and that the public was thereby, impliedly at least, if not expressly, invited to make use of it, is also clear. At folio 153 the chief engineer of defendant expressly stated that he acquired the right for the public use; and having so acquired it, and so invited the public to use the same as a substitute for the regular highway, defendant was under legal obligation to keep and maintain it in reasonably safe condition for travel.

3. We discover no error in the instructions of the court of a nature to justify a new trial. While the court stated to the jury that defendant was under legal obligation and duty to provide the substituted way, the case in fact went to the jury upon the question whether defendant was negligent in the maintenance of the way voluntarily acquired by it. The instructions, taken as a whole, presented the case properly to the jury.

Order affirmed.

PHILIP E. BROWN, J., being absent on account of sickness, took no part.

Sherzer v. Lincoln Traction Co.

(Nebraska — Supreme Court.)

ELECTRICITY; MAINTENANCE OF TROLLEY WIRE ACROSS TRACK OF STEAM RAILWAY; CARE REQUIRED; INJURY TO EMPLOYEE; PRESUMPTION OF NEGLIGENCE; RELEASE; JOINT LIABILITY; INSTRUCTIONS.—The right to construct and maintain an overhead trolley wire carrying a deadly current of electricity across the tracks of a steam railway imposes upon those having such privilege the duty of so managing affairs as not to injure persons lawfully operating the trains of the railroad company.

An injury to an employee of the railroad company from contact with such an overhead trolley wire affords a presumption of negligence, and requires the party maintaining the structure to show that the dangerous condition of its wire was caused by some unforeseen act or agency beyond its control.

A release of the railroad company by the injured employee in consideration of the payment of wages and a small gratuity given the injured person, where no liability existed upon the part of the railroad company, is not a defense to an action against the party causing such injury.

Instructions examined and approved.

(Syllabus by the Court.)

DEFENDANT appeals from a judgment for plaintiff. Reported 136 N. W. 62.

C. S. Allen, for appellant.

Greene & Greene, for appellee.

MAINTENANCE OF WIRE OVER RAILROAD TRACK.

Several cases sustain the liability of a street railway company for injuries to a servant of a steam railroad company injured by coming into contact with a wire maintained by the street railway company across the tracks of the railroad company. Thus, in *Erslew v. New Orleans, etc., R. Co.*, 49 La. Ann. 86, 21 So. 153, the opinion was expressed that a street railway company is negligent in placing a guy wire over the track of a steam railroad so low as to interfere with the employees of the railroad company, and the railroad company is negligent in permitting a street railway company to so place and maintain a wire.

In *Pittsburgh Rys. Co. v. Chapman*, 145 Fed. 886, 76 C. C. A. 418, it appeared that a street railway company crossed a railroad track at grade; the tracks were thereafter raised a few feet, but the trolley wire of the street railway company passing over the railroad track was not elevated to correspond with the elevation of the tracks, and, by reason thereof, an employee of the railroad company was injured. It was held that the question of the street railway company's negligence was properly submitted to the jury. The court said: "Assuming that the defendant had the right to cross the railroad with its structure of tracks and overhead wires, it was legally bound so to use this

Opinion by BARNES, J.:

Action to recover damages for personal injuries sustained by the plaintiff by coming in contact with the overhead trolley wire of the defendant where its track crosses the line of the Chicago & Northwestern Railway Company on North Fourteenth street in the city of Lincoln. The cause was tried to a jury in the district court of Lancaster county, where the plaintiff had the verdict and judgment, and the defendant has appealed.

The appellant contends that the verdict is not sustained by the evidence. The abstracts disclose, without dispute, that in the spring of 1887 the Chicago & Northwestern Railway built its railroad across Fourteenth street in the city of Lincoln, and in the year 1891 the defendant constructed its street railway, consisting of tracks, poles and an overhead trolley wire upon and along North Fourteenth street, across the railroad tracks, for the purpose of transporting passengers to and from the Nebraska State fair; that for about a week before and after that event the defendant company uses its track on North Fourteenth street for that purpose, and that for the remainder of each year that part of its system is used very infrequently, if at all; that up to the 18th day of October, 1909, the defendant had maintained its overhead trolley wire where it crosses the railroad tracks at a sufficient height to enable the employees of the Northwestern Company to safely operate its trains by riding, as it was necessary for them to do, upon the top

right and these appliances as not to injure those lawfully using or employed upon the railroad at the said crossing. Its duty was such by relation to the place of crossing, and to the persons lawfully within any danger, to be occasioned by too low a placement of the wire. So far the defendant has clearly no right to complain that the question of its negligence raised by these facts and circumstances were submitted to the jury."

In *Saginaw Union St. Ry. Co. v. Michigan Central R. Co.*, 91 Mich. 657, 52 N. W. 49, 4 Am. Electl. Cas. 243, it was held that, while an electrical street railway company has no right to string its wires across a steam railroad track at such height as to interfere with the proper operation of the railroad company, and the latter would in case of neglect or refusal of the former to place its wires at the proper height have a right to remove or raise the same, yet this must be done with due regard to the business of the street railway company and so as to do as little harm as possible; and where the railroad cuts such wires when the line is in full operation in the daytime, although there were several hours in each night when the wires might have been raised or removed without injury to the business or property of the street railway company, it is guilty of trespass *ab initio*, and becomes liable for all damages caused to the street railway company.

of its largest freight cars; that on the day above mentioned, at about 7 o'clock in the evening, the plaintiff, while properly performing his duties as yardmaster of the Northwestern Railroad Company, and while riding upon the top of a box car in one of the company's trains of cars, was struck by the defendant's overhead trolley wires, which for some cause, not fully shown by the record, had sagged at the place of crossing sufficiently to allow it to strike the plaintiff in the face; that his face, mouth and tongue were cut and bruised, and some of his teeth were broken or destroyed; that he was badly burned by contact with defendant's live trolley wire, and thereby sustained severe injuries. It appears that it was dark at the time the accident occurred, and plaintiff could not see the condition of the trolley wire. It further appears that frequently for several years before that time, and once upon that day, plaintiff had passed under this wire, while riding upon one of the highest freight cars in use by the railroad company, without injury or danger, and therefore had the right to assume that the wire was still in its former position. There was some testimony introduced which tended to show that the next morning after the accident occurred the wire was sagged at that point, and hung from six inches to one foot below the place where it had theretofore been maintained. Plaintiff also testified that he noticed that the supporting poles looked old and weak.

Defendant argues, upon the foregoing facts, that plaintiff cannot invoke the rule *res ipsa loquitur*, or, in other words, that negligence on its part is not to be presumed. Section 1, chap. 26a, Comp. St. 1911, provides in part that all persons, associations, and corporations engaged in the generating and transmitting of electric current for sale in this State for power or other purposes are hereby granted the right of way for all necessary poles and wires along, within and across any of the public highways of this State. It further provides, among other things, that all such wires shall be placed at least twenty feet above all road crossings, and that all such poles and wires shall be so placed as not to interfere with the public use of any such highways; that such wires shall in no case be maintained at a less height than twenty-seven feet above the top of the rails of any railroad tracks. It also provides that nothing contained in that section shall be construed to grant any rights within the corporate limits of any village or city of the first and second class, or of the metropolitan class in this State.

The record contains no ordinance or ordinances of the city of

Lincoln relating to that subject. Therefore, in the absence of direct statutory provisions, we are compelled to resort to the rule of the common law in such cases in order to determine this question.

In 1 Joyce, *Electric Law* (2d Ed.), § 409, it is said:

"The fact that a street railway is a proper street use will not entitle it to so construct its line across the tracks of a steam railroad as to substantially interfere with or obstruct the latter in the enjoyment of its rights."

It was said by the court in a case in Connecticut that a steam railroad

"holds its right of way charged with the performance of a public trust for its continuous use for public accommodation. * * * Its railroad is a great avenue of communication between one part of the State and another, and between this and other States. Any impediment to its safe and proper use is a matter of public concern, not to be measured by money, or dealt with on the footing of a claim for damages."

New York, N. H. & H. R. Co. v. Bridgeport Traction Co., 65 Conn. 410, 32 Atl. 953, 29 L. R. A. 367. So, where it is proposed to construct an overhead trolley across the tracks of a steam railroad, the wires should be suspended at sufficient height to permit the free operation of the railroad. *Erslew v. New Orleans & N. E. R. Co.*, 49 La. Ann. 86, 21 South. 153.

Proper construction alone does not meet the full duties and obligations imposed upon the traction company in such a case, but such duty extends to the proper maintenance thereof at all times.

"Entirely apart from the fact that the wires may be charged with a dangerous current, the fact that such a structure is set up in a public street, even though duly authorized, involves the obligation to take care that it shall be constructed of good materials, in a substantial manner, so as to withstand all strains that may reasonably be anticipated, and that it shall be maintained in good repair." *Keasbey, Electric Wires* (2d Ed.), § 233.

In *Excelsior Electric Co. v. Sweet*, 57 N. J. Law, 224, 30 Atl. 553, the court said:

"The general rule is that the occurrence of the accident does not raise the presumption of negligence; but, where the testimony which proves the occurrence by which the plaintiff was injured discloses circumstances from which the defendant's negligence is a reasonable inference, a case is presented which calls for a defense."

It has been held in other cases that from the happening of such accident in the absence of explanatory circumstances, negligence will be presumed, and the burden is upon the defendant of showing ordinary care.

In the notes to *Western Union Telegraph Co. v. State*, 31 L. R. A. 572, 576, 82 Md. 293, 33 Atl. 763, 51 Am. St. Rep. 464, it is stated that

"the construction and maintenance of electric lines in the highways being a matter wholly under the control and care of the parties building them, and the maintenance being wholly under the care of the parties owning them, the court usually holds that the fact of an electric wire falling or sagging into the street in such a way as to obstruct travel, and cause injury, is *prima facie* evidence of negligence on the part of the company."

In 2 Joyce, Electric Law (2d Ed.), § 608, it is said:

"We have already stated in a prior part of this work that it is the duty of electrical companies whose wires are suspended along or across the streets and highways to string them in such a manner as not to interfere with or obstruct public travel. If a traveler who is free from contributory negligence is injured by contact with wires stretched along or across a public highway, he may recover from the company maintaining such wires, for the injury."

It appears that the box car upon which the plaintiff was riding at the time he was struck by the defendant's trolley wire was approximately thirteen feet and six inches high, that the plaintiff was six feet in height, and it would thus seem clear that defendant's wire by which he was struck and injured was only about nineteen feet above the railroad track. Therefore it may be reasonably inferred from the undisputed facts of this record that the height at which the defendant constructed and maintained its trolley wire was insufficient to enable the railroad company to operate its trains with safety to its employees.

We are therefore of opinion that the plaintiff made a case which called for explanation on the part of the defendant, and it was incumbent upon it to show that it had constructed and maintained its wires at a suitable and sufficient height, or that the accident was caused by the happening of some event beyond its control, and was not caused by its negligence. It follows that the defendant's contention upon this point should not be sustained.

Defendant further contends that the undisputed testimony shows that the plaintiff accepted the sum of \$50 from the railroad company in satisfaction of the damages he had suffered by the acci-

dent upon which this suit is based, and that such payment and satisfaction operated to release the defendant from liability in this case. Upon this question the evidence discloses that the payment made to the plaintiff, for which the release in question was given, included his wages during the time he was unable to perform his labors as yardmaster; and the sum of \$20 to enable him to have his teeth repaired, which it is claimed was given to him as a mere gratuity on the part of the railroad company. Plaintiff also testified that it was never his intention by the acceptance of this money to release his claim against the defendant. Appellant's argument proceeds on the theory that the railroad company was a joint tortfeasor with the defendant, and if this were true defendant's contention would be well founded.

As we view the record, it contains nothing which shows or tends to show that the railroad company was guilty of any negligence which contributed to defendant's injury. It is suggested that it was the duty of the railroad company to have erected guards, or what may be called a "whip-lash" warning signals, at a suitable distance from and on each side of the street crossing in question, for the purpose of warning its employees to avoid being struck by defendant's trolley wire. It would seem that there is no merit in this suggestion, for it was the duty of the defendant to erect and maintain its wires in such a manner as to in no wise interfere with the safe operation of the railroad company's trains at the point in question; and not only plaintiff, but the railroad company as well, had the right to presume that the defendant had suitably performed its duty in that behalf. We are therefore of opinion that the payment and release in question in no way inured to the benefit of the traction company.

Finally, it is contended that the court erred in giving paragraphs 7, 8 and 9 of its instructions to the jury. An examination of the instructions complained of satisfies us that they are in accord with the views heretofore expressed in this opinion and afford no basis for a reversal of the judgment.

For the foregoing reasons, the judgment of the District Court is affirmed.

Alabama City, G. & A. R. Co. v. Heald.

(Alabama — Supreme Court.)

PERSON WHILE HOLDING FRIGHTENED HORSE STRUCK BY CAR AND KILLED; EVIDENCE; RES GESTÆ; CONCLUSIONS. — In an action to recover for the death of plaintiff's intestate, who while holding a frightened horse by the bridle was thrown in front of defendant's car and killed, evidence that deceased told witnesses that "he is the biggest fool on earth about a car," is inadmissible as part of the *res gestæ*.

Evidence by witnesses of the accident that "the motorman had no time to stop the car before it struck Heald" was properly excluded as mere conclusions of the witnesses.

DEFENDANT appeals from a judgment for the plaintiffs. Reported 59 So. 461.

Hood & Murphree, of Gadsden, for appellant.

Denson & Denson, of Birmingham, for appellees.

Opinion by SAYRE, J.:

* * * * *

Plaintiffs' intestate came to his death under the wheels of an electric street car operated by defendant along a street of Attalla. Intestate was driving a horse and buggy out of an alleyway which debouched into the street along the middle of which ran defendant's track. The driveway of the street was about fifty feet wide. Defendant's car was turning into the street from a cross-avenue one-half a block away. The car moved along at a rate of speed estimated by the witnesses at four or five miles an hour. Intestate, evidently observing the approach of the car, alighted from the buggy and held the horse by the bridle or the reins near the bit. The horse showed fright, and intestate's effort to restrain him was noticed by the motorman. As the car approached, the horse began to rear and plunge, carrying intestate into the street and somewhat to the west, the direction in which

Res Gestæ. — For a discussion of the admissibility of statements of a motorman relative to an accident as *res gestæ*, see note to *Champlin v. Pawcattuck*, etc., Ry. Co., p. 521. See also Chamberlayne's *Modern Law of Evidence*, §§ 6, 47, 48, 1304 and 1344.

* Portion of opinion omitted as not material to street railway law.

the car was moving. The car slowed up — some of the witnesses say, stopped — shortly before it got opposite the mouth of the alleyway. When it came into collision with intestate, it had either started again, or its speed had been accelerated. After the collision, it moved through a space variously estimated at from eight to sixteen feet; its front wheel stopping on the body of deceased. On the evidence adduced plaintiffs' inference of negligence on the motorman's part and claim to a recovery might have been urged upon the jury in two phases: One, that the horse moved in a way indicative of fright and without pause from the sidewalk to the railway track in front of the moving car; the other, that after carrying deceased upon or in evident dangerous proximity to the track, the horse had become more quiet, and that thereupon the motorman ran the car against deceased. Defendant's theory of the facts is that after the horse had become quiet, and while deceased was yet at what seemed to be a safe distance from the track, the motorman moved the car to pass deceased, as a prudent motorman, they say, might have done under the circumstances, whereupon the horse plunged forward, striking deceased with his shoulder or the shaft of the buggy and throwing deceased immediately under the overhanging front of the car, after which no human effort could have saved him — a theory of inevitable accident.

To add weight and credit to its contention that the situation after deceased had taken his horse by the head at the sidewalk, or when he had succeeded in measurably quieting the animal after it had carried him into the street, if this last be the true version of what happened, was such as to justify a prudent motorman in supposing he might safely continue the movement of the car, and that what subsequently occurred was not in reason to be expected, but was the result of a most unusually nervous and foolish disposition of the horse, unknown to the motorman, and thus to negative the negligence imputed to the motorman in the management of the car in view of the horse's fright and the efforts of plaintiffs' intestate to restrain him, defendant offered to show by a witness that when deceased had gone to his horse's head, upon witness asking deceased whether his horse was afraid of the car, deceased had replied, "He is the biggest fool on earth about a car." The witness had clearly indicated that he would so testify. The objection to the question was that it called for immaterial, irrelevant, illegal and incompetent testimony; that it called for hearsay. For the court's ruling in excluding this testimony it is said that, if relevant

and competent for any purpose, it was to prove the contributory negligence of plaintiffs' intestate which was not pleaded.

Appellant's insistence is that the declaration offered in evidence was a part of the *res gestae*, had probative effect in the establishment of its theory of the facts, and should have been received. Appellees concede, and properly we think, that if the prudence of deceased in clinging so long to his horse had been made an issue in the case by a plea of contributory negligence, as conceivably it might, this utterance would have been admissible on the idea that it was a contemporaneous verbal act illustrative of what else the declarant was doing. In *Campbell v. State*, 133 Ala. 81, 31 South. 802, 91 Am. St. Rep. 17, the court said broadly that:

"Whenever evidence of an act is in itself competent and admissible as a material fact in the case and is so admitted, the declarations accompanying and characterizing such act become and form part of the *res gestae* of the act, and as such are competent and admissible in evidence as being explanatory of the act."

This principle has its limitations. The act to be illustrated by such testimony must not only be independently material and provable under the issues made, but the utterance must serve to give character to conduct not complete and definite in itself. 3 Wigm. Ev., §§ 1773, 1774. Manning, J., in *Cooper v. State*, 63 Ala. 80, thus states the consideration upon which such expressions are received in evidence:

"What a person says that is explanatory of an equivocal or ambiguous act which he is then doing, or situation which he is then occupying (as that of a person in possession of property) may be proved as *res gestae* (a part of the thing then going on) to elucidate and define the character of such equivocal act or situation."

If the conduct of deceased as constituting contributory negligence had been made an issue in the case, it may be that the jury would have allowed some weight to the utterance of deceased as going to show that he clung to his horse after ordinary prudence dictated that he should let him go. Or if the utterance had been in the hearing of the motorman, it would have been notice to him of the unusual temperament of the horse, and perhaps the jury would have considered that circumstance as sufficient to have called for the exercise by the motorman of an unusual degree of care in dealing with the situation. In that case the evidence might have

weighed against the defendant. But there is no pretense that the motorman heard.

The true and only purpose defendant had in offering evidence of what deceased said about the disposition of his horse was to prove as a fact his uncommon proclivity to fright. An exception to the rule which forbids the use of an unsworn assertion, made out of court, as evidence of the truth of the fact asserted, has been established in favor of contemporaneous spontaneous exclamations. The proper limits of such an exception, as Prof. Wigmore observes, must be elusive. He affirms, however, that its core and substance is universally recognized by the courts. 3 Wigm. Ev., § 1746. It is illustrated in our case of *Dismukes v. State*, 83 Ala. 289, 3 South. 671, where, on a prosecution for breaking into a dwelling house with intent to commit rape, the exclamation of a young woman, on running from her room in her night clothes, that she saw some one at the window,

"being uttered so near the scene of the transaction, and being apparently spontaneous in its nature, * * * was free of all suspicion of device, premeditation, or afterthought,"

was held to have been properly admitted. Another case of the same sort is *Shirley v. State*, 144 Ala. 35, 40 South. 269, cited by appellant. The learned text-writer to whom we have referred quotes the language of Bleckney, C. J., in *Travelers' Ins. Co. v. Sheppard*, 85 Ga. 751, 12 S. E. 18, as among the best statements of the principle of the exception. In that case it was said:

"There must be no fair opportunity for the will of the speaker to mould or modify them. His will must have become and remained dormant, so far as any deliberation in concocting matter for speech or selecting words is concerned. * * * His declarations must be the utterance of human nature, of the genus *homo*, rather than of the individual. Only an oath can guarantee individual veracity. But spontaneous impulse may be sufficient sanction for the speech of man as such — man distinguished from this or that particular man. True, the verbal deliverance in each instance is that of an individual person. But if the state of his mind be such that his individuality is for the time being suppressed and silenced, so that he utters the voice of humanity rather than of himself, what he says is regarded by the law as in some degree trustworthy."

We think the testimony here offered to prove the uncommon disposition of the horse cannot be fairly brought within the reason of the exception. At that time there was no situation calculated to

take a man out of himself. Nor was there any statement of fact or impulse begotten of the occasion. The language used was superlative, but it was the language of individual judgment based upon past observation or experience. The statement and the act it accompanied showed precaution and a reasoned regard for the future. It was elicited by a question. It was no more to be received as evidence of the fact stated than if deceased had made the same statement at any other time or place or on any other occasion. We are impressed with the opinion that to admit the statement in question as competent evidence of the fact stated, and for that purpose it was offered, would be, not to recognize an exception to the rule against hearsay, but to deny the rule itself, and we are unwilling to affirm error of its rejection.

Appellant, for the purpose of a trial, admitted showings for two witnesses who had stood by and observed the accident, but who were absent from court. These showings contained the following statements which, on motion of plaintiffs, were excluded:

"The motorman had no time to stop the car before it struck Heald."

"The motorman had no opportunity to stop the car after the horse plunged out into the street before striking Heald."

"It was done so quickly that he had no chance to stop it."

On motion these statements were excluded. Appellees claim they were bare conclusions of the witnesses and properly excluded. Appellant insists they were the legitimate statements of a collective fact, and ought to have been admitted. There are cases which give strong color to appellant's contention, but none of them, we think, have gone quite far enough to sustain their assignments of error based on these rulings. These conclusions which the witnesses had drawn from observing the occurrence were just the conclusion, in one aspect of the case, which appellant desired to have the jury draw from a consideration of all the evidence. However far witnesses have been allowed to go in the statement of so-called collective facts, they cannot, on any correct principle, be allowed to decide the issue in controversy. It was the appropriate office of the jury to draw the conclusion whether the motorman waited overlong to stop the car from all the circumstances developed in evidence, the circumstances upon which the witnesses predicated their opinion, and which, so far as we can see, might have been stated to the jury. The law does not permit that witnesses shall be put in the place of the jury to draw conclusions for them. *Perry*

v. Graham, 18 Ala. 822; *L. & N. R. R. Co. v. Landers*, 135 Ala. 504, 33 South. 482. It does not appear whether the showings were admitted subject to legal exceptions. There is certainly no intendment that the facts were admitted. Without saying whether appellees may not have lost or waived the right to object, the court below must be justified on the ground that it had the right to exclude the mere conclusions of the witnesses. *B. R. L. & P. Co. v. Rutledge*, 142 Ala. 195, 39 South. 338; *K. C., M. & B. R. R. v. Phillips*, 98 Ala. 159, 13 South. 65.

This court, interpreting section 5365 of the Code, seems to have held that it rests within the discretion of the trial court whether showings shall be taken out by the jury on their retirement. *Shirley v. State*, *supra*.

Charges 5 and 6, refused to defendant, were both elliptical, and in other respects faulty.

It may be that the verdict and judgment in this case were unfair to the appellant. If so, the fact is not made to appear to this court in a way to authorize a reversal. It is certain that there was evidence to support the verdict. Its weight was for the jury. If injustice was done, defendant's remedy was to be had on a motion for a new trial addressed to a judge who knew the case better than we can know it, and who, we may presume, would have set the parties right. On the case presented we cannot see our way to a reversal.

Affirmed. All the justices concur, except DOWDELL, C. J., not sitting.

Palmer v. Portland Ry., Light & Power Co.

(Oregon — Supreme Court.)

1. COLLISION WITH VEHICLE; JUDGMENT ON SPECIAL VERDICT; CONTRIBUTORY NEGLIGENCE. — Where, in an action to recover for injuries sustained from collision of a street car with a vehicle, the findings of fact in a special verdict establish that the plaintiff was guilty of negligence contributing to her injury, which was inconsistent with a general verdict for the plaintiff, judgment should be entered for the defendant, under section 155, L. O. L.

Collision with Vehicle. — For a discussion of the liability of a street railway company for injuries arising from the collision of a street car with a vehicle, see *Nellis on Street Railways* (2d Ed.), §§ 400-402, 414-418.

2. **SAME; INTERROGATORIES; ISSUES; FINDINGS UPON EVIDENTIARY MATTER.** — Where the defendant alleged that, though plaintiff saw and heard or reasonably should have seen and heard said car approaching in time to avoid a collision, she negligently drove upon the track directly in front of defendant's approaching car, and this was denied by the reply, and thus a direct issue raised, a finding that plaintiff, by the exercise of ordinary care, could have seen the car approaching in time to have avoided the accident, was not improper.
3. **SAME; FORM OF INTERROGATORY AS TO ORDINARY CARE BY PLAINTIFF.** — An interrogatory as to whether the plaintiff could have avoided the collision by the exercise of ordinary care on her part is not improperly submitted to the jury without the words, "under all the circumstances," where such omission was supplied by the judge in his charge.

PLAINTIFF appeals from a judgment for defendant. Reported 125 Pac. 840.

STATEMENT OF FACTS BY THE COURT.

This is an action to recover damages sustained by plaintiff for injuries inflicted in a collision between an electric car operated on defendant's street railway and a buggy in which plaintiff was riding. This case was before the court on a former appeal, and is reported in 56 Or. 262, 108 Pac. 211. Another trial was had in the Circuit Court, resulting in a general verdict for plaintiff in the sum of \$425. With the form of general verdict, the court submitted special interrogations, which, with the answers returned by the jury, are as follows:

"(1) Did the car of the defendant, described in the complaint, run at a greater rate of speed than ten miles per hour to the point of collision with the buggy in which the plaintiff was riding, as alleged in the complaint? Answer: Yes.

"(2) Did the motorman in charge of the car in question fail to ring the bell, or otherwise give warning to the plaintiff that the car was approaching her? Answer: Yes.

"(3) Could the motorman have stopped the car by the exercise of ordinary care, under all the circumstances, after it became apparent that the plaintiff was crossing the track in front of the car? Answer: No.

"(4) Could the plaintiff, by the exercise of ordinary care, have seen the car in question approaching her in time to have avoided the accident? Answer: Yes.

"(5) Could the plaintiff have avoided the collision by the exercise of ordinary care on her part? Answer: Yes.

"(6) Was the collision an unavoidable accident on the part of the defendant? Answer: No."

The testimony was the same as stated in the previous opinion, and need not be repeated here. The court entered judgment in

favor of defendant upon the special verdict, disregarding the general verdict. Plaintiff appeals.

Thomas Brown, of Salem (*Carson & Brown*, of Salem, on the brief), for appellant.

R. A. Leiter, of Portland (*Geo. G. Bingham*, of Salem, and *Franklin T. Griffith*, of Portland, on the brief), for respondent.

Opinion by McBRIDE, J.:

Taken as a whole, the findings of fact in the special verdict amount to this: That the defendant was operating its car at an unlawful rate of speed; that the motorman in charge failed to ring the bell, or otherwise give warning of the approach of the car, but that he could not, in the exercise of ordinary care, have stopped the car after it became apparent that plaintiff was about to cross the track in front of it. These findings conclusively settle the fact of defendant's negligence. Conceding, for the purposes of this case, the proposition that finding No. 4 was upon an evidentiary fact, findings No. 5 and No. 6 conclusively establish the fact that the plaintiff, by the exercise of ordinary care on her part, could have avoided the accident, and that the collision was not unavoidable on her part. These findings are conclusive that plaintiff was guilty of negligence, contributing to her injury; and it was the duty of the court, under section 155, L. O. L., to give judgment in accordance with the special findings.

We cannot agree with counsel that finding No. 4 was improper as being merely a finding upon an evidentiary matter. In paragraph 2 of defendant's second defense it is alleged that,

"though plaintiff and her husband saw and heard, or reasonably should have seen and heard, said car approaching in time to adjust their course and avoid a collision,"

they negligently and recklessly drove their horse and buggy upon the track directly in front of defendant's approaching car, etc. This was denied by the reply, and thus a direct issue was raised as to whether plaintiff, in the exercise of ordinary care, might have seen the car in time to have avoided the collision.

The court, in its discretion, might have refused to submit this interrogatory to the jury, and, for that matter, might have refused to submit any interrogatory requested; but, under the circumstances, we do not think its submission was improper, and if it

were this would not necessarily be reversible error. It is a rule of practice that improper findings in a special verdict do not defeat the verdict, but should be disregarded. *Board of Commissioners, etc., v. Bonebrake*, 146 Ind. 311, 45 N. E. 470; *Jones v. Casler*, 139 Ind. 382, 38 N. E. 812, 47 Am. St. Rep. 274; *Equitable Ins. Co. v. Stout*, 135 Ind. 444, 33 N. E. 623.

It is claimed that the court erred in submitting interrogatory No. 5 to the jury without adding to it the words, "under all the circumstances," but this qualification was given in the general charge in this language:

"It is for you to determine whether the defendant departed from the rule of ordinary care under all the circumstances, and under the instructions I have given you; and it is for you to determine whether, under all the circumstances, the plaintiff departed from the rule of ordinary care in a way to contribute to her injury."

And again:

"Ordinary care is such care as a reasonably prudent person would exercise in his own behalf over his own affairs under like circumstances."

The duty of the jury to consider all the circumstances is referred to in other parts of the charge, and is made especially prominent. Now, the ultimate fact is the exercise or failure to exercise ordinary care. The circumstances of the accident are not the ultimate fact, but are evidence by which the ultimate fact is to be ascertained; and, after the explicit instruction of the court to the jury as to the weight and attention they give to all attendant circumstances, it was unnecessary to require them to state, in answer to an interrogatory, that they had done the very thing that the court had by repeated instructions directed them to do. This instruction, given in substantially the same language, is approved in the following cases: *C. & N. R. Co. v. Dunleavy*, 129 Ill. 132, 22 N. E. 15, in which case the court said: "The question substituted by the court submitted to the jury a material and controlling fact, and one which could properly be made the subject of a special finding." See also *Republic Iron & Steel Co. v. Jones*, 32 Ind. App. 189, 69 N. E. 191; *Lake St. Elevated R. R. Co. v. Fitzgerald*, 112 Ill. App. 312; *Chicago City Ry. Co. v. Taylor*, 170 Ill. 49, 48 N. E. 831.

Finding no error in the record, the judgment of the Circuit Court will be affirmed.

BURNETT, J., took no part herein.

Metropolitan Ry. Co. v. Fonville.

(Oklahoma — Supreme Court.)

COLLISION WITH VEHICLE AT CROSSING; CONTRIBUTORY NEGLIGENCE; LAST CLEAR CHANCE. — In an action to recover for personal injuries resulting from a collision with a street car at a crossing, an instruction to the effect that, although plaintiff was guilty of contributory negligence in placing herself in a position of danger, defendant was liable for injuring her if it failed to exercise reasonable care to avoid injuring her after it discovered, or by the exercise of reasonable care might have discovered, that an accident was imminent, is error. The duty of the defendant to avoid the effects of her contributory negligence did not begin until her danger was actually discovered.

DEFENDANT brings error from judgment for plaintiff. Reported 125 Pac. 1125.

Shartel, Keaton & Wells, of Oklahoma City, for plaintiff in error.

Wm. L. McCann, of Oklahoma City for defendant in error.

Opinion by **ROSSER, C. J.:**

* * * * *

Plaintiff was struck by one of the defendant's street cars as she was driving a team and hack across its Broadway track at Main and Broadway, in Oklahoma City. At the first trial no proof was offered by the plaintiff as to the speed of the car. Upon the last

Last Clear Chance Doctrine. — For a discussion of the "last clear chance" doctrine, see the notes and cases cited in 4 St. Ry. Rep. 685; 5 St. Ry. Rep. 192; 6 St. Ry. Rep. 33, 451, 514-527. See also the note to *Mather v. Metropolitan St. Ry. Co.*, p. 477.

Is Actual Discovery of Peril Necessary for Application of "Last Clear Chance" Doctrine. — In *Nellis on Street Railways* (2d Ed.), § 462, it is said: "It has been held in some jurisdictions that plaintiff may recover in an action for negligence notwithstanding his negligence directly contributed to his hurt, if the defendant by ordinary care could have prevented the accident. In Arkansas, Iowa, Texas, Massachusetts and Ohio it is not sufficient that the employees in charge of a street car might by the exercise of reasonable care have become aware of the dangerous position of the party injured in time to avoid striking him, but actual knowledge is essential to relieve the person injured from the effects of his previous negligence."

* Portion of opinion not material to street railway law omitted.

trial the testimony of at least one witness, who was one of two passengers on the car when the plaintiff was injured, was that the car was running fifteen miles an hour. After the case was reversed and remanded by the Supreme Court of Oklahoma Territory, plaintiff amended her complaint and alleged that the car which caused the injury was not properly equipped, and that some of the machinery at the power house of the defendant was not in repair. There are other minor differences in the issues and evidence at the two trials, and, considering these differences, it is proper to remand this case for a new trial, rather than dismiss it. This opinion, however, is not to be construed as passing on the value of the evidence at the last trial, but only that it is substantially different from the evidence on the former trial.

In view of the fact that the case may be tried again, it is proper to notice the assignment that the court erred in giving the following instruction :

"The duty of the plaintiff to use ordinary and reasonable care in crossing a street railroad track is the same in degree and kind as the duty of the defendant to use ordinary and reasonable care in the operation of its cars; and even though the defendant failed to use such care, and the accident would not have happened had such care been used by it, still the plaintiff cannot recover if she herself failed to use ordinary and reasonable care, and but for her failure the accident would not have happened, unless it further appears from the evidence that, notwithstanding such negligence on the part of the plaintiff, the accident would not have occurred, had the defendant exercised reasonable care to avoid the injury after it discovered, or by the exercise of reasonable care might have discovered, that an accident was imminent."

This instruction made the defendant liable for failure to exercise reasonable care to avoid the injury, though plaintiff was guilty of contributory negligence in placing herself in a position of danger, whether she was discovered or not, if by the exercise of reasonable care she might have been discovered. This was error. The exact point was decided in the case of *Oklahoma City Ry. Co. v. Barkett*, 118 Pac. 350, not yet officially reported. It was there held that the giving of an instruction identical with the one set forth above was error. In other words, it was held that the doctrine of "last clear chance" did not intervene to protect a plaintiff from the consequences of his contributory negligence, unless he was actually discovered. This case was followed in *Oklahoma City Ry. Co. v. Diab*, 118 Pac. 351. The cases of *A., T. & S. F. R. Co. v. Baker*, 21 Okl. 51, 95 Pac. 433, 16 L. R. A. (N. S.)

825, and *Clark v. St. L. & S. F. R. Co.*, 24 Okl. 764, 108 Pac. 361, while not so entirely in point, as to the form of the instruction, supported the rule laid down in the *Barkett Case*, and it is supported by numerous cases from other States. It seems clear that this view is proper. If the failure to keep a lookout has any bearing in a case of this kind, it is part of the negligence of the defendant in the first instance, and the plaintiff, because of the contributory negligence, is prevented from recovering on account of it. But if the defendant discovers the perilous condition it becomes charged with a different and active duty — that of avoiding the effect of the contributory negligence.

It is not necessary to consider the other questions assigned as error, for the reason that they are not likely to arise on another trial.

The case should be reversed and remanded for a new trial.

PER CURIAM. Adopted in whole.

Gilcher v. Seattle Electric Co.

(Washington — Supreme Court.)

PERSON ATTEMPTING TO BOARD CAR THROWN TO GROUND AND RUN OVER BY CAR ON PARALLEL TRACK; EVIDENCE; NEGLIGENCE; QUESTION FOR JURY; INSTRUCTIONS; LAST CLEAR CHANCE. — Plaintiff, in an action to recover for personal injuries, alleged that while boarding a car it was suddenly started, throwing him to the pavement, where he was run over by a car

Starting of Car While Passenger Is Getting On. — In *Nellis on Street Railways* (2d Ed.), § 301, it is said: "It is the duty of the persons in charge of a street car to see that the car does not start while a passenger is getting on. It is their duty to know that a passenger is safely on the car before it is started, and a person in attempting to board a car has the legal right to expect and demand that the car will not be started while he is in the act of getting on. It is not the absolute duty of a street railway company to keep its cars stationary after the passenger has mounted the car and before he reaches a place of safety therein, unless there is something to indicate that it would be dangerous to move until he reaches such safety. But the car must not be started with an unusual or dangerous jerk. It is, however, the duty of a conductor, before giving the signal to the employee controlling the power to start the car, after it has stopped to take on passengers, to look around and see that all passengers to take passage at that place are safely on board; and failure to do so is not excused by the fact that he does not see an intending passenger."

on a parallel track and received the injuries for which he seeks to recover. Evidence examined and *held*, that whether the first accident occurred was a question for the jury.

That, it being uncertain whether the first accident occurred and how the plaintiff came to be upon the parallel track, it was error for the court to refuse to instruct the jury that if they found the first accident did not occur they must find for the defendant.

That the doctrine of last clear chance did not apply.

DEFENDANT appeals from a judgment for plaintiff. Reported 124 Pac. 218.

James B. Howe and *A. J. Falknor*, both of Seattle, for appellant.

Robt. W. Jennings, of Seattle, for respondent.

Opinion by **Crow, J.:**

This action was commenced by Henry Gilcher against the Seattle Electric Company, a corporation, to recover damages for personal injuries. From a verdict and judgment in plaintiff's favor, the defendant has appealed.

Appellant owns and operates a double-track cable street railway in the city of Seattle for a distance of thirty blocks or more on Yesler Way from Pioneer square on the west to Lake Washington on the east. West-bound cars are operated on the northerly track, and east-bound cars on the southerly. Respondent, in substance, alleged that on October 1, 1910, he signaled a west-bound car near Twenty-seventh street, indicating his intention to become a passenger; that the gripman stopped a short distance west of the street intersection; that respondent attempted to board the car; that while he was doing so the gripman negligently, suddenly, and without warning started the car; that respondent was thereby thrown with great force to the street pavement over and across the southerly track; that he sustained severe injuries about his head, which immediately rendered him unconscious and placed him in a position of imminent danger; that appellant's servants in charge of the west-bound car made no effort to ascertain what had become of respondent, but left him in his dangerous position; that while he was thus lying across the southerly track in an unconscious condition one of appellant's east-bound cars passed over him, causing the injuries of which he complains; that his position of danger ought to have been known to or discovered by appellant, had it observed due care in the equipment and operation of its west-bound car; that appellant was negligent in failing to see that a careful

watch or lookout was maintained by its gripman in charge of the west-bound car, and in failing to see that the car was equipped with an unobstructed headlight, or with a suitable fender. Appellant pleaded the defense of contributory negligence, affirmatively alleging that, on the night of October 1, 1910, while it was raining, and at a very dark place between Twenty-sixth and Twenty-seventh avenues on Yesler Way respondent, without warning to appellant, either fell or lay down upon or near the track over which appellant's west-bound cars were operated, and that respondent was then intoxicated. The answer also denied all allegations of negligence pleaded in the complaint.

The undisputed evidence shows that respondent, a man about 56 years of age, had resided in Alaska for many years; that he was in Seattle on a brief visit; that about 9 or 10 o'clock on the evening of October 1, 1910, in response to a telephone message, he went to a dwelling house near Twenty-seventh avenue on the south side of Yesler Way, to call upon a woman whom he had known for many years; that another woman was at the house; that during the day respondent had taken several drinks of whisky and port wine; that he took two more such drinks while at the house; that later in the evening one of the women telephoned into the city for a lunch, consisting of oysters, crackers, and several bottles of beer, which was delivered by a messenger boy; that the messenger boy left the house first; that respondent left about twenty or thirty minutes later; that about 1:20 A. M. a west-bound cable car, operated on the southerly track, ran over respondent, cutting off his left foot and the toes of his right; that he was then lying south of the southerly track, with his feet across the rail; that neither the gripman nor any other person saw him until the car was within five or six feet of him; that the length of the car was from thirty-five to forty feet; and that it could not be stopped within less than half its length. On other points the evidence was conflicting.

It will be noted that respondent claims (1) that, when attempting to board the west-bound car, he was, by reason of appellant's negligence, thrown upon the pavement and across the southerly track, where he was left in an unconscious condition; (2) that, while he was still there, an east-bound car ran over his feet and injured him. In the briefs these two alleged accidents are called the first and second accidents, and we will thus mention them.

On the trial appellant vigorously contended that the first acci-

dent never happened. Its evidence strongly indicated that respondent did not leave the dwelling house until after the last west-bound car had gone into the city. The gripmen, conductors and others on the last two cars, and the messenger boy who rode in on the last car, testified that the first accident did not occur; while respondent as positively testified that it did. The evidence on this question, although conflicting, seems to preponderate in appellant's favor, yet the issue involved was for the jury.

It is conceded that, at the instant the east-bound car ran over respondent's feet, he was lying just south of the track, with his feet across the south rail. If he had in fact been thrown and left there in an unconscious and helpless condition by reason of appellant's previous negligence involved in the alleged first accident, it would necessarily follow that appellant would be liable for the damages sustained from both the first and the second accident. On the other hand, if the first accident did not occur, then appellant was in no way responsible for respondent's perilous position at the instant of the second accident; and any liability upon its part would have to be predicated upon some act of negligence not involved in the alleged first accident. Appellant, in substance, requested the trial court to instruct the jury that, if they found the first accident did not occur, they must find for appellant. This instruction was refused, and upon its refusal appellant assigns error. Although the issue of the first accident was for the jury, we cannot from the general verdict conclude whether they did, or did not, find that it had occurred. It may have been that their verdict was based on the second accident only. The trial judge, when passing upon the motion for a new trial, gave expression to his views in the following language:

"The only trouble in this case is this: There is not a human being on earth apparently that knows how that man got on that track. That is the only trouble there is in it. There is no question in the world that he had drunk a little liquor in this house on this night that he was hurt, and that he went out of that house and got on some kind of a car line; and the only evidence that really is positive on earth is that he was found bleeding and mangled and hurt and injured, and terribly injured. * * * I became fully convinced on this trial the man didn't attempt to come on what we call the inbound train. * * * I became convinced of that as a physical fact. Now, how he got on the other car line, you know, the outbound car line, whether it was because he was drunk, I couldn't tell. If I had been a jurymen I couldn't have told. * * * This court doesn't believe that the plaintiff in this case ever attempted to come into town on that inbound car. I mean that he ever got on board of it. * * * I cannot figure it out by the physical facts."

Were we to assume, what may have been the fact, that the first accident did not occur, and that the jury would have so found, then, in passing upon the propriety of the instruction requested and refused, it would become necessary for us to inquire whether the second accident alone would sustain a recovery under the evidence. There was evidence which, although disputed, was sufficient to sustain a finding that respondent was badly intoxicated at the time of his injury. He was lying on the street on a rainy night midway between two cross streets, with his body angling to the south and west, and with his feet upon the track. He was not seen by the gripman in time to stop the car. No other person had previously seen him on or near the track. If the first accident did not occur, no one has told how he came to be there, or how long he had been there. With the first accident eliminated, appellant was neither directly nor indirectly responsible for his position, and would not be liable, unless it was guilty of some negligent or wrongful act after it actually discovered him, or which prevented his timely discovery.

It is contended that the headlight on the west-bound car was obscured by a sign which had fallen over it. We think the evidence shows that it was not thus obscured prior to the accident, but that the car, in passing over respondent's legs, sustained a severe jolt, which caused a signboard to be shaken from its position and, to some extent, obscure the headlight. Assuming, however, that the headlight was thus obscured before the accident, and that the gripman could not see as far as he would, had it been in proper condition, yet there is no evidence showing how long respondent's feet had been upon the track. For all that appears, he may have been lying upon the street, and may have rolled or moved upon the track just before the car passed. Or he may have fallen upon the track just about that time. There is an utter absence of evidence sufficient to sustain a finding that his feet were upon the track at any time prior to the instant he was first seen by the gripman and a passenger, who stood on the front end of the car. It is undisputed that he was then only six feet ahead of the car. There is no contention that the car was operated at an excessive or dangerous rate of speed; nor was there any evidence that the fender was not a suitable one, as alleged in the complaint. With the first accident eliminated, the only negligence which respondent urges is that the headlight was obscured. His contention is that, had it been in proper condition, the gripman's view would have extended

further along the track; that he could then have seen respondent a distance of forty or fifty feet; and that he could have stopped the car in time to have avoided the accident. The difficulty with this contention is that it assumes respondent had been upon the track a sufficient length of time to have been seen before the car came too close to be stopped. Such a finding by the jury would have been the result of surmise and speculation as to when appellant lay down, rolled upon, or fell upon the track.

Respondent urges the last-chance doctrine to fix appellant's liability. But that doctrine has no application to the evidence before us, as it does not appear that the gripman did see, or, in the exercise of due care, could have seen, respondent in time to stop the car. On all the evidence we conclude that, with the first accident eliminated, the circumstances of the second accident do not show any negligence for which the appellant would have been liable. The instruction requested should therefore have been given, and its refusal constituted reversible error. Other assignments need not be discussed, as they will not be material upon a retrial.

The judgment is reversed, and the cause remanded for a new trial.

DUNBAR, C. J., and GOSE, PARKER and CHADWICK, JJ., concur.

Lacey v. Minneapolis St. Ry. Co.

(Minnesota — Supreme Court.)

PASSENGER STRUCK BY OBSTRUCTION NEAR TRACK; NEGLIGENCE; CONTRIBUTORY NEGLIGENCE; QUESTION FOR JURY; INSTRUCTIONS. — Plaintiff, while a passenger on a street car, became nauseated, put his head out of an open window of the car, and was struck by an upright plank used as sheathing in a sewer being constructed. It is *held*:

Contributory Negligence of Passenger Projecting Part of His Body Beyond Side of Car. — In *Nellis on Street Railways* (2d Ed.), § 356, it is said: "A passenger sitting beside an open window, riding with his arm resting on the sill not more than three inches outside the car, is not necessarily negligent so as to preclude recovery for an injury to his arm caused by another car passing on a switch. And where a passenger projected his head beyond the side of the car to expectorate, whereby he came in contact with a pole which the company had placed very near the track, it was held that he was not, as a matter of law, so lacking in care and caution that he was precluded from recovering damages for the injuries sustained. But under certain con-

It did not conclusively appear from the evidence that defendant was free from negligence in not warning passengers of the obstructions in close proximity to the tracks, or in not screening or placing barriers on the windows of the car.

Plaintiff was not guilty of contributory negligence as a matter of law.

Certain instructions to the jury were not applicable to the facts, and were calculated to confuse and mislead the jury, in the absence of other instructions clearly and correctly stating the question to be determined by the jury and the law applicable.

(Syllabus by the Court.)

PLAINTIFF appeals from an order denying a new trial. Reported 136 N. W. 878.

E. W. Campbell, of Litchfield, and *Latham, Pidgeon & Larson*, of Minneapolis, for appellant.

John F. Dahl, *W. O. Stout* and *D. R. Frost*, all of Minneapolis, for respondent.

Opinion by BUNN, J.:

This action was brought to recover damages for personal injuries sustained by plaintiff while a passenger on one of defendant's street railway cars on Lake street in Minneapolis. The issues were submitted to the jury, and a verdict returned in favor of defendant. Plaintiff appealed from an order denying his motion for a new trial. Plaintiff's main contention here is that the trial court committed prejudicial error in its instructions to the jury. Defendant contends that it was entitled to a directed verdict, or, if not, that there was no error in the instructions complained of.

There is little dispute as to the facts, which are briefly as follows: Plaintiff, with his fifteen-year old daughter, late in the afternoon of August 26, 1910, visited "Wonderland," an amusement park on Lake street. They rode on the "merry-go-round," and about

ditions of speed and surroundings it may be negligent, as a matter of law, for a passenger to permit his arm, or any portion of his body, to protrude beyond the outside line of the car, and the same rule be applicable as in the case of passengers on steam roads. So, if a passenger unnecessarily and voluntarily leave his seat and thus expose himself to danger and come in contact with some object in close proximity to the track, he cannot recover for the injury thus occasioned. And where a passenger riding on the rear platform projected his head beyond the side of the car and came in contact with a trolley pole about seventeen inches from the side of the car, it was held that he was guilty of contributory negligence as a matter of law."

8 o'clock took the street car to return to Minneapolis. Plaintiff felt nauseated as a result of the rides in the park, and with his daughter got off the car. They resumed their journey on another car in about half an hour, taking a seat on the left side of the car; plaintiff sitting next to an open window, which had no screen. The feeling of nausea again seizing him, he thrust his head out of the open window, and it came in contact with the edge of an upright plank, causing the injuries complained of. The plank was one used as sheathing in the excavation of lateral sewers leading from the main sewer, which was under the tracks. These lateral sewers were being put in at the time by the city. The evidence of defendant's witnesses tended strongly to show that the planks next to the tracks were from twelve to fourteen inches distant from the side of the car, while plaintiff's witnesses testified that he did not extend his head farther than six inches out of the window, and that the sheathing was about that distance from the car as it passed. It was admitted that Lake street had been torn up by these excavations for some months prior to the accident, and that the sheathing nearest the tracks had been in the same condition. Plaintiff was a visitor in Minneapolis and had no knowledge of the existence of the obstructions. It was dark at the time of the accident, and, while plaintiff had ridden to the park in the street car in the afternoon, there was no evidence that he noticed the conditions, and there is no reason for saying that he ought to have done so. We cannot agree to defendant's contention that a verdict should have been directed in its favor on this evidence. In view of the high degree of care which the law imposed on defendant as a carrier of passengers, and its knowledge that these planks were in the street in close proximity to the sides of passing cars, it is clear, in our opinion, that it was a question for the jury whether defendant ought not to have taken means to guard its passengers from injury, either by posting notices warning of the danger, or by screening or placing barriers across the windows of the car.

We do not sustain defendant's contention that plaintiff was guilty of contributory negligence as a matter of law. It was an emergency that confronted him, and he had to act quickly. It was perfectly natural to do as he did. The window was open, and not barred or screened. Plaintiff had no knowledge of the presence of obstructions close to the track, and it was dark. It is not a case where a passenger deliberately extends part of his body beyond the side of the car out of motives of curiosity or pleasure, or a case

where he moves or avoids a barrier or screen in order to relieve his nausea. The cases relied on by defendant are largely based upon such facts. The question is whether plaintiff acted as a man of ordinary prudence would have done under like circumstances, and, viewing this question from a common-sense standpoint, we hold that plaintiff was not negligent as a matter of law. It follows that defendant was not entitled to a directed verdict.

It remains to consider whether the questions were submitted to the jury under instructions justly subject to the criticism that they were liable to mislead. The instructions complained of were as follows:

"Now, as a general rule of law, a carrier of passengers for hire is not liable to the passenger when the passenger protrudes his head or any part of his body outside of the lines of the car. As a general rule of law that is true. It is the passenger's duty to keep within the lines of the car, and a common carrier would not be responsible under ordinary conditions because a passenger protruded his body or any part of it outside of the lines of the car. But under some special circumstances and conditions that rule might change. For instance, if a passenger laid his hand on an open window sill, and his fingers or his hands should happen to protrude in the natural way a little, or his elbow, or if he leans out in any way in a natural way, and the defendant happened to be negligent in having something in close proximity to that car, and an injury should occur, under circumstances of that kind the defendant might be liable."

The above instructions were assigned as error in the notice of motion for a new trial, and also on this appeal. In stating that as a general rule of law a carrier is not liable when a passenger protrudes his head or any part of his body outside of the lines of the car, the trial court probably gave correctly the general rule, if it is possible to formulate a general rule on the subject. In attempting to state an example of circumstances that might change the rule, the court apparently had in mind the facts in *Dahlberg v. Minneapolis Street Ry. Co.*, 32 Minn. 404, 21 N. W. 545, 50 Am. Rep. 585. There is no serious fault with either proposition involved in the instructions assigned as error, save and except that neither was applicable to the facts in the case that was on trial. An instruction that plainly and simply told the jury that, if plaintiff failed to exercise the care that a man of ordinary prudence would have exercised under similar circumstances, he was guilty of contributory negligence and could not recover, with a simple statement of the converse of this proposition, would have presented the issue to the jury in a way that could not confuse or mislead. Such an

instruction is much preferable to the statement of abstract rules of law, and examples that are not drawn from the facts. However, it was not prejudicial error to give the instructions, unless, considering the charge as a whole on the subject of contributory negligence, it appears probable that the jury received an erroneous idea, or were misled or confused. This must depend on the further instructions on the subject. Unless they served to clear up the impressions which the instructions above quoted would, unexplained, give to the jury, it is apparent that it must be held that it was reversible error to give abstract rules and illustrations that could only serve to convey a wrong understanding of the question to be decided. If, however, it was made clear to the jury what the real issue was, there was no reversible error in the instructions complained of, though not applicable to the particular facts in the case on trial.

Immediately after giving the instructions assigned as error, the trial court gave the following instructions:

"In this case, if the plaintiff because of any sudden sickness protruded his head, and in doing so he used ordinary care, such care as a prudent and careful person in the exercise of ordinary care would use under the same conditions, and he did not protrude his head too far, then as a question of fact it would be for you to determine whether or not he was negligent. If you find from the evidence in this case that he did not use the degree of care that is required of him, taking into consideration the circumstances and conditions that surrounded him, and he protruded his head further than he ought to, then he was guilty of contributory negligence, and he cannot recover. If he did not protrude his head only to such extent as a person using ordinary care and caution would have done under the same circumstances, then you have a right to take into consideration, from all the evidence, whether or not he is entitled to recover."

We are constrained to hold that these instructions did not clearly or correctly tell the jury what the real issue was, or remove the confusion and misapprehension probably caused by the prior instructions. The jury is told that if plaintiff used ordinary care, such care as a *prudent and careful person* would use under the same conditions, *and did not protrude his head too far*, then as a question of fact "it would be for you to determine whether or not he was negligent." This instruction was incorrect and liable to mislead. It required of plaintiff the care that a prudent and careful person would use, it required that the jury find that he did not protrude his head *too far*, and told the jury that if they so found it was for them to determine whether or not he was negligent, not that he

would not be negligent if he acted as a prudent and careful man would have acted, and did not protrude his head too far.

The conclusion that the charge as a whole was calculated to confuse and mislead the jury, instead of making plain the questions for decision, is strengthened by the evidence that there was confusion in the minds of the jurymen, as witnessed by the request for further instructions made after the jury had deliberated:

"The jury would like to have the court explain again under what circumstances a man may extend his body outside the lines of the car, and what precaution, if any, he must take to avoid contributory negligence in case of accident."

In response to this request for further enlightenment, the court merely caused the instructions already given and quoted herein to be reread.

We have reached the conclusion that, considering that the evidence would have justified a verdict for plaintiff, it is probable that the instructions assigned as error, considered with the other instructions, confused and mislead the jury to plaintiff's prejudice, and that there ought to be a new trial.

Order reversed, and new trial granted.

Moeller v. United Rys. Co.

(Missouri — Supreme Court.)

INJURY TO BOY ALIGHTING FROM MOVING CAR; EVIDENCE; NEGLIGENCE; RAILINGS; MOTOEMAN; CONDUCTOR; CONTRIBUTORY NEGLIGENCE. — A country boy twelve years of age, in attempting to alight from one of defendant's cars which was moving a little faster than a man ordinarily walks, fell and was injured. He was the only passenger, and had told the conductor that he wanted to get off at a certain place, but the conductor became interested in a newspaper and failed to signal the motorman to stop the car. In an action to recover damages it was alleged that the defendant was negligent in failing to have a guard on the side of the platform, in increasing the speed of the car while the plaintiff was in the act of alighting, and in failing to stop the car for plaintiff to alight.

Held, that there was no evidence tending to prove negligence on the part of the defendant in the matter of railings;

Contributory Negligence of Passenger Leaving Car. — For a discussion of the circumstances under which a passenger is guilty of contributory negligence in leaving a street car, see *Nellis on Street Railways* (2d Ed.), §§ 363-366.

That the motorman was not negligent in increasing the speed of the car while plaintiff was alighting, as he had no reason to know that the plaintiff was about to alight;

That the conductor was negligent in failing to stop the car at the crossing and failing to see the plaintiff about to get off the car;

That the plaintiff was not guilty of contributory negligence as a matter of law, and the question ought to have been submitted to the jury.

PLAINTIFF appeals from a judgment for defendant. Reported 147 S. W. 109.

William R. Gentry, for appellant.

Geo. T. Priest and *T. E. Francis* (*E. T. Miller* and *Boyle & Priest*, of counsel), for respondent.

Opinion by **VALLIANT, J.:**

Plaintiff, a boy twelve years old, in attempting to alight from one of defendant's cars fell and was injured. He sues for damages, alleging that the accident was the result of defendant's negligence. Defendant owns and operates a double-track electric railway extending from the city out through the county of St. Louis to Creve Cœur lake. About three miles east of Creve Cœur lake, defendant's railway crosses a steam railroad, which is called in the evidence the Colorado road. The defendant's road crosses the Colorado on a high trestle. Coming east from Creve Cœur lake, this trestle is approached on an embankment against which the west end of the trestle abuts. On the south side of the embankment is a cinder platform, about forty-five feet long, for the use of passengers boarding or alighting from defendant's cars. This platform runs up to the east end of the embankment, and is level with it. On the south side of the platform there is a railing. The east end of the platform is six feet four inches wide. There is no railing at that end. Plaintiff lives near Creve Cœur lake, and had for some days ridden in defendant's cars from his home to that crossing, attending school near the crossing, and had alighted on that platform. He was familiar with the situation. This is the account he gives of the accident:

He was on his way to school. When he boarded the car he told the conductor he wanted to get off at the Colorado crossing, and the conductor told him that he would let him off there. He took the rear seat in the car; the conductor sat in the second seat forward from the one occupied by plaintiff, and was engaged in reading a newspaper. As the car approached the crossing the plaintiff went

out on the rear platform with the purpose of alighting. He gave no notice then to the conductor, but expected the conductor would stop the car as he had said he would. The conductor was apparently absorbed in the newspaper, and paid no attention to the plaintiff. When the car was within half a block of the crossing, plaintiff stepped down on the step with both feet, holding onto the car, and not venturing to alight then, because the car was going too fast. When it had got within twenty feet of the east end of the cinder platform it was still going too fast; so he waited until it got within three feet of that end and then attempted to alight. He stepped down with his right foot on the ground, his left still on the car step, and just then, he says, the speed of the car was increased, and it carried him forward over the brink, and he rolled down the embankment to the surface below, a distance of forty feet or more. He testified that at the instant he stepped from the car with his right foot to the ground the car was moving faster than a walk, but not as fast as a run. After saying the car was going too fast for him to attempt to get off at the west end of the cinder platform, he was asked by his counsel:

"Q. How was it moving when you started to get off? A. A little faster than a run. Q. What kind of a run? A. A little slow run. By the Court: How fast—do you know how fast a person ordinarily walks? A. Yes, sir. Q. Was it as fast as that, or faster? A. A little faster than a walk."

The acts of negligence alleged in the petition are, first, failure to have a sufficient guard on the south side of the cinder platform and having none at all on the east end; second, increasing the speed of the car while the plaintiff was in the act of alighting; and, third, failing to stop the car for plaintiff to alight. The answer was a general denial and a plea of contributory negligence. At the conclusion of the plaintiff's evidence, the court gave an instruction to the effect that the plaintiff was not entitled to recover; whereupon the plaintiff took a nonsuit with leave, and, the court refusing to set it aside, took an appeal. The amount of damages claimed in the petition being within the jurisdiction of the St. Louis Court of Appeals, the appeal was taken to that court where it was heard and the judgment affirmed by a majority of the court; but one of the judges dissented and filed a dissenting opinion, in which he expressed the opinion that the majority opinion was in conflict with certain decisions of this court, and requested that the cause be certified to this court to be heard and determined, which was done.

1. There was no evidence tending to prove negligence on the part of defendant in the matter of railings. The evidence on that point consisted only in a description of the embankment, the cinder platform and the trestle, illustrated by photographs. There was a railing on the south side, but none on the east end, of the cinder platform. Whether or not the absence of a railing at the east end was negligence was a matter of inference. Counsel for plaintiff argue that if there had been a railing there the plaintiff would not have fallen over the brink, and counsel for defendant argue that, whilst a railing might have caught the plaintiff and prevented his going over, yet the same force that threw him over would have thrown him against the railing, and whether he would have been more greatly injured in one than the other was a mere matter of conjecture; and, besides, they say that a railing at that end, to have prevented an accident like this one, would have to come so close to the moving cars as to endanger the lives of persons on the step of the car, as there frequently might be in case of crowded cars. We hold that under the evidence the court would not have been justified in submitting to the jury the question of negligence for the absence of a railing at that end of the platform.

2. Nor was the motorman guilty of negligence in increasing the speed of the car, if he did so, while the plaintiff was in the act of alighting. If the motorman had known that the plaintiff was in the act of alighting, or if he had had any reason to suppose that a passenger would be in the act of alighting, it would have been negligence on his part to have increased the speed of the car; but that was not the case. He had no signal from the conductor, or from any one, warning him that a stop was desired. The plaintiff, according to his own testimony, was within three feet of the brink of the precipice when he stepped off with his right foot to the ground. The body of the car must, therefore, have been almost, if not altogether, on the trestle. The motorman's duty was to look to the front, not to the rear; and, having no warning to slow down, there is no perceptible reason why he should not have increased the speed of the car, if he saw fit to do so. But in saying that the motorman was not guilty of negligence for increasing the speed of the car, we are not intending to say that the defendant was not guilty of negligence in that respect, because the defendant was then and there represented by another servant, the conductor, whose duty it was to have seen the plaintiff, and if he had seen that he was about to step off the car, under those circumstances, he should have

given the motorman a signal to stop; and as the conductor neglected to see the plaintiff when it was his duty to have seen him, the legal consequence is the same as if he had seen him and neglected to give the signal.

3. The conductor was guilty of negligence in failing to stop the car at the crossing and failing to see the plaintiff in his motions indicating a purpose to get off the car. We infer from the record that the plaintiff was the only passenger on the car. The conductor, therefore, did not have the excuse that in a crowd of passengers and a multitude of requests he could not keep this one in mind. The boy, after he had been on the car awhile, told him that he wanted to get off at the Colorado crossing, and the conductor promised to let him off there, but, instead of doing so, took a seat in the car and allowed his attention to become absorbed in a newspaper. If he had been attentive to his duties, even if he had forgotten the boy's request, he would have seen him when he left the inside of the car and went out on the platform and descended to the step, and the signal could then have been given and the catastrophe possible averted.

4. The next question, and the only difficult one, is, Was the plaintiff by his own showing guilty of such negligence contributing to his injury as should preclude him from recovering?

If the conductor had caused the car to stop as he promised there would have been no accident; and if the plaintiff had not attempted to step off the car while it was moving there would have been no accident. The difficulty in the question is in the fact that the act we are to pass judgment on was the act of a twelve-year old boy. If a man of mature years had acted as did this boy and received like injuries, we would say he contributed by his own negligence to his injury, and, therefore, could not recover; but in answer to that suggestion it may be well said that a man of mature years would not have acted that way.

The standard by which the plaintiff's act is to be measured is not the degree of care to be reasonably expected of an ordinarily prudent man of mature years, but the care to be reasonably expected of an ordinarily prudent boy of twelve years. The question, then is, What could reasonably be expected of an ordinarily prudent boy twelve years old? When he went out to the rear end of the car and got down with both feet on the step, it was then, as he said, about half a block west of the east end of the cinder platform, and he realized that it was going too fast to attempt to alight, and when

it was about twenty feet from the end he still realized that it was going too fast; but when it came within three feet of the end he attempted to alight, but was carried by the momentum of the car over the brink. He thinks it was the increased speed imparted to the car, just as he was alighting, that carried him over; but that is only his opinion, and in that he is probably mistaken. A passenger stepping from a car to the ground, while it is in motion, is precipitated forward more or less, according to the speed of the car, after he alights on the ground. A space of three feet between the step and the brink of the precipice is a very short space; and with the car going faster than a walk, as fast as a slow run, it would be almost impossible for one to recover from the momentum before going over the brink. But can we charge a boy twelve years old with knowledge of that law of physics? Or putting the question in this form, Can we charge him with knowledge of the fact that if he jumps off a moving car he is liable to be carried several feet in the direction the car is moving, before he can recover control of his movement? And is that a pure question of law which the court can apply in a peremptory instruction, or is it to be left to a jury in the particular case, under proper instructions, taking into account his experience?

A court is justified in taking a case from the jury only when, from the evidence adduced, there can be but one reasonable conclusion drawn. Can there be no two opinions on the question of whether this boy was possessed of sufficient experience to enable him not only to see what a person of mature years would have seen, but also to appreciate the danger into which he was plunging?

The court cannot specify the age to which a child, when attained, shall be held as liable in such case as a person of full maturity, because there are other facts to be taken into account — the peculiar circumstances of the particular case, the knowledge and experience of the child in reference to those circumstances and his capacity to appreciate the danger.

There have been several cases before this court, which will be seen by reference to the briefs of counsel, where questions like this have been involved. In some of them it has been held that the minor was guilty of such contributory negligence as precluded a recovery, and in some that he was not. But there is no conflict in those cases; the principle of law governing them is the same in all. They differ only in the facts. We do not deem it necessary to review those cases here.

It can hardly be said that the danger into which this boy ran was obvious to one of his years and experience, like, for example, stepping immediately in front of an approaching car. What actually carried him over the brink was the projectile impetus imparted to his body by the moving car. That danger would probably be obvious to any person of mature years, and, perhaps, so to a city boy familiar with the feat of jumping on and off moving cars; but whether so to a country boy, without experience, is a question.

We are of the opinion that the question of the plaintiff's contributory negligence ought to have been submitted to the jury under proper instructions.

The judgment is reversed, and the cause remanded to the Circuit Court to be retried according to the views herein expressed.

PER CURIAM. — The foregoing opinion of VALLIANT, C. J., in division, is adopted on hearing *in banc*. LAMM, FERRISS, KENNISH and BROWN, JJ., concur. WOODSON and GRAVES, JJ., dissent.

Macon Ry. & Light Co. v. Castopulon.

(Georgia — Court of Appeals.)

INJURY TO PASSENGER ALIGHTING FROM MOVING CAR; EVIDENCE; CONTRIBUTORY NEGLIGENCE; QUESTION FOR JURY. — It is not contributory negligence *per se* for a person to alight from a moving street car; but the question whether the person alighting was guilty of contributory negligence would depend upon the rate of speed, the place and other circumstances.

The evidence in the present case is not clear as to whether the plaintiff was injured while attempting to alight from a car that was actually moving, or whether, while in the act of alighting, the car suddenly moved and threw him to the ground. In either event, the question of his contributory negligence, as well as the negligence of the defendant company, were questions exclusively for the determination of the jury; and the evidence is sufficient to support the verdict for the plaintiff.

(Syllabus by the Court.)

DEFENDANT brings error from judgment for plaintiff. Reported 75 S. E. 15.

Injuries to Passenger While Alighting from Car. — For a discussion of the liability of a street railway company for injuries to passengers received while alighting from a street car, see the note to *Champayne v. La Crosse City Ry. Co.*, 2 St. Ry. Rep. 988.

Ellis & Jordan, of Macon, for plaintiff in error.

Napier & Maynard, of Macon, for defendant in error.

Opinion by HILL, C. J.:

The plaintiff recovered a verdict for \$400 for personal injuries received by him while alighting from a street car in the city of Macon. The defendant made a motion for a new trial, based upon the general grounds, which was overruled, and the case is before this court solely on questions of fact.

The evidence in behalf of the plaintiff shows that he boarded the defendant's street car for the purpose of going to Crump's Park, a pleasure resort near Macon. He asked the conductor if that car was going to Crump's Park, and the conductor told him it was not; that he would have to take a Vineville car; and he replied that he would get off, and the conductor said: "All right. Get out and catch the Vineville car." He put his foot on the ground. The car was going, and it threw him down and broke his arm. The evidence is not perfectly clear as to whether the car was actually moving when the plaintiff attempted to alight, and whether his foot coming in contact with the ground threw him, or whether while he was in the act of alighting from the car the car moved immediately, and the motion threw him down. It is insisted on the part of the railway company that the only reasonable inference to be drawn from the evidence of the plaintiff is that he attempted to get off the car as it was actually moving; and that in doing so he was guilty of such contributory negligence as would bar his right to recover. It may be stated that the only evidence as to the manner in which the injury occurred was that of the plaintiff himself. The only witness for the defendant was the conductor, who testified positively that no such incident occurred as was narrated by the plaintiff.

The question was exclusively for the determination of the jury. A careful examination of the plaintiff's evidence raises a reasonable inference that he may have been injured by the sudden motion of the car while he was attempting to alight therefrom. But it may be conceded that the car was actually moving when he attempted to alight, and yet this fact would not be *per se* such negligence as would prevent a recovery. The earlier cases in many instances recognized the principle of negligence *per se* in alighting from a moving train, but modern authority to a great extent has supplanted that doctrine with broader views upon the question; and it is now

generally held, and especially by the courts of this State, that it is not contributory negligence *per se* for a person to alight from a moving street car, but the question of whether the person so alighting was guilty of contributory negligence depends upon the rate of speed, the place and other circumstances. In the case of *Myrick v. Macon Ry. & Light Co.*, 6 Ga. App. 38, 64 S. E. 296, this court quotes with approval the statement of Judge Thompson, in his *Commentaries on the Law of Negligence* (vol. 3, § 2878), that

"the weight of modern authority seems to sustain the view that an attempt by the passenger to alight from a railway train while it is passing a place at which it should stop to enable him to alight, or at which it has failed to stop a reasonable time to permit him to leave it, will not, as a matter of law, be considered a negligent act, unless the attending circumstances so clearly show that he acted imprudently or rashly that reasonable minds could fairly arrive at no other conclusion; and that the question whether the act of the passenger in so attempting to alight from the train was negligent (that is, whether he exercised for his safety that degree of care and caution which a person of ordinary prudence would be expected, under like circumstances, to exercise) must ordinarily be submitted to the jury." See also 3 *Hutch. on Carriers* (3d Ed.), § 1179.

We think that this construction of the rule applies more clearly to attempts to alight from moving street cars than from cars propelled by steam; and the fact that, in attempting to alight from a moving street car, the passenger was encouraged to do so by the direction of the conductor in charge would be a strong circumstance supporting the view that the act did not amount to negligence. Certainly, under the facts in this case, the question was clearly one of fact, to be determined exclusively by the jury, and it is equally clear that the conclusion at which the jury arrived is not unsupported by the evidence or reasonable inferences therefrom.

Judgment affirmed.

Leary v. Houghton County Traction Co.

(Michigan — Supreme Court.)

1. INJURY TO CONDUCTOR DESCENDING FROM TOP OF CAR; ABSENCE OF STEP; NEGLIGENCE; INSPECTION; QUESTION FOR JURY. — Where, in an action by a conductor to recover for personal injuries sustained by a fall while

Injury to Employee. — As to the liability of a street railway company for injuries to its employees, see *Nellis on Street Railways* (2d Ed.), §§ 431-460.

descending from the top of his car, it appears that he ascended the car by means of the rods across the windows and attempted to descend by means of a step usually found on the rear of cars; that the absence of the step caused him to fall; that the car was in the same condition as when he received it from the company's inspector, a question of reasonably careful inspection is raised which should be submitted to the jury.

2. **SAME; ASSUMED RISK; CONTRIBUTORY NEGLIGENCE.** — There is no question of assumed risk of employment involved in such a case. It is a question of contributory negligence.

As a matter of law the plaintiff was guilty of contributory negligence in failing to discover the absence of the step.

PLAINTIFF brings error from judgment for defendant. Reported 137 N. W. 225.

O'Brien & Le Gendre, of Laurium, for appellant.

Allen F. Rees, of Houghton, for appellee.

Opinion by **McALVAY, J.:**

This is an action brought by the plaintiff to recover damages for personal injuries sustained by him on February 14, 1908, while acting as conductor on one of the motor cars of defendant, a Michigan corporation, operating an electric railway in Houghton county. At the close of plaintiff's case, counsel for defendant moved for a directed verdict in its favor on the ground that from the most favorable view of the evidence in favor of plaintiff it shows that he was guilty of contributory negligence, and also that the accident resulted from a risk assumed by him. By an agreement between counsel some further testimony as to one matter was taken by plaintiff. The court then granted the motion and instructed a verdict as requested, for the reason that in the opinion of the court the plaintiff was guilty of contributory negligence. Upon such verdict a judgment was duly entered and plaintiff has removed the case to this court by writ of error for review.

The facts briefly stated are: That plaintiff, aged twenty-eight years, had been employed by defendant for about seven years as conductor and inspector. At the time of his injury he was employed as a conductor on the main line of its road running from Houghton to Red Jacket, passing through Hancock and Laurium. At the latter place the company has car barns and car inspectors. On this day at Laurium there were two car inspectors at the barn where plaintiff received car No. 16 at about 5.30 A. M. He made

the trip to Red Jacket at the north end of the road from Laurium, and then proceeded to Houghton, at the southern end, without mishap, passing through Laurium and Hancock. When at Houghton he attempted to pull down the trolley and the rope attached to it broke or came off, making it necessary for him to go on top of the car to attach or repair the rope. For the purpose of getting up or down to and from the top of this car an iron step two inches wide and three inches long was fastened on the back of the car near the door at the right as you enter. The step on this car was two and one-half feet from the top. The top of the car may also be reached by stepping on the handhold bar, and then on the bars across the window, going up in that way. Plaintiff on this occasion went up in the way last described, and, having repaired the trolley rope, started to come down by way of the step provided by defendant for that purpose. He took hold of the grabirons on the roof of the car with his hands, and, with his face towards the car, proceeded to let himself down. The step on the end of the car was not there, and, instead of landing upon it with his foot, he fell to the ground. He was bruised and injured on his shoulder, and the bones of the ankle of his right foot were displaced and fractured, and the ligaments ruptured, causing what is claimed to be a permanent injury.

The record shows that, when cars were turned in at night at the barns, it was the duty of the conductor to report all defects, breaks, etc., which they had noticed on their runs. It was the duty of the car inspector to inspect the cars during the night, and get them in condition to run before they went out on the next day. Plaintiff had received this car from one of the inspectors on that morning, and had not noticed the absence of this step. There is nothing in the record to show what caused this step to come off or to be broken off from the car, or when its removal occurred. It does appear that the car proceeded on this trip without mishap before plaintiff was injured.

Much attention is given in its brief to defendant's contention that there is no evidence in the case of the negligence of the defendant, and

"that the defect claimed by plaintiff was obvious to the most common understanding, and the risk arising therefrom was therefore one which was assumed by plaintiff when he undertook in the course of the employment to ascend and descend from the roof of the car."

We do not think that from this record it may be said as a matter of law there was no evidence of defendant's negligence. A reasonable inference might be drawn from the testimony that the car when the accident occurred was in the same condition as when received from the inspector at the barn, which would require the question of a reasonably careful inspection to be submitted to the jury.

Our opinion is that the question of assumed risk of the employment is not involved in this case. Strictly speaking, the assumed risks of an employment are the risks usually incident to such employment. Every person whose negligent acts result in injury may be truly said to have assumed the risk of such injury, but such assumption of risk has no relation whatever to the doctrine of assumed risk which arises from the contractual relations between master and servant. An interchangeable use of terms in the decisions of this and other courts has given rise to a confusion with respect to assumption of risk and contributory negligence which should be avoided. In some cases, as has been said, they may be inseparably connected, but in this instant case it appears to us that the doctrine of assumed risk is not applicable. The only fault to be charged to plaintiff, if any, is that by his negligence he contributed to his injury. In our opinion, therefore, the only question necessary to be determined by us is whether the trial court erred in holding that plaintiff could not recover because of his contributory negligence.

As in all cases where a verdict is instructed against a plaintiff, we will give the evidence in this case the most favorable construction for plaintiff it will bear. Giving the plaintiff the full benefit of the rule above stated, we must determine whether as a matter of law we should say he was guilty of contributory negligence. It appears that this step was fastened on the end of the car, little higher, if any, than the head of an ordinary man, and in plain view. It was there for the use of employees of defendant to go to and from the top of the car, and this was well known to the plaintiff. Plaintiff did not use this way on going up, but undertook to go to the top of the car by the window bars. He, however, knew when he was about to undertake this ascent that he must come down from the car, and chose this way of coming down, without making any observation or taking any notice of the condition of this appliance by which he undertook to come down, when the defect complained of was open, obvious and apparent, and re-

quired only the most ordinary observation and notice in order to give him full knowledge of its condition. The discovery of this defect required nothing in the way of what may be called an inspection, but was obvious to ordinary observation, or even the most casual observation. The learned trial judge, in passing upon the question, said:

"Now, negligence is simply want of care. That is all. It is not something that a man does intentionally or actively, and with deliberation and using his will to perform a particular act, but it simply means that he is careless. Now in applying that rule to this case what are the facts? Leary was an experienced employee of the street car company. He had been in its employ something like seven years, a greater portion of that time as an inspector. He knew all about the cars. That is, how they should be when they were on the road and running. He knew they provided for the employees in ascending to the roof of the car for years a foot step, as he denominated it and as he has described it. He has testified that the step was situated about the height of his head as he stood on the platform of the car. That is the door of the platform from which he started to go. The time of the accident is in daylight. The step, from his testimony, is made expressly for the use of employees in ascending the car. He did not notice that the step was lacking. He did not undertake to use the step, the means provided by the company for getting on top of the car, but took another way which he preferred, but not a way provided by the company, and, when he descended without ascertaining whether the step was there or not, he came down in the manner that has been detailed to you by his own testimony. Now, I think that there can be no question that Leary was careless in not observing whether there was a step there or not at the time he went on the car; and he certainly was careless having gone up that way, by undertaking to come down from the car in a way different from the one he went up, in not ascertaining whether the step was there when he came down, and therefore I direct you to bring in a verdict in favor of the defendant."

This is in accord with the weight of the authorities relative to the duty to discover danger.

"While a person is not required to use extraordinary care, the law requires of him a reasonable exercise of his faculties to observe and discover danger. Hence, if the defect or danger is visible and obvious, the failure of a person to discover and avoid it amounts to contributory negligence." 29 Cyc. 513, and cases cited.

We agree with the conclusion of the trial court that, as a matter of law, the plaintiff was guilty of contributory negligence.

The judgment is affirmed.

BLAIR, J., on account of sickness, took no part in this opinion.

Gerlach v. Detroit United Ry.

(Michigan — Supreme Court.)

1. **INJURY TO PASSENGER WHILE ALIGHTING BY PULLING OUT OF BRACKETS FASTENING HANDHOLDS; EVIDENCE; QUESTION FOR JURY.** — In an action by a passenger to recover for injuries sustained by a fall caused by the pulling out of the brackets fastening a handhold which he was using while alighting from the car, evidence examined and *held*, that the case was one for the jury.
2. **SAME; USE OF HANDHOLD; EVIDENCE; INSPECTION.** — The use of the handhold being perfectly obvious, evidence offered by the defendant as to the purpose of the handhold was inadmissible.

It is intended as an aid to all who are invited to become passengers to be used in boarding and alighting from cars.

Such an appliance imposes upon those furnishing it the duty of maintaining a very high factor of safety.

Inspection not only involves looking at cars and appliances, but all those tests which would ordinarily be used to ascertain the condition of cars and appliances that a prudent man would use.

DEFENDANT brings error from judgment for plaintiff. Reported 137 N. W. 256.

STATEMENT OF FACTS BY THE COURT.

Plaintiff, a man weighing upwards of 200 pounds, was injured while attempting to alight from one of defendant's cars. As the car was coming to a stop in response to his signal, plaintiff stepped toward the edge of the front vestibule, took hold of the handhold with one hand, and, when the car stopped or was just about stopping, he was thrown with considerable violence to the pavement by reason of the fact that the two metal brackets which held the wooden handhold in position tore away from the car. In falling

Inspection of Cars and Appliances. — In *Nellis on Street Railways* (2d Ed.), § 290, it is said: "While the carrier is not an insurer of its passengers against accidents, the inspection of its cars and appliances, roadbed and machinery must be such as, in the judgment of those who understand the subject, will be sufficient to secure, or such as experience has shown to be sufficient to secure, the safety of its passengers. Where an accident happens to a passenger by the breaking of one of the railway company's appliances, the burden is upon it to show affirmatively a condition of things which would exonerate it from liability. A railroad company is bound to know the effect of time and weather upon its appliances, and it should, by proper inspection and timely changes and renewals, keep them safe."

plaintiff carried with him in his hand the handhold and both brackets. Besides various cuts and bruises, plaintiff suffered a dislocation of the right shoulder; the evidence tending to show that his injuries were, to some extent, permanent in character.

It is not claimed by plaintiff that there was any negligence in the operation of the car. The duty and the breach thereof is stated in the declaration as follows:

"First, to operate Sherman line cars that were in fit and proper condition to act as conveyances for passengers; second, to transport plaintiff safely and securely to his destination; third, to use a very high degree of care and caution with reference to the condition of its cars and their appurtenances, upon which the public and especially plaintiff was invited to ride for money paid to defendant; fourth, to especially refrain from running on said Sherman line a car that was worn out, old, ancient, antiquated by reason of years of service on other lines, and in a condition unfit to be used for the transportation of passengers; fifth, to especially refrain from running over said Sherman line a car the woodwork of which was mellowed by age and usage, and so rotten that the bolts, screws, handles, brass and iron works and brackets and handholds would collapse, pull out and tear asunder when passengers, especially plaintiff, took hold of the same; sixth, to especially examine, inspect, adjust, repair and replace all rotten, defective and worn-out portions of said car, more especially the woodwork to which front handholds were attached on said Sherman line cars, the screws, brackets, handholds and contiguous appurtenances, when said defendant knew or ought to have known that passengers, especially plaintiff, were invited to use these very instrumentalities for their more safe and convenient exit from the cars. And plaintiff avers that said defendant, well knowing its duties in the premises, did carelessly and negligently omit to do or perform the same, in consequence of which plaintiff, while a passenger on said Sherman line car on or about the date as aforesaid, met with severe and permanent injuries."

As to the condition of the car plaintiff testified:

"Q. What did you notice, if anything, to be the condition of the wood, either that was attached to the screws or that was in the car? A. The wood pulled right out with the screws, and on the bottom of the screws, down below, the wood came right out the same as if you had pulled a screw out bending it down. The bottom wood was broke right off and rotten, and stuck right to the screws. Q. Could you see its condition by inspecting it? A. Plain enough. We looked at it. There was two others looked at it besides myself. Q. What was the wood; do you know? A. I never examined it. Q. What kind of screws were they? A. I never examined it to see whether it was oak or white wood. Q. What kind of screws were they? A. I think they were about an inch and a quarter round head, ten or maybe twelve. The screws at both ends came out. The condition of the wood, as I described it, existed at both ends. There was wood attached to all the screws. The general condition of the wood was rotten. There was no paint on the car. It was an old car. It was not a new painted car. The paint was pretty well worn. It was an old car."

On cross-examination he said :

"As I said, it was an old painted car, an old coat of paint. The wood underneath the brackets was rotten. Q. No; but what was the area? A. And to speak as to the brackets, it showed outside of the brackets where it was dirty and dark."

Upon the same question he offered the testimony of a fellow passenger :

"Q. And the brackets and screws — will you describe to the jury what you noticed about their condition? A. He took the handlebar from the man, and put it in the vestibule. I examined the handlebar, and noticed the screws had pulled right out of the socket, out of the wood, and there was still some of the rotten wood hanging to the screws, and then I looked at the wood where the handlebar was fastened to. I observed that they had both pulled out, top and bottom. Q. What was the condition of the wood on the car where they had pulled out? A. It looked rotten and worn out. Q. Was that noticeable from the outside? A. Yes, sir. Q. Well, was there any paint covering this rotten wood or was it worn off in places? A. It was painted in spots. It looked like all paint worn off."

On cross-examination this witness testified :

"Q. How about the wood on that post, did you know what kind of wood it was — that is, whether it was oak or elm or what it was? A. I am no judge of wood. Q. Underneath the lugs of the brackets or (of) the handhold you observed it looked kind of dark and rotten? A. Yes, sir."

To meet this testimony as to condition, defendant introduced its inspector's daily report, from which it appeared that the car in question had been inspected and found "O. K." on August 30, 1910, the day before the accident, and that it was inspected in the ordinary manner by the motorman and conductor who took it out on the day of the accident. It also introduced evidence tending to show that, while the wood immediately under the lugs which held the handhold was soft and to some extent decayed, outside the lugs the wood showed no evidence of being unsound. It was likewise shown that the car was but four years old, was of a type and equipment in general use, and was purchased from a reputable manufacturer. The ordinary life of such a car including the appliances such as the handholds was shown to be not less than fifteen years.

The charge of the court was, in part, as follows :

"The degree of care which is required by the defendant and by all street car companies in inspecting the various appliances of its car must be a reasonable degree of care and caution. By this I mean the degree of care to be used in

the inspection of its car must conform to the nature of the appliance in the car it is intended and expected to use, and the actual use to which it is customarily put by the passengers in the car.

"In the case at bar it is undisputed that the object of this handhold is to steady, aid and to help passengers in getting off and on cars, and it must be expected that said appliance will be subjected to more or less strain, and that, as a consequence of this, it is the duty of the defendant not to make a perfunctory or careless inspection of it, but to make such an inspection of the handhold as is reasonable under the circumstances, and as will satisfy them that the handhold will answer the requirements naturally intended by it, and for which it is placed upon the car.

"Now, gentlemen of the jury, I charge you in this connection, as requested by the defendant, that the defendant company is not an insurer of the safety of its passengers. The only duty it owed to the plaintiff in this case under the declaration and the evidence was to provide a car with suitable appliances to enable the plaintiff to alight at his destination, and to see to it that those appliances were kept in a safe and proper condition of repair. The defendant is not required to provide its cars with all known and approved appliances necessary to protect its passengers from injury, but it is sufficient if it has all the approved appliances that are in general use, and which are necessary for the protection of its passengers and an appliance which has been in daily use for years and has uniformly proved adequate, and safe and convenient, may be continued in use without the imputation of negligence. I do not mean to say by that, gentlemen of the jury, that they are relieved from the duty of making such inspection as may reasonably be necessary at such intervals as may be proper. There is no evidence in this case that the handhold or its fastenings has been ever improperly, insufficiently or negligently repaired prior to the time of the accident. I think that is so.

"It appears from the evidence that the car in question was procured by the defendant from a reputable and respectable builder and dealer not earlier than April, 1906; that it was a type of construction generally approved and a type of car in general use. There is nothing to indicate that it was constructed of improper materials at the outset, nor that the wood posts to which the handhold was attached was originally defective, but it was such a car as the defendant had a right to use in its business. There is no doubt about that. But, of course, when I say that, I do not mean to say with reference to that that they were relieved from the duty of inspection to which I have called your attention. It appears from the evidence that the ordinary and average life of the car in question was not less than fifteen years, and defendant had a right to continue the use of this car in its business up to the time of the accident in this case, provided they took such means as the law requires to apprise themselves of deterioration, decay or wear, by proper examination and inspection, and made such necessary repairs as were shown necessary.

"If you believe from the evidence that the defendant obtained the car in question from reputable and respectable manufacturers, not earlier than April, 1906, that it was constructed of proper materials, and that there was nothing to indicate that the wood in the posts to which the handhold was attached was originally defective; that the ordinary and average life of the car was not less than fifteen years; that defendant employed such test and made such tests

and examination as are required of it during its use of the car, and to apprise itself of the deterioration or decay, and that such test and inspection did not reveal the defects which were found to exist after the accident, or should or should not reveal such defects, then I charge you the defendant was not negligent in using this car in its business at the time of the accident and under those circumstances the plaintiff cannot recover.

"I am asked to charge you in this case the defendant was not obliged under the law and the evidence to furnish a handhold of sufficient strength and capacity to sustain the whole or substantially the whole of plaintiff's weight in his attempting to get off the car. Well, doubtless, gentlemen of the jury, as an academic question that may be so, but at the same time I cannot exactly say how much strain is ordinarily put upon a handhold of that description. At the same time, gentlemen of the jury, it is requisite that they should put on the car a handhold which would sustain the strain which would come from the ordinary use of that car, and I think in our daily life, gentlemen of the jury, we see people swing off from a car with one hand on the car and leaning a certain amount of their weight forward, and the only thing I can say to you on that subject is that you may, you must, find that it should be sufficient at least to take the ordinary strain which will occur in the running of cars; and when I say ordinary strain I do not mean the strain which comes from the use by the ordinary individual, for the street cars are not merely for you and for me, gentlemen of the jury, but they are for gentlemen as large as the plaintiff in this case, as large as Mr. Webber on the other side of the table, and so I do not want you to think that I mean the strain an average man would give it, but the strain which would come in the ordinary use by those of the public who are entitled to use it. * * *

"I am asked to charge you in this case that the plaintiff was in duty bound to wait until the car had come to a stop before attempting to alight therefrom. So far as the right to use the handhold is concerned, and if, in attempting to alight before the car stopped, he subjected the handhold to an unusual or unreasonable strain, his weight considered, and under such strain it pulled out and resulted in his falling, I charge you plaintiff cannot recover. I cannot give that language, gentlemen of the jury. As I said before, as we go through life we see people who will swing out from a car and I think the handhold — I think that is a part of the incidents of the ordinary use of a car. Of course, if a person gets off a car in motion he takes the risk of so doing — that is, the risk which is consequent upon getting off a car in motion, but he does not necessarily, if he swings off from a car, unless he puts some extraordinary strain upon the handle. He does not, in the mere attempt to alight, gentlemen of the jury, take the risk of a defective handhold or a handhold that would not sustain the weight which is ordinarily incident to such an action. * * *

"With respect to the duty of inspection, all the law required of the defendant was that it should provide such necessary means as in the judgment of those who understand the subject and such as experience has shown would be sufficient to secure the safety of its passengers, and to apprise itself of defects, deterioration and want of repair, and, if such means are provided and proper use made thereof, it has discharged its duty in this behalf, and no negligence can be claimed on this head. * * *

"I am asked to charge you that the defendant at and before the time of the accident provided a proper and sufficient means and system for the inspection of its cars. Of that there can be no question. The system was unquestionably proper, but whether there was the proper inspection or not is a question, or one of the questions, in this case for you.

"Now, I am asked to charge you on the question of a latent defect. Of course, gentlemen of the jury, if this may be said to be a latent defect which was not discoverable by the ordinary inspections, there would not be any liability. It is claimed in this case, gentlemen of the jury, that there was no evidence of rotten wood from the outside that was open to a glance or a proper examination by the eye. That is denied, I think, by the plaintiff in this case because the testimony of Mr. Newman contains some expressions which would tend to show that the wood was discolored around the lug, or whatever you may call it, that part of the front through which the screws were placed, and that it ought to have apprised the defendant of a possible deterioration. What the fact is in this case is one of the questions for you. All I can say is that if they made the proper inspection by applying a sufficient amount of force, if you think that that was essential to the inspection and made a proper inspection with the eye and that under those circumstances the mere fact that there was evidence of decay beneath might make it a latent, or would make it doubtless a latent, defect for which they would not be liable, but whether there is a proper and sufficient application of force and putting of strain upon that handhold, if you find that to be part of a reasonable inspection, or whether an inspection would have disclosed the fact that the wood was so deteriorated that the handlebars should have been taken off, is a question for you, and not a question for me.

"I am asked to charge you, and do charge you, if you believe from the evidence that the defendant's agents and servants properly inspected the car and its appliances at all reasonable times before the accident, and that such inspections did not disclose, and could not in reason have disclosed, the defect which was found to exist after the accident, then that the existence of such defects would not be negligence and plaintiff could not recover. I think that is so. * * *

"I am asked to charge you that the law does not require defendant to make examinations and inspections of the handles to remove the screws and take off the brackets for the purpose of examining the condition of the wood underneath the bracket. I think that is so, gentlemen. I cannot lay down a rule telling you how much of an inspection there should be, or what inspection there should be, but there should be a reasonable inspection, and if, gentlemen of the jury, you find from the evidence in this case there should have been a pressure or a strain put upon that bracket as a part of the inspection, if you find that a proper inspection of that kind would have disclosed the defect, why the plaintiff would be entitled to recover unless he has been guilty of negligence.

"And, too, gentlemen of the jury, if you believe that an inspection of the wood around the immediate vicinity of the lug by which the bracket was attached would have showed that the wood was deteriorating, you may find, gentlemen of the jury, that they ought to have made a further inquiry by the removal of the bracket, but if there was nothing, if a proper inspection dis-

closed nothing around the bracket to indicate a deterioration of the wood, they bought this car, I think, from a reputable manufacturer, and if the wood appeared sound, I think myself, gentlemen of the jury, they were not obliged in the matter of inspection to remove the bracket."

Plaintiff having recovered a judgment of \$1,800, defendant made a motion for a new trial which was denied.

The case is now in this court for review upon the following questions as stated by defendant:

"(1) There should have been a direction for defendant on the close of plaintiff's evidence

"(2) There should have been a direction for defendant on all the evidence.

"(3) There was error in the court's refusal to receive the testimony of Savage as to the purpose the handhold was intended and designed to serve, and his refusal to charge as requested on this point, and his charge as given.

"(4) There was error in the court's refusal to charge as requested that the mere fact the handhold pulled loose and that the accident happened in this case is no evidence of negligence.

"(5) There was error in the overruling of defendant's motion for a new trial, and in the reasons of the judge given therefor."

Corliss, Leete & Joslyn, of Detroit (*Wm. G. Fitzpatrick*, of Detroit, of counsel), for appellant.

Clarence P. Milligan, of Detroit, for appellee.

Opinion by BROOKE, J.:

1, 2. Referring to the motion for a directed verdict, we need say no more at this point than that in our opinion the case presented on the part of the plaintiff was clearly one for the jury, under proper instructions.

3. Did the court err in refusing to receive testimony offered on behalf of defendant as to the purpose the handhold was intended to serve, and charging in respect thereto as he did? We think not. No testimony offered upon that question could have added to the knowledge already in the possession of each of the jurors. The use of the appliance is absolutely obvious. It is intended primarily as an aid to passengers in boarding and alighting from cars, but, when cars are crowded, it is frequently used by passengers to enable them to maintain themselves in a position upon the car which without its use would be impossible. It is intended for use by all who are invited to become passengers upon the cars of defendant. As, in its invitation to the public, no discrimination is

or can be made by defendant in favor of those light in weight or against those who are heavy, it follows that defendants' equipment must be such as to reasonably meet the demands of all. The handhold is frequently subjected to severe strain. Appliances of this character, devoted to such uses, impose upon those who furnish them the duty of maintaining a very high factor of safety. The infrequency of such accidents as the one which caused the plaintiff's injury would indicate that both manufacturer and operator recognize this principle. Common experience teaches every one the character of the use to which the handhold is put. The defendant cannot be permitted to say that it was not designed to be used in a manner which it daily permits and invites. It was not error to exclude the testimony offered, nor to charge the jury in accordance with the views here indicated.

4, 5. We are of opinion that to have given this request to charge without qualification would have amounted to error under our decisions. The plaintiff's case was predicated, not only upon the fact that the handhold pulled out and the accident happened, but upon evidence that the wood underneath the lugs was decayed, to such an extent that the screws drew out, and upon further evidence that the appearance of the wood immediately outside the lugs was such as might reasonably lead a careful and prudent inspector to suspect the existence of decay in the timber. Such evidence, coupled with the failure of the appliance, we think warranted the court in submitting the question to the jury, who, in turn, might draw an inference of negligence on the part of the defendant from the failure of the handhold and the happening of the accident under the circumstances disclosed by the testimony. Upon this point the following Michigan cases will be found instructive: *Barnowsky v. Helson*, 89 Mich. 523, 50 N. W. 989, 15 L. R. A. 33; *Stoody v. Detroit, etc., R. Co.*, 124 Mich. 420, 83 N. W. 26; *La Fernier v. Soo River Wrecking Co.*, 129 Mich. 596, 89 N. W. 353; *Howell v. Lansing City Electric R. Co.*, 3 St. Ry. Rep. 443, 136 Mich. 432, 99 N. W. 406; *Sewell v. Detroit United Railway*, 158 Mich. 407, 123 N. W. 2; *Niedzinski v. Bay City Traction, etc., Co.*, 160 Mich. 517, 125 N. W. 409; *Mirable v. Simon J. Murphy Co.*, 135 N. W. 299.

We are of opinion that the instructions of the court with reference to the duty of inspection were proper. It is obvious that the handhold is, so far as the safety of the passenger is concerned, one of the most vital parts of the car. We may say of defendant

here as was said of defendants in the case of *Scott v. University Athletic Ass'n*, 152 Mich. 684, 116 N. W. 624, 17 L. R. A. (N. S.) 234, 125 Am. St. Rep. 423, 15 Ann. Cas. 515:

"They were not insurers of safety, they did not contract that there were no unknown defects, not discoverable by the use of reasonable means; but, having constructed the stand, they did contract that, except for such defects, it was safe."

In the case of *Texas & P. Ry. Co. v. Allen*, 114 Fed. 177, 52 C. C. A. 133, which upon the facts much resembles the case at bar except that there an employee instead of a passenger was injured, the Court of Appeals for the Fifth Circuit approved of the following definition of the word "inspection":

"'Inspection,' gentlemen, as used in the court's charge, is an inquiry, by actual observation, into the state, efficiency, safety and quality of the thing inspected. Inspection of the appliances and instrumentalities in use by a railway company should not rest alone upon the vision, because there are many defects, the existence of which could be ascertained by reasonable and ordinary tests which involve the exercise of senses other than the sense of vision. I should say the railway company would be liable for those defects in its appliances and instrumentalities which, in the course of inspection, could be perceived—that is, capable of coming under the cognizance of any one or more of the senses of man in the exercise of ordinary care. Inspection not only involves looking at cars and appliances, but as well all those tests which would ordinarily be used to ascertain the condition of cars and appliances that a reasonably prudent man would use in the exercise of such an undertaking."

The charge, as a whole, we think, presented the question of defendant's negligence fairly. No error is discovered in the record. The judgment is affirmed.

Maryland Electric Rys. Co. v. Beasley.

(Maryland—Court of Appeals.)

COLLISION WITH VEHICLE AT CROSSING; FAILURE OF AUTOMATIC BELL TO RING; EVIDENCE; CONTRIBUTORY NEGLIGENCE.—In an action to recover damages resulting from a collision with a street car at a crossing, evidence as to the operation, at indefinite periods prior to the accident, of an automatic

Common Knowledge as to Photography.—In Chamberlayne's *Modern Law of Evidence*, § 729, it is said: "The scientific principles relating to photography, the mechanical and chemical processes employed and the general accuracy of the results, are known to the courts. The accuracy of a properly taken X-ray photograph of the bones of a living body will be judicially known."

alarm bell and photographs of the scene of the accident taken some time thereafter were admissible.

Evidence examined and *held*, that the driver of the vehicle was guilty of contributory negligence as a matter of law.

DEFENDANT appeals from a judgment for plaintiff. Reported 83 Atl. 157.

Charles A. Marshall and *Robertson Griswold*, for appellant.

Robert Moss, for appellee.

Opinion by PEARCE, J.:

This suit was brought by the appellee to recover damages resulting from a collision at Shipley Station, on the line of the Maryland Electric Railways Company, between one of the appellant's cars and a team of mules and wagon belonging to the appellee, one of the mules being killed, the wagon and load of peas destroyed, and the harness much broken and injured. The driver of the wagon also sustained injuries for which he has brought suit, the result of which, by agreement of counsel, is to abide the decision of this appeal.

The public road from Severn to Baltimore crosses the railways track at Shipley Station, and is used day and night by a very large number of teams hauling produce of all sorts to market. The county road at that crossing, going towards Baltimore, runs near North East and crosses the track at an angle of about forty degrees. The approach of the railway to the station coming from Baltimore is through a deep cut, the course before entering the cut being nearly due south, but curving in the cut until it emerges from it, until at the crossing the course is about southeast. It appears from the testimony of the plaintiff, as a result of actual measurement by him, that a car approaching this crossing from Baltimore comes first into the vision of one at the crossing, or ten feet therefrom, at a point 450 feet from the center of the crossing, as is shown on the blueprint used at the argument. There is an automatic bell at the station, the purpose of which is to warn travelers of the approach of trains, but there was evidence from a number of witnesses that it rang frequently when there were no cars approaching, and frequently failed to ring when they were approaching. Mr. Warthen, who lived at Shipley in May, 1910, said it rang "continuously most of the time" though sometimes it acted properly, that it was a nuisance and disturbed him so

much at night that he wrote to the company about it, it might have been a week or as much as two weeks before the accident, but he could not tell just how long. Mr. Stockett said he lived close to Shipley Station up to October, 1909, that he had known this bell to ring twenty-four to forty-eight hours on a stretch; that it became a nuisance and he complained to the company, and they gave him a key to the box so he could stop it, and he had stopped it as late as 10 o'clock at night. Mr. Kelley said he often heard it ringing when there was no car coming; that he had waited on that account as much as ten minutes before attempting to cross, and had become so hardened to it that he paid no attention to its ringing during the last year or so. He drove over that crossing the day of the accident, but could not say whether the bell then rang. Mr. Ford, who lived about 200 yards distant, said seven out of ten times when it would be ringing there would be no car coming; that he crossed there that day, but the bell was not ringing at that time. Richard Hall said he crossed there frequently, going to and coming from Baltimore, when the bell was ringing and there was no car coming. This was in the summer of 1910, but he could not say whether it was before or after this accident, and there was similar testimony from other witnesses.

Wesley Forrester, the driver of the team, testified that he left Mr. Beasley's about seven miles from Shipley about 9:30, June 14, 1910. The night was foggy. His mules walked most of the time and he could see their heads as he drove along; that he had been driving that road five or six years day and night and he knew this bell, and knew it often rang continuously whether cars were coming or not; that as he approached that night he stopped thirty or forty yards from the track, and heard the bell ringing faintly, but heard nothing else; then went up to the tracks, stopped, looked in both directions, listened but saw nothing, and heard nothing except the bell, and then went on; that the first notice he had that the car was coming was when he saw the headlight right on top of him.

On cross-examination he said he stopped at the track two or three minutes before attempting to cross, and he had stopped at other times when the bell was ringing, as much as ten or fifteen minutes, and had waited until three or four other wagons came along and crossed before him. He said he was not asleep when he approached the crossing, and had not been asleep that night, but that he would not swear that as he came to the crossing he did

not have his hands and his head down; that he did not hear either a station signal or a danger signal from the car, and that he is positive he would have heard either or both, if they were given.

Harry Albaugh testified for the defendant that he left Baltimore on the 14th of June, 1910, on the 11:35 P. M. car; that he occupied the front seat on the front car on the right hand side, the motorman being on the left; that the car had a bright head-light, and he could see blades of grass in the track 200 feet ahead; that he had been keeping notice of the whistle being blown, and just before they got to the curve approaching Shipley a real sharp whistle was given; that just as they came around the curve he saw the head of one mule going very slowly across the track; that he jumped and then saw both mules and saw a man

"sitting in the seat with his head down and the reins in his hands carelessly like this (indicating)."

The man on the wagon never made a move to get out of the way, and when he saw the car was going to hit them he moved back in the car, but facing front all the time; that he felt the car tremble as the brakes were applied; that the whistle was blown before the team was in sight, and after it was in sight six or eight times; that the bell was ringing all the time when the car stopped until the car backed into the siding, and began again as the Annapolis car approached; that the motorman slowed up before he hit the curve, and he judged the car after that was going about half as fast as before.

Allan T. Hopkins was on the right-hand side about the middle of the front car, there being two on the train, with a bright head-light; the whistle was sounded as they approached the curve, and again just as they came around the curve. He did not see the mules, but saw the motorman apply the brakes two or three seconds before the collision, and that the car was going at a moderate speed.

W. C. Kennedy was in the center of the first car with his window up. When the emergency brakes were applied he looked out and saw the heads of two mules on the track, and he judged the car was about 150 feet from the crossing; heard the whistle blow when the emergency brakes were applied and also before.

V. J. Vanous, the conductor in charge that night, said the regular crossing signal was blown just before they reached Shipley

about 150 yards from the crossing, and the danger signal following from five to ten seconds later as well as he could judge.

Wm. T. Scible, the motorman on the car, testified that he stopped at Linthicum, the station just north of Shipley, and after leaving Linthicum blew for Shipley, and at a reasonable distance blew for that crossing; that as he eased up on the car and swung round the curve he saw the tail end of the wagon on the track about 100 feet away; that he grabbed the brake with one hand and the whistle cord with the other and shut his eyes to keep out the flying glass, and when he stopped, the wagon was smashed into pieces.

The blueprint already referred to was then put in evidence, and Mr. Laying, the engineer who made the plat, testified to its accuracy, and said that when a car coming from Baltimore is 600 feet from the crossing, the headlight strikes the road 127 feet from the crossing, and when the car is 198 feet from the crossing, it strikes the road forty-nine feet from the crossing. He said there was no change in the surroundings affecting the vision of the light, as only a little had been cut out of the tops of the trees near the station above the line of vision. He also offered to exhibit certain photographs of the location taken after this trimming, which, on objection by the plaintiff, were excluded.

It should also be noted that the plaintiff testified with commendable frankness that the driver of that team at ten feet from the track could see further towards Baltimore than when right on the track, and, on cross-examination, after having stated in his examination-in-chief, that one ten feet from the track, could see down the track 450 feet, by his own measurement, said that if the driver had stopped ten feet from the track and had looked for the light, he should have seen it. There were six exceptions to the rulings on evidence and one to the rulings on the prayers. The first, second, third, fourth and fifth exceptions were taken to the action of the court in permitting a number of the plaintiff's witnesses to testify to the operation, at indefinite periods prior to the accident, of the automatic alarm bell at the crossing, and may all be considered as one exception. The sixth exception was taken to the refusal to allow the introduction in evidence of the photographs mentioned.

The principle involved in the group of exceptions above was considered in *Brooke v. Winters*, 39 Md. 509, and in *Maryland, Del. & Va. R. R. v. Brown*, 109 Md. 319, 71 Atl. 1005, and its

application has been frequently discussed in the various courts of this country under varying circumstances. Without repeating here, we may refer to what was quoted in *R. R. v. Brown, supra*, from Wigmore on Evidence, as bearing generally upon the subject. Elliott, in his work on Evidence, vol. 1, § 87, referring more directly to the precise question here involved, says:

"Where it becomes necessary to affect those charged with the duty of keeping highways, bridges or other structures in a safe condition, or of keeping only competent persons in their service, with notice of defects or *unfitness*, or *where the question is as to the safety or availability of a machine or contrivance designed for a particular purpose or for practical use*, evidence is admissible to show how the thing served when put to the use for which it was designed, in the one case, or that occurrences of a character to make the defect or incompetency notorious had taken place, in the other."

This rule is illustrated in the following cases, among numerous others:

Brewing Co. v. Bauer, 50 Ohio St. 560, 35 N. E. 55, 40 Am. St. Rep. 686, where in an action for injuries to an employee while operating a lift or elevator which it was his duty to operate, evidence was admitted showing that on a prior occasion the elevator behaved in the same manner as when he was injured, as tending to show some vice in its construction or defect in its maintenance, rendering its operation unreliable and dangerous, and that the employer knew, or should have known of this fact.

Myers v. Hudson Iron Co., 150 Mass. 125, 22 N. E. 631, 15 Am. St. Rep. 176, where evidence was held admissible of former slips of the clutch gear designed to prevent slipping, by which slipping the plaintiff was injured, said former slippings being in the knowledge of the defendant.

Pittsburgh & Ft. Wayne R. W. v. Ruby, 38 Ind. 294, 10 Am. Rep. 111, where evidence was held admissible of particular acts of carelessness on the part of a coservant to show his retention by the master after he knew of his carelessness.

McCarragher v. Rogers, 120 N. Y. 526, 24 N. E. 812, where in an action for an injury by an employee because a piece of machinery he was operating jumped out of the socket, a person previously injured at the same machine was allowed to testify that this occurred frequently during his use of it. And to the same effect are *Baker v. Hagey*, 177 Pa. 128, 35 Atl. 705, 55 Am. St. Rep. 712, and *Perry v. Machine Co.*, 70 Vt. 277, 40 Atl. 731.

The broad principle underlying all these cases is well stated in *Brooke v. Winters*, 39 Md. 508, as follows:

"The rule that excludes facts because they are collateral does not apply to facts wherever existing if they may afford any reasonable presumption as to the matter in dispute. Whether they are facts before or after the suit, they are admissible, if they illustrate or explain the question in issue."

One important qualification of this rule is that the time must not be too remote, and in this respect we think the evidence admitted, being of practically continuous behavior of the bell, comes within that requirement of the rule.

It should also be noted that in all such cases it will be presumed that the trial court did its duty and all reasonable presumptions necessary to uphold its rulings will be indulged. 1 Elliott on Evidence, § 127; and that the matter should be regarded as in the discretion of the trial court, unless there is plain evidence of abuse of that discretion. There is no such evidence here and there was no error in these rulings.

As to the sixth exception relating to the admissibility of photographs taken some time after the accident and after a change of seasons, the authorities are not in harmony.

In *Dyson v. N. Y. & N. E. R. R.*, 57 Conn. 9, 17 Atl. 137, 14 Am. St. Rep. 82, Chief Justice Beardsley said:

"The picture represented the crossing in question and its surroundings, and presumably the court below found it was a correct representation of them. The change in the appearance of the locality by the falling of the leaves from the trees was of course open to explanation."

In *Chicago & Eastern Ill. R. R. Co. v. Crose*, 214 Ill. 602, 73 N. E. 865, 105 Am. St. Rep. 135, the court said:

"Photographs offered in evidence to explain a transaction are only competent when they are shown to have been taken so as to correctly exemplify the actual situation, circumstances and surroundings *at the time*. When the situation and surrounding circumstances are subject to change, photographs, to be of any value as evidence, must be shown to have been taken at the time, or when the situation and surroundings are unchanged."

In the case before us certain trees which were referred to by the driver as obstructing the vision, and which were in leaf at the time of the accident in June, had been since trimmed, though only in the tops, and there had been a fall of snow when the photograph was taken. It is not possible to lay down a general rule

as to what changes shall require an exclusion of photographic representations of the locality, but the trial court with the photographs before it, and the witness who took them, ought to be conceded some discretion in admitting or rejecting them, and we should not feel warranted in reversing this judgment upon that ground, without clear proof that injury was thereby inflicted upon the defendant.

This brings us to the rulings on the prayers.

It conclusively appears from the evidence that the automatic electric bell had been almost continuously out of order for some time before the accident; that it could not be relied on for the purpose for which it was provided, and that this was well known to the driver at and before the time of the accident. His own evidence shows he knew that when the bell was silent, this gave no assurance of safety, and that its ringing was no certain indication of danger.

The situation, therefore, as to him, was the same as if a bell had never been placed there, except that his knowledge of the untrustworthiness of the bell when he heard it ringing as he approached the track and later drove on it, demanded special care and caution on his part to look and listen for the danger of which the track itself was a warning.

The defendant's third prayer, which was refused, asked that the jury be instructed

"that, from the uncontradicted evidence in the case, the driver of the plaintiff's wagon was guilty of negligence directly contributing to the accident complained of, and therefore their verdict must be for the defendant."

There is evidence strongly suggesting that he was asleep in his seat when he drove on the track, until, as he expressed it, "he saw the headlight right on top of him," but he denied that he had been or was asleep, though he would not deny that his head was down and his hands dropped. If this were the only basis of that prayer it could not be granted, because that remains a disputed fact for the jury. But that is not the only, nor is it the real, basis of the prayer. The uncontradicted testimony of Mr. Layng, the draftsman of the blueprint, is that when a car coming from Baltimore is 600 feet from the crossing the light is thrown plainly on the road on which Forrester was driving at a point 127 feet from the crossing, and the uncontradicted testimony of the plaintiff, Mr. Beasley, is that the driver when ten feet from the track should

have seen the headlight itself 450 feet from the crossing, as there was nothing to obstruct his view.

The driver himself testified that if the car was going to stop at the station he was sure it could not have traveled round the curve at the rate of twenty miles an hour, to the crossing, before he got over the track, and the testimony is uncontradicted that the car was going to stop at the station. The driver says he *heard* no whistle or signal, and no noise of an approaching car, but there is no contradiction of the testimony that repeated signals were given, nor of the fact that there were two cars on in the dead of night.

It has been repeatedly held in this State that when one who can see and hear, says he looked and listened, but did not see or hear an object, which if he had really looked and listened, he must have seen or heard, such testimony is unworthy of consideration (*Helm's Case*, 84 Md. 515, 36 Atl. 119, 36 L. R. A. 215; *Medairy's Case*, 86 Md. 174, 37 Atl. 796; *Roming's Case*, 96 Md. 80, 53 Atl. 672; *Phillip's Case*, 104 Md. 458, 65 Atl. 422); and this is now declared in 1 Elliott on Evidence, § 127, to be the general rule. We cannot escape the conclusion that this prayer should have been granted, and this renders it unnecessary to consider the rulings on any of the other prayers, except those of the plaintiff which it follows should have been refused.

Judgment reversed, without awarding a new trial, costs above and below to be paid by the appellee.

Sawin v. Connecticut Valley St. Ry. Co.

(Massachusetts — Supreme Judicial Court.)

1. INJURY TO PASSENGER BY GIVING WAY OF CULVERT; LIABILITY OF COMPANY.
— Where a culvert maintained principally by a municipality gave way because of a heavy rain, and a passenger on defendant's car was injured, defendant is liable.

MAINTENANCE AND REPAIR OF BRIDGES, CULVERTS, ETC.

In *Opdyke v. Public Service Ry. Co.*, 7 St. Ry. Rep. 249, 78 N. J. L. 576, 76 Atl. 1032, it appeared that a street railway company had built a bridge for its tracks by the side of a bridge for the use of the public, both of which were within the bounds of the highway. The bridge constructed by the company was similar to railroad bridges with open spaces between the cross-ties. A runaway horse of the plaintiff ran onto the bridge and was killed by reason of its feet falling through the open spaces. It was held that the company

2. **CARE TOWARD PASSENGERS.** — A street railway company is bound to exercise the utmost diligence consistent with the nature and extent of its business and its practical operation for the safety of those whom it undertakes to transport.
3. **CONSTRUCTION AND MAINTENANCE OF TRACKS.** — The grant to a street railway company of the privilege of laying tracks and transporting passengers carries with it by necessary implication the right to establish such foundations and supports within the limits of the street as are required by the reasonable conduct of its business and the safety of its passengers.

DEFENDANT excepts from judgment for plaintiff. Reported 99 N. E. 952.

Frank J. Lawler, of Greenfield, for plaintiff.

Fredk. L. Greene and *Francis N. Thompson*, both of Greenfield, for defendant.

Opinion by Rugg, C. J.:

This is an action of tort to recover damages for injuries sustained by the plaintiff while a passenger upon a car of the defendant. The accident occurred in the town of Montague at a place where the defendant's tracks had been constructed in accordance with a location duly granted within the limits of the highway, but on its side and not within its wrought portion. The cause of the accident was the giving way of a culvert in consequence of a heavy rain following a severe snow storm. This culvert had existed long prior to the construction of the defendant's tracks, and had been maintained by the town of Montague, except that since the laying of the defendant's tracks in 1896 it had washed out twice, and thereafter had been enlarged and lengthened, to the expense of which by agreement the defendant contributed. The culvert was wholly within the highway. Its dimensions were determined by the town authorities, and it carried the surface water from a considerable territory lying outside the highway. The immediate cause of the accident was the flowing of water over the highway

had no right to build such a structure within the highway limits, and that it was liable for the death of the horse.

In *Ft. Smith Light & Tract. Co. v. Soard*, 79 Ark. 388, 96 S. W. 121, it was held that a street railway company was liable for the overflowing of water upon the plaintiff's lands where such overflowing was caused by the failure of the company to construct and maintain proper drains as required by a municipal ordinance.

In *Murphy v. Suburban Rapid Transit Co.*, 28 J. & S. (N. Y.) 9, 15 N. Y.

and tracks of the defendant by reason of obstruction of the culvert by ice. In previous years the town had kept the culvert clear, but did not do so during the year of the accident, although the defendant had no knowledge of any change in its practice. Water upon and over the tracks of the defendant was not unusual. Upon these facts the chief justice of the Superior Court

"found as a matter of fact that the defendant company was not negligent in regard to the condition of its car tracks or power, nor in the management of its car at the time of the accident, but, however, ruled that the defendant company was bound to maintain beneath its tracks within the highway over the culvert such structure or foundation as to enable it to run cars safely thereover in the event that the town of Montague failed so to do."

Having made these findings and this ruling, he found for the plaintiff. The defendant's exception to the ruling brings the case here.

This ruling is interpreted to mean that the defendant was bound to discharge the obligations of a common carrier touching the foundations of its tracks, not that it was absolutely bound to guard against every conceivable emergency, and that it did not discharge such obligation by relying upon the town and its officers to do their duty as to the culvert.

There is nothing in the record to indicate that there were terms or conditions in the original location granted to the defendant, by which it was bound to do anything as to the culvert. Reasons

Supp. 837, it appeared that the defendant company obtained permission from the city of New York to construct a bridge across the Harlem river for its trains on condition that it keep and maintain a footway thereon with necessary and convenient stairways and approaches thereto from the street at either end; it failed to keep an approach in repair, causing injury to the plaintiff. It was held that the defendant was bound to keep the approach in repair and was liable for the plaintiff's injuries.

In *Jenree v. Metropolitan St. Ry. Co.*, 8 St. Ry. Rep. 282, 86 Kans. 479, 121 Pac. 510, it appeared that an ordinance granting a street railway company a franchise over certain viaducts and streets contained a provision requiring the company to repair and maintain in good condition and safe for public travel all parts of the viaducts, including the approaches. A sidewalk forming a part of a viaduct was negligently permitted by the company to become out of repair and dangerous for public use, in consequence of which the plaintiff, while traveling upon it, was injured. It was held that the company was liable for the injuries sustained by the plaintiff.

In *Birmingham v. Rochester, etc., R. Co.*, 137 N. C. 13, 32 N. E. 995, it appeared that the State had built a bridge over a State canal where such canal

which might apply under such circumstances, therefore, may be laid on one side. See *Selectmen of Gardner v. Templeton St. Ry.*, 184 Mass. 294, 68 N. E. 340; *Selectmen of Wellesley v. Boston & Worcester St. Ry.*, 188 Mass. 250, 74 N. E. 355; *Worcester v. Worcester Cons. St. Ry.*, 192 Mass. 106, 78 N. E. 222; *Selectmen of Clinton v. Worcester Cons. St. Ry.*, 199 Mass. 279, 85 N. E. 507. The point now presented for decision has never before arisen in this commonwealth. It has nothing to do with the repair of the surface of highways for general travel. Cases like *Leary v. Boston Elev. Ry.*, 180 Mass. 203, 62 N. E. 1, and *Hyde v. Boston*, 186 Mass. 115, 71 N. E. 118, have no bearing.

The precise point is the extent to which a street railway is required in the performance of its duty as a common carrier of passengers to provide for the support of its track and the extent to which it may rely upon the public authority in this regard. The obligation to its passengers in justice can be no more extensive than its power to provide adequate foundations. In reason, the street railway cannot be held to a degree of liability higher than it can provide against in the exercise of its right. The statutes make no definite provision upon the subject. The board granting the location is empowered to

“prescribe how the tracks shall be laid and the kind of rails, poles, wires and other appliances which shall be used and”

and a city street intersected; a street railway company laid its tracks over the bridge. It was held that the company did not thereby make the bridge an appliance of its own within the meaning of the rule relative to the condition of appliances employed by a carrier.

In *Northern Cent. Ry. Co. v. United Rys. & Elec. Co.*, 6 St. Ry. Rep. 171, 105 Md. 345, 66 Atl. 44, it appeared that an ordinance had been passed by the city granting a street railway company permission to lay tracks upon a street on condition that it keep the portion of the street covered by its tracks and two feet on either side thereof in repair. The street passed over the tracks of a railroad company. It was held that the bridge over such tracks was a part of the street, and that the street railway company was bound to pay its proportion of the expense of the repair thereof.

In *Maine* it is provided by statute that the railroad commissioners may determine who shall bear the expense of maintaining and repairing bridges over which street railways pass and may apportion the expense of the maintenance thereof between the railway and the municipality. It has been held that this statute applies to all bridges which municipalities are bound to maintain and keep in repair and over which any street railway passes. *Orono v. Bangor*, etc., Elec. Co., 105 Me. 428, 74 Atl. 1022.

as to matters not treated in the general provisions of law in addition may

“impose such other terms, conditions and obligations incidental to and not inconsistent with the objects of a street railway company as the public interests may in their judgment require.”

St. 1906, chap. 463, part 3, §§ 7, 64, 65, as amended by St. 1909, chap. 417, §§ 1, 2, 3. The laying of tracks in a broad sense, includes the preparation of proper foundations to support the weight of the rails, cars and loads carried, as well as the amount and character of ballast to be used and the size and type of rails and the nature of their binding. By St. 1906, chap. 463, part 3, § 79, a street railway company is authorized to

“open any street, highway or bridge in which any part of its railway is located, for the purpose of making repairs or renewals,”

and the officer having charge of streets is required to issue permits therefor. The fair implication from language of the statute is that, in addition to the express requirements of the public board as set forth in the location, the company may satisfy the reasonable needs of its business in the respects pointed out, both in original construction and in subsequent repairs.

Broader considerations lead to the same conclusion. The street railway is an instrumentality for the accommodation of public travel. As a common carrier of passengers, it is bound to exercise the utmost diligence consistent with the nature and extent of its business and its practical operation for the safety of those whom it undertakes to transport. It is authorized to use instrumentalities denied to the ordinary traveler upon highways. Its cars are as matter of common knowledge far heavier than vehicles for which municipalities are required by law to maintain highways in safety. The teams and carriages, for the safe and convenient passage of which by travelers the highways must be kept in repair under R. L., chap. 51, § 1, are confined to the same general kind in use when the statute first was enacted, and do not include electric cars. *Doherty v. Ayer*, 197 Mass. 241, 83 N. E. 677, 14 L. R. A. (N. S.) 816, 125 Am. St. Rep. 355. Moreover, the weight of carriage for which liability exists on the part of a city or town for failure to repair does not exceed six tons (R. L., chap. 51, § 18), a weight far less than that of the electric car in common use. If in other respects the way is safe and convenient for the

ordinary traveler, it does not become out of repair merely because not safe for such an instrumentality of travel as an electric car. The duty of the public authority toward the traveler in the street car is far different from that assumed by the common carrier towards its passenger transported for hire.

The location of a street railway within the limits of a public way imposes upon the city or town no obligation toward the street railway company of changing the way so that it may be fit and convenient for the construction and maintenance of tracks, poles or other appliances for the operation of the railway. The company in this respect takes the street as it finds it, and must make it suitable to its needs without the aid of the municipality. If by reason of the grade of the streets, the character of its soil or the presence of other structures in it, a necessity arises to make special and peculiar adaptations in order to repair the roadbed or construct its railway, this work devolves upon the company, and not upon the public authority. A consideration of other kinds of corporate structures in streets confirms this view. A telegraph or telephone company, given a right to set up and maintain a line of poles in public ways, cannot require the municipality to make firm ground of a swamp along a roadside. The company must prepare the ground for such strength of support as the weight superimposed upon its poles may need. Nor can it demand a cutting of the underbrush or trimming of trees at the expense of the city or town in order that the wires may be strung from pole to pole. Public service corporations may be permitted to lay conduits and pipes beneath the surface of public ways under numerous statutes. If in the course of excavation for such purpose quicksand should be encountered, the municipality could not be compelled to overcome this obstacle in order that a secure foundation be afforded for the conduit or pipe.

A street railway acquires by its location a right in the nature of a license to occupy portions of the street for purposes of its travel. As to the preparation of the place where the license for the special needs of the street railway is to be exercised it stands upon no higher ground than other licensees. Its right is a peculiar privilege to modify to some extent the use of the public way, and by such modifications to enjoy in common with others, the easement of public travel, according to the limitations and advantages which accrue from the employment of rails and cars. *Attorney-*

General v. Metropolitan R. R., 125 Mass. 515, 28 Am. Rep. 264; *Union Ry. v. Cambridge*, 11 Allen 287. It obtains no right of private property in the soil of the street. *Connecticut Valley St. Ry. v. Northampton*, 99 N. E. 516; *New England Telephone & Telegraph Co. v. Boston Terminal Co.*, 182 Mass. 397, 65 N. E. 835; *Lorain Steel Co. v. Norfolk & Bristol St. Ry.*, 187 Mass. 500, 73 N. E. 646. In many parts of the commonwealth locations have been granted upon the side of the road to street railway companies. It has been the practice under these circumstances for the railway company to make such clearing of obstructions, changes in the grade, blasting of ledges, construction of culverts, fitting of foundations and preparation of ballast as its necessities demand, at its own expense and without cost to the city or town. Indeed, the right of the street railway to do this is recognized in *Worcester v. Worcester & Holden St. Ry.*, 194 Mass. 228, 80 N. E. 232. See also *Hyde v. Boston & Worcester St. Ry.*, 194 Mass. 80, 80 N. E. 517; *Laroe v. Northampton St. Ry.*, 189 Mass. 254, 75 N. E. 255; *Underwood v. Worcester*, 177 Mass. 173, 58 N. E. 589. It appears to be authorized as to ways proposed for State highways by St. 1909, chap. 417, § 4.

The power to establish the necessary supports to make safe its traffic is implied from the nature and purpose of the location of the street railway. It comes within the generalization of Chief Justice Shaw respecting the location of a horse railroad, in *Commonwealth v. Temple*, 14 Gray 69, 77:

"Every grant, by an obvious and familiar rule of law, carries with it all incidental rights and powers necessary to the full use and beneficial enjoyment of the grant; and where such grant has for its object the procurement of an easement for the public, the incidental powers must be so construed as most effectually to secure to the public the full enjoyment of such easement."

Although the Legislature has changed the obligation of street railways touching the care of the streets for other travel than its own, from time to time, and finally has abrogated it altogether in most instances, this comprehensive statement of the law never has been limited.

The grant to a common carrier of passengers of the privileges of laying tracks and running cars for transporting the public, and thus facilitating the easement of travel, carries with it by necessary implication the right to establish such foundations and supports within the limits of the street as are required by the reason-

able conduct of its business and the safety of its passengers. This implied power must be exercised in accordance with such terms as the board granting the location may impose under the statute. Where terms of the location are silent or not specific, the power must be exercised with a reasonable regard to the rights of others and of the general public. But it exists and must be exercised before the street railway can be said to have discharged its obligation to its passengers. In the absence of any evidence as to the terms of the location, it cannot be assumed that the public authorities in granting it would hamper the power and duty of a street railway company to make its track safe. A street railway voluntarily assumes to be a common carrier of passengers within public streets and highways. It may accept or renounce the onerous burdens imposed upon it as such with knowledge of the conditions under which they must be performed. The street railway stands on a different basis in this regard from other common carriers upon highways, such as owners of coaches, stages or automobiles. These are given no special privileges in the streets, and must use the surface as provided by the public. But street railways possess extensive rights denied to other travelers, as to size and weight of vehicles employed, as to route of travel and powers of doing work, as to their track within the limits of the way, and may be held to a correspondingly larger obligation.

There is nothing inconsistent with this view in *Birmingham v. R., C. & B. R. R. Co.*, 137 N. Y. 13, 32 N. E. 995, 18 L. R. A. 764, which had to do with an accident occurring upon a bridge spanning a canal, over which as matter of law the railroad company could exercise no control, and over which it must pass on the same terms as any other traveler. See *Indianapolis v. Cauley*, 164 Ind. 304, 73 N. E. 691; *Elgin, Aurora & Southern Traction Co. v. Hench*, 132 Ill. App. 535. This judgment does not define the obligations of street railways as to bridges, which may be built under special statutes and with varying obligations and conditions attached to their construction, maintenance and repair.

The result is that as the defendant possessed the power to construct such supports within the limits of the highway as would render its railway safe for the discharge of the duties resting upon it as a common carrier of passengers, it may be held.

Exceptions overruled.

Kirkpatrick v. Metropolitan St. Ry. Co.

(Missouri — Kansas City Court of Appeals.)

1. **PASSENGER STANDING ON BUMPER STRUCK ON HEAD BY TROLLEY POLE; EVIDENCE; DAMAGES.** — In an action by a passenger to recover for injuries sustained by being struck on the head by a trolley pole while standing on the bumper of a car, evidence examined and *held*, that plaintiff was injured by a blow from the trolley pole and that a verdict for \$500 was not excessive.
2. **PASSENGER; WHAT CONSTITUTES.** — A person permitted to ride on the bumper of a car by the conductor, because of its crowded condition, thereby becomes a passenger.
3. **ASSUMPTION OF RISKS BY PASSENGER.** — Although a person riding in a place not intended for passengers assumes all the risks, he does not assume the negligence of the defendant.
4. **INJURIES TO PASSENGERS; BURDEN OF PROOF.** — Where general negligence is charged and it is shown that a passenger is injured, it devolves upon the defendant company to prove that the accident was unavoidable.
5. **JUDICIAL NOTICE OF MECHANICAL CONTRIVANCES.** — The court cannot take judicial notice of the fact, if it is a fact, that there is no known mechanical contrivance in use that will prevent trolleys from becoming detached from the wires.

DEFENDANT appeals from a judgment for plaintiff. Reported 143 S. W. 865.

John H. Lucas and *Chas. N. Sadler*, for appellant.

S. D. Scott, *A. F. Smith* and *Guthrie, Gamble & Street*, for respondent.

Opinion by BROADBUSH, P. J.:

This is a suit by plaintiff against defendant for damages for personal injuries alleged to have been received on or about August 24, 1908, on Southwest Boulevard, between Twenty-fourth and Twenty-sixth streets in Kansas City, Mo. The action is founded on a general allegation of negligence.

The evidence of plaintiff tended to show that he boarded de-

Riding on Bumper. — As to the liability of a street railway company for injuries to a passenger riding on the bumper of a car, see *Nellis on Street Railways* (2d Ed.), § 317.

Who Are Passengers. — As to who are to be deemed passengers, see note to *Indianapolis, etc., Co. v. Lawson*, 4 St. Ry. Rep. 270.

Burden of Proof. — As to the burden of proof and burden of evidence, see *Chamberlayne on the Modern Law of Evidence*, §§ 930-1025.

defendant's car a short time before he received his injuries, at which time he was standing on the bumper of the car, which position he had taken on account of the crowded condition of the car. When he got on the car he tendered his transfer to the conductor who received it. There were two or three persons riding on the back fender of the car at the same time. He was a man about five feet and six inches tall. The trolley pole came off the wire, and plaintiff claims that it struck something and was thrown down against him and struck him on the head. The trolley came off the wire in crossing a bridge over the Belt line tracks, and at the time it was coasting down-grade going about ten or twelve miles an hour. When the trolley pole hit the crossing it was knocked back against the rear end of the car. The plaintiff and one other witness testified that the wheel of the trolley struck him on the head and knocked him to the ground. His injury consisted of a cut through the cuticle and the outer layer of the bones of his skull of about two inches in length, and there was a cut through the stiff crowned hat he had on at the time. One other witness, who was standing on the fender of the car, did not see plaintiff struck because there was another person between himself and plaintiff. His statement is that he saw him sink down and fall off the car; and that he had ahold with both hands with his face right in the car. He was asked what became of his hands. A. "They just slid right down and he dropped off;" and that he did not fall on his head.

To show that it was a physical impossibility for plaintiff to have been struck by the wheel of the trolley pole as he claimed he was, the defendant had measurements made of the pole, the distance from the top of the vestibule to the bumper and other measurements. The height of the plaintiff was conceded to be five feet and five or six inches. Mr. James A. Taylor, a lawyer of good repute, made the measurements. He testified from memoranda he made at the time. They are as follows: The distance from the bumper on which plaintiff was standing to the top of the vestibule of the edge of the roof that comes out over the vestibule was six feet and ten inches. The distance from the top of the deck to the top of the vestibule straight down, twelve inches. From the end of the trolley pole pulled down over the deck, four feet and two inches when the trolley was pulled down flat against the top of the car. The trolley pole was fifteen feet eight inches in length, including the wheel at the end. From the end of the deck to the end of the vestibule, three feet seven inches. From

the end of the deck to the end of the trolley pole, four feet two inches. He was asked:

"Did you make measurement how far the pole extended from the vestibule to the end of the trolley pole?" A. "In order to do that you would have to bend the trolley pole. Approximately, though, it was, I would judge it was, about eight inches."

His opinion was that it was impossible for a man five feet six inches high standing on the bumper to be struck by the end of the trolley.

Mr. Guthrie testified for the plaintiff, and stated as an additional fact that the distance of the base of the pole where it was attached to the top of the car was ten inches. Although his measurements did not differ materially from those of Mr. Taylor they showed that it was possible for the plaintiff to have been struck by the trolley while standing on the bumper. In his measurements he used a stiff wire of the same length as that of the pole.

By the aid of geometry, making due allowance for the dynamometric force that was given to the pole while it thrashed back over the end of the car, it is made certain that the plaintiff could have been struck as he stated while standing on the bumper. The fault in the conclusions of Mr. Taylor is that they are based upon measurements of the reach of the pole to the rear ends of the deck and vestibule by laying the pole flat on the deck of the car, when as a matter of fact, it would describe a slight circle from the base ten inches above the car to the top of plaintiff's head. This calculation accords with the other physical facts that the wound on plaintiff's head and the injury to his hat consisted practically of clean cuts, whereas, if he had fallen on his head on the ground the injury to the hat would have been in the nature of a break, and that on his head a contused wound. We think it sufficiently shown that plaintiff's injury can safely be reconciled with the law of physics, and that it was not caused by his falling from the bumper as contended by defendant.

There was evidence that the result of the plaintiff's injury was somewhat serious and permanent, and that he incurred considerable expense for medical services. Dr. Longenecker, who was plaintiff's physician, and who dressed his wounds and attended him, was asked to state whether the injury of the kind plaintiff received would in his opinion produce dizziness as one of the

permanent results which would flow to a man of the type of plaintiff. The question was objected to and the objection overruled. There has been much uncertainty as to whether the question was a proper one, and, so much so, that this court has certified a case to the Supreme Court in order that that court may determine whether it is or not. However, it is not necessary to decide the question in this case, because the doctor's answer was as follows: "I think such a result might follow." It is held that whatever objection there may have been to the form of a question if the answer it elicits is competent evidence the question is harmless. *Young v. Railroad*, 126 Mo. App. 1, 103 S. W. 135.

It is contended that the court should have sustained defendant's demurrer to the plaintiff's case. It having been shown that the plaintiff was injured as has been stated, the questions arise whether he was a passenger within the meaning of the term; whether the negligence of defendant has been shown; and whether plaintiff was guilty of contributory negligence. When a person is permitted to ride on the bumper of the car by the conductor, owing to its crowded condition, he thereby becomes a passenger. *Paquin v. St. Louis & Sub. Railway Co.*, 90 Mo. App. 118. It is contended that because plaintiff was riding in a place not intended for passengers he assumed all the risks. Such is the law. *Vessels v. Met. Street Ry. Co.*, 129 Mo. App. 708, 108 S. W. 578; *Hedrick v. Railway Co.*, 195 Mo. 104, 93 S. W. 268; *Lehnick v. Railway Co.*, 118 Mo. App. 611, 94 S. W. 996. While such is the law such passenger does not assume the negligence of the defendant, and if he is injured under such circumstances by the negligence of the carrier he is entitled to recover. *Vessels v. Railway Co.*, *supra*. All the decisions are to the same effect.

The charge is general negligence, and the rule is well established in such cases that when it is shown that a passenger is injured it devolves upon the carrier to prove that the accident was unavoidable. Under such a general allegation of negligence the plaintiff was allowed to show that the trolley pole of the car broke, and that a part of it fell upon and crushed through the roof of the car and injured a passenger. *Donovan v. Met. Street Ry. Co.*, 7 St. Ry. Rep. 190, 138 S. W. 679.

In this case it was shown that the trolley became detached from the overhead wire. Defendant contends that it is a matter of common observation that trolleys do frequently become so detached, therefore it was not a matter which the defendant could

prevent or anticipate. It is true that such is common observation, but we are not to conclude because such is the fact that it was not within the power of the defendant by the exercise of proper care in the construction of its railway to prevent such mishaps. If there was no way in which defendant could have prevented such occurrences it should have given a reason therefor. We do not know and cannot take judicial cognizance of the fact, if it is a fact, that there is no known mechanical contrivance in use that will prevent trolleys from becoming detached from the wires. And furthermore, it seems to us that there could be a means provided which would prevent the trolley pole, when it does become detached, from falling upon the car and endangering the safety of passengers.

The defendant complains that the verdict of the jury was excessive. It was for \$500. We believe the evidence of plaintiff's injury fully supports the verdict in every respect.

Affirmed. All concur.

Central Kentucky Traction Co. v. Miller.

(Kentucky — Court of Appeals.)

1. **MASTER AND SERVANT; EMERGENCY ASSISTANT; WHEN MASTER LIABLE FOR INJURIES TO.** — A person who is not authorized to perform as a servant the work in which he is injured cannot recover of the master, if he is injured, damages for his injury, because the master, not having authorized him to act, owes him no duty.

There is an exception to this rule, where the injured person is an emergency assistant, acting at the request of an employee who has, under such circumstances, authority to request his assistance, although ordinarily he is not invested with such power.

2. **ACTION FOR INJURY TO CONDUCTOR OF ANOTHER CAR ACTING AS MOTORMAN; EMERGENCY; INCAPACITY OF MOTORMAN; QUESTIONS FOR JURY.** — A conductor of defendant, while returning to the car barn on a car of the defendant, was requested by the motorman, who was taken suddenly ill, to run the car to the barn. In doing so he ran into some other cars on defendant's tracks and was injured. In an action to recover for such injuries evidence examined and *held*, that whether the motorman was too sick to operate his car and whether the plaintiff acted in an emergency were questions for the jury.

Injury to Employee. — Relative to the liability of a street railway company for an injury to an employee, see *Nellis on Street Railways* (2d Ed.), §§ 431-460.

3. DUTY OF STREET RAILWAY COMPANY TO KEEP TRACKS CLEAR. — Where a street railway company, through its dispatcher, orders a car to be returned to the barns, it is its duty to exercise ordinary care to keep the tracks clear for such car.

DEFENDANT appeals from judgment for plaintiff. Reported 143 S. W. 750.

Jno. R. Allen, Allen & Duncan, and Stoll & Bush, for appellant.

Scott & Hamilton and Hunt, Bullock & Hunt, for appellee.

Opinion by HOBSON, C. J.:

Liston B. Miller was a conductor in the service of the Central Kentucky Traction Company, and on August 30, 1908, was injured in a collision between the car he was on and some other cars which had been left standing on the track. He brought this suit to recover for his injuries.

The proof for him on the trial showed these facts: He left Lexington for Versailles at 11 P. M., and was ordered by the dispatcher to return from Versailles to Lexington that night, so as to be able to take out a car early the next morning. His car was a regular car, but an extra followed it. When he reached Versailles he got on the extra car, which had orders to return to Lexington that night. They left Versailles for Lexington at 12.05. When they were about a mile out of Versailles the motorman became sick, was pale, and looked weak. He asked Miller to operate the car for him, as he was sick. Miller then took the motor bar and began operating the car. The motorman went to the side of the car and vomited. When they reached Anglin avenue in Lexington, the motorman said to Miller that he felt better, and Miller turned the car over to him at his request. When they reached Broadway, the motorman again called to Miller, saying that he was too sick to run the car, and asked him to take charge of it. He ran it to Union and Broadway, where, at the request of the motorman, he again turned the handlebar over to him. The motorman then ran the car to Main and Limestone streets, where he again said to Miller that he was too sick; that he could not go to the barn with the car, and Miller would have to take the car in for him. Miller took charge of the car again, and when he reached Fourth street, where the motorman lived, by an agreement between them, the motorman got off; Miller slowing down the car for that purpose, but not coming to a full stop. Miller ran the car on

toward the barn. Between three and four squares beyond where the motorman got off, but before they had reached the car barn, the collision occurred, and Miller was badly hurt. The track at that point was owned by the Lexington Railway Company, but the Bluegrass Traction Company and the Central Traction Company, under an arrangement with the owner, ran their cars over it. Each of the three companies were under the same management; each had the same dispatcher and the same superintendent. They all used the same car barn. The cars into which Miller ran had been placed upon the track by the servants of the Bluegrass Traction Company, acting under the orders of the same superintendent who had ordered the car Miller was on to return from Versailles to the car barn that night. The headlight of the car Miller was on was burning badly. An automobile passed just before he reached these cars which threw up considerable dust, so that Miller, although on the lookout, could not see the cars in front of him until he was right on them. Miller, while by employment a conductor, had previously run cars from the Central station to the barn, and understood how to manage them. The train dispatcher left his office at 12 o'clock at night, and there was no way to communicate with any officer of the defendant after the motorman became sick and unable to operate the car.

On the other hand, the proof for the company was to the effect that the motorman simply felt badly, but was able to operate his car; that he did not request Miller to operate it for him, but that Miller requested him to let him run it, and the motorman sat by him on the stool while he was running it until they reached Fourth street, where the motorman asked Miller to take the car into the barn for him, as Miller lived near the barn, so as to save the motorman the walk back home from the barn. The conductor, who was in the car, testified that the motorman was not sick, so far as he knew; that he had heard nothing of his being sick; and that he did not know that Miller was operating the car until they reached Fourth street, where he heard the motorman, from the ground, call to Miller, and ask him to take care of his tool box for him. The defendant's proof was to the effect that Miller was not ordered to return to Lexington that night, but came back of his own accord, to avoid the expense of staying at Versailles. The proof for the defendant also showed that the headlight was good; and that there was an express rule of the company forbidding a motorman, under any circumstances, to turn over his handlebar to another, and

requiring him, if for any reason he had to leave the car, to take his handlebar with him, so that no one could operate the car while he was off it. On the other hand, there was proof by the plaintiff to the effect that it was customary for the conductors to operate the cars when the motorman was eating his lunch, or for any reason he was temporarily disabled, and this usage was known and acquiesced in by the officers of the defendant.

On this proof the court instructed the jury in substance, (1) that if Miller was rightfully operating the car as motorman, and while he was so operating it and exercising ordinary care it collided with the freight cars negligently left on the track by the defendant, they should find for the plaintiff; (2) that, unless they so believed, they should find for the defendant; (3) that if the motorman on the car became so ill that he could not in safety to himself and in safety to the car and its passengers or crew operate it, or if the plaintiff believed, and had reasonable grounds to believe this, and that it was necessary that the car should be moved, and it was impracticable to obtain orders from the officers of defendant what steps to take toward supplying the place of the motorman, then the plaintiff, so long as these conditions existed, and no longer, was rightfully the motorman upon the car; (4) the plaintiff could not recover if he failed to exercise ordinary care in operating the car; (5) if the cars with which the collision occurred had been negligently left on the track by the servants of the Bluegrass Traction Company, such servants, for the purposes of this action, were the servants of the defendant. The jury found for the plaintiff, fixing the damages at \$12,000. The court entered judgment on the verdict and refused a new trial. The defendant appeals.

The defendant asked the court to instruct the jury that they could not find for the plaintiff unless they believed from the evidence that at the time the motorman left the car at Fourth and Limestone streets he was, by reason of sickness, unable to run the car, and it was for this reason necessary to get Miller to run the car to the barn. The court refused to so instruct the jury, and by the instruction which he gave allowed Miller to recover, although no emergency in fact existed, if Miller believed and had reasonable grounds to believe that the emergency existed.

In determining the rights of the parties, we must carefully bear in mind the relation in which they stood. While Miller was in the service of the company as conductor, he was not the conductor

of the car on which he was riding; he had no duty to the company to perform on that car; under his own evidence, he was simply ordered to return to Lexington on that car. In so far as he took any part in running the car, he was simply a volunteer, unless an emergency arose, requiring him to run the car. The rule is that a person who is not authorized to perform as a servant the work in which he is injured cannot recover of the master, if he is injured, damages for his injury, because the master, not having authorized him to act, owes him no duty. There is an exception to this rule, where the injured person is an emergency assistant, acting at the request of an employee who has, under such circumstances, authority to request his assistance, although ordinarily he is not invested with such power. 2 Labatt on Master and Servant, § 631. Thus, in *Sloan v. Cent. Iowa R. R. Co.*, 62 Iowa 728, 16 N. W. 331, a conductor whose crew was short requested a third person to act as brakeman on his train; the regular brakeman being absent. It was held that the conductor, though not ordinarily authorized to hire brakemen, had authority to supply the place of the absent brakeman for the time being. The same principle was applied in *Aga v. Harbach*, 127 Iowa 144, 102 N. W. 833, 109 Am. St. Rep. 377, where an engineer requested another to help him adjust an electric light in the engine room. In *Georgia Pac. R. R. Co. v. Propst*, 83 Ala. 518, 3 South. 764, one of the brakemen on a train became violently sick, and the conductor requested a third person to act as brakeman in his place. It was held that the person so acting in the emergency could recover for an injury received. In *L. & N. R. R. Co. v. Ginley*, 100 Tenn. 472, 45 S. W. 348, the conductor, in an emergency, requested a third person to help him, when his brakeman was otherwise employed, and could not make a coupling. A recovery by the person who was thus injured was sustained. There are also numerous cases holding that a person is not a volunteer, if he assists the servants of the defendant, at their request, in doing work in which he is interested, and while so acting is injured by the negligence of the defendant. This has been applied in cases in loading freight and in favor of passengers on cars, where an accident had occurred, or, by reason of some other emergency, it was necessary that the passengers should assist the servants of the railroad company. *Eason v. S. & E. T. R. R. Co.*, 65 Tex. 577, 57 Am. Rep. 606, and authorities cited.

But we have not been referred to any case in which a recovery

has been allowed by one who assisted a servant, at his request, when no emergency in fact existed, and the servant was without authority to employ assistance. We do not think that such a rule should be applied on the facts of this case. From the time the car left Versailles until about the time that the motorman got off at his house, the conductor, the motorman and Miller were the only persons on the car. About the time the motorman got off, a trespasser got on to ride down to the barn, and he was the only other person on the car. The conductor and the motorman were in charge of the car. If the motorman became disabled, it was incumbent upon the conductor to take charge of it. Miller was under no responsibility for the car. The conductor was not consulted. Miller simply took charge of it at the request of the motorman, and should be regarded as a volunteer, unless the motorman was in fact so sick that he could not safely operate the car. It is true there is proof by Miller that the conductor had not long been on the road, and did not understand how to operate a car. Still he was in charge of it, and he knew nothing of any disability on the part of the motorman, or of his intention to leave the car, until he had left it. It is true that he then allowed Miller to operate the car down toward the barn; but, as the motorman had been left behind, in view of the short time that elapsed before the collision, Miller should be regarded as simply a volunteer, unless in fact the motorman, when he left the car at Fourth and Limestone, under the arrangement between him and Miller, was too sick to operate it safely to the barn. In other words, Miller cannot recover unless he acted in an emergency; and it was for the jury, under all the facts, to say whether or not an emergency existed. The fault with instruction No. 3, given by the court, is that the court thereby left it to Miller to decide whether an emergency existed, when this question was for the jury and not Miller. This instruction, with the words

"or if the plaintiff believed, and had reasonable grounds to believe, that such motorman had become and was so ill"

omitted, expresses our idea of the law upon this point. The court should have instructed the jury on this point in substance as above indicated.

By another instruction, the court will tell the jury that if the motorman got off the car at Fourth and Limestone streets, and Miller then took charge of the car to operate it to the barn for the

accommodation of the motorman, when the motorman was not in fact too sick to safely operate the car to the barn, they should find for the defendant.

Instruction 5 is also complained of; but we do not see that it was improper under the facts of the case. The defendant, by its dispatcher, had ordered this car to return from Versailles to the barn. Having given this specific order, it was the duty of the defendant to exercise ordinary care to keep the place where the servant was to work reasonably safe. While this duty rested upon it, the superintendent, who had charge of this car, ordered the other cars taken out, and gave the men who were to take them out no warning of the coming of the other car, or direction to keep the track clear. No care was taken to keep this track clear for the car which had been ordered to run over it. The court, therefore, properly held that the defendant was liable for the obstruction of the track. The court did not err in refusing to instruct the jury peremptorily to find for the defendant.

There was sufficient evidence that the motorman was too sick to operate his car to take the case to the jury, and, in view of the short distance from Fourth and Limestone streets to the barn, and the usage prevailing in such cases, if the emergency really existed, the plaintiff was an emergency assistant. We have examined the cases of *Gamble v. Akron R. R. Co.*, 63 Ohio St. 352, 59 N. E. 99, and *L. & N. R. R. Co. v. Hays*, 128 S. W. 289. Neither of these cases are in any manner applicable to the question that we have considered; in neither of them was the question of the right of a volunteer to determine whether or not an emergency existed presented or decided.

Judgment reversed and cause remanded for a new trial, and for further proceedings consistent herewith.

NUNN, J. (dissenting):

The lower court instructed the jury, in substance, that if Miller was rightfully operating the car and exercising ordinary care when the collision occurred to find for him; and that if they believed from the evidence that the motorman on the car became so ill that he could not, in safety to himself, the passengers, the crew and the car, operate it, *or if the plaintiff believed, and had reasonable grounds to believe, this*, and that it was necessary for the car to be moved, and it was impracticable to obtain orders from the officers of defendant with reference to what steps to take in supply-

ing the motorman's place, then plaintiff, so long as these conditions existed, but no longer, was rightfully the motorman upon the car. The opinion of the court condemns the language above which is italicized, and only allows appellee to recover in case the motorman was *actually* sick and unable to run the car. The court says that it has been unable to find any authorities condemning this language in the instruction. I do not believe any court out of this State will ever condemn a proposition so just and reasonable. What does it mean? It simply means that if the jury believed from the evidence that Miller believed, and that he had reasonable grounds to believe, that the motorman was too ill to run the car they should find for Miller, as an emergency then existed which authorized him to run the car. The opinion eliminates Miller's right to act upon what he believed and had reasonable grounds to believe the existing condition was, and holds that, unless Miller actually knew that the motorman was too sick to operate the car, he had no right to take charge of it, and he should not, therefore, be allowed to recover, unless he knew positively that the motorman was too sick to manage the car.

The accident happened after midnight, when those in charge of the car could not get in connection with the superintendent who sent them out, and by whose directions the cars collided with were negligently placed upon the track. Those in charge of the car had been directed to bring it back from Versailles to Lexington, and put it in the car barn. The testimony shows, without contradiction, that the regular motorman was sick. Miller testified that he was very pale; that he looked weak, and was hardly able to hold his head up; that he vomited four or five times while going to Lexington; and that he asked him, on account of his condition, to run the car for him. The motorman testified that he was sick, but not so much so as he could not have run the car into the car barn. He said nothing about having vomited while going from Versailles. He also testified that he was familiar with the rules of the company, and that they did not authorize him to turn his motor bar over to another, unless he was sick, but said nothing about how sick he would have to be before he could do this, nor as to who was to determine that he was sick, and the extent of his sickness. While it does not expressly say so, the effect of the opinion is that, before Miller could be sure of his right to take charge of the car he would have to send for a competent physician, and have him examine the motorman and determine whether or

not he was too sick to operate the car, and then, if it should afterwards turn out that the motorman was not too ill to manage the car, Miller could not recover for an injury received, it matters not how honest his belief and how reasonable the grounds upon which it was founded, as the opinion requires positive knowledge upon his part.

To show the absurdity of this holding we will suppose a case: While a train is passing through the country, a shot is fired from the woods, and the engineer falls instantly from his seat, and has all the appearances of having been shot. The fireman takes charge of the engine at once, and soon afterwards runs into some cars that have been negligently left upon the track, and is injured. Now, the court's opinion in this case is to the effect that the fireman could not recover unless the engineer was actually shot and rendered unable to operate the train. They would not let him recover, no matter how honest his belief that the engineer was shot, nor how reasonable his grounds for believing. This court holds that before he is authorized to take hold of the throttle he must know positively that the engineer was shot, which, to my mind, is absurd. In the supposed case, if the fireman knew that the engineer was shamming, he could not recover, if injured while operating the train; nor should Miller be allowed to recover in this case, if he knew, or had reasonable ground to believe, that the regular motorman was shamming, or feigning; therefore it was necessary for the court to submit to the jury the question whether or not he had reasonable ground to and did believe that the regular motorman was sick.

In the case of *L. & N. R. R. Co. v. Hays' Adm'r*, 128 S. W. 289, the company claimed that Hays was violating its rules when he met his death, and appellee claimed that Hays believed he was doing his duty for the company. In commenting upon that idea, Chief Justice Hobson, in writing for the court, said:

"In the case of the servant the question would be simply, Were the circumstances such as to justify a man of ordinary prudence in regarding the thing as a part of his duty?"

In that case the court did not require the servant to know what facts actually existed before he was authorized to act for his master.

In the case of *Gamble v. Akron, Bedford & Cleveland Railroad Co.*, 63 Ohio St. 352, 59 N. E. 99, the conductor took the place

of the motorman while he ate his dinner; but the motorman did not come out after he finished his dinner, so the conductor continued to operate the car. The dispatcher ordered them out with the car, and also sent a snow plow out on the same line. While the conductor was operating the car he came upon the snow plow on a sharp curve, collided with it, and was killed. The company contended that the motorman was a volunteer, and was violating the rules, which provided that the motorman should not turn his car over to any person, and the conductor should not be permitted to run it. The lower court decided against the conductor; but the Supreme Court of Ohio, after reviewing the facts of the case, said that the evidence would have justified the lower court in directing a verdict for him. The rules for running a car in that case were the same as those in the case at bar. They stated that if an emergency, such as sickness, etc., existed the motorman had a right to turn his motor car over to another.

The court also said in that case that:

"So far as appears here, there was no violation of either the letter or the spirit of these rules, construed together, when Walborn temporarily exchanged places with the motorman that the company's property or the safety of passengers was in any way imperiled by this arrangement, and there was no occasion to apprehend an emergency which would call for them to be in their respective places. It would seem that in this instance the conductor exercised his judgment and authority, under the rules, reasonably and prudently. This case is not therefore akin to those cases in which a servant voluntarily and needlessly, and not in the performance of duty to the master, places himself in a position of great peril. But, if it be conceded that Walborn was in a prohibited position at the time he was fatally injured, it seems to us that the same result must be reached. The blunder of the train dispatcher put everybody on the train in peril. His act was the sole and proximate cause of the collision. Not a thing that Walborn did contributed to bring about a collision, and he heroically died at his post in trying to prevent it. Nothing is alleged against him, except that he was in the most dangerous position, where all were in common danger, without the fault of any. Under such circumstances it is nothing short of absurdity to contend that, because he was killed, instead of another, or possibly all, the company should escape all liability for its wrong. But it is argued that he should have deserted his temporary post, and have gone back to his proper position; in other words, that he was negligent in remaining. But if he had run away without attempting to reverse, and the people on the car had been killed or mangled, would any court acquit the company of negligence in that respect? If the contention of counsel is correct it involves the contradiction that Walborn was negligent in remaining, and would have likewise been negligent if he ran away. Who, among us, is sufficient for the decision of such things in an emergency? We are not willing to accept it as a law that a motor engineer or locomotive engineer is guilty of

contributory negligence merely because he remains in his dangerous position and continues his efforts to avert calamity from the passengers behind him. Beach, Contrib. Neg., § 42. And Walborn was, for the time being, the motor engineer of that car, and as such responsible for the safety of the passengers being carried therein. We find no prejudicial error in the record. It was hardly necessary to have bothered with the elaborate charge and request to charge in this case."

It appears in that case that court recognized the right of the conductor to exercise his judgment as to the emergency, even when the regular motorman was sitting in the car, after finishing his dinner. In my opinion, appellee in the case at bar had a right to judge as to whether or not an emergency existed, and if he had reason to believe, and did believe, that such existed he had a right to run the car to the barn, where it was ordered to be placed by the superintendent, especially as the regular motorman had left the car, and he was the only one on it who could operate it.

In the case of *Poillon's Adm'r v. Louisville Ry. Co.*, 140 Ky. 707, 131 S. W. 996, the railway company claimed that Poillon received his injuries while violating a rule that prohibited him from going on the platform. In that case the court said:

"But a conductor who has charge of a car may go on the outside, when called to do so in the discharge of his duty, or when he has reason to think it necessary in the discharge of his duty."

Applying the principles of the foregoing cases to the case at bar, it is clear that Miller was acting rightfully and lawfully at the time of his injury. The cases referred to in the opinion by the court sustain this view. In the Tennessee case the conductor, in an emergency, requested a third person to help him, when his brakeman was otherwise engaged, and he could not make a coupling alone, and this third person was allowed to recover for an injury received, although the conductor had no right to employ him, except in a case of an emergency. Does any one think the court would have refused to allow him to recover if it afterwards turned out that the regular brakeman was not in fact otherwise employed at the time? If this third person had reasonable grounds to believe, and did believe, that the conductor was telling him the truth, the Tennessee court would have sustained his recovery. There is a long line of decisions in this State authorizing persons to recover for injuries received while acting under the belief that an emergency exists, provided they have reasonable ground upon

which to base such a belief, although it may develop afterwards that no emergency did actually exist, and they would not have been injured if they had not so acted.

Aside from this, the court erred, as, under the facts stated in the opinion, an emergency existed when the regular motorman left the car, and he did so without the knowledge of the conductor. Miller did not have charge of the motorman; he could not control him; and when he left Miller was the only person on the car who could run it. There were but two others, the conductor and the trespasser mentioned in the opinion, and it is in proof that the conductor could not operate the car. Under this state of facts, was it the duty of Miller to leave the car standing on the track in the street, where other cars might collide with it and cause injury to persons and property, or was it his duty to take it to the barn, the place for storing cars that are not in use? Miller was an employee of the company as conductor on other cars, it is true; but it certainly would have been expected of any employee, under the circumstances, to take the car to the barn where, according to orders, it was to go, and if Miller had not done so he would have doubtless lost his employment the next morning. There was an emergency which authorized Miller to take charge of the car, whether the regular motorman was too sick to handle it or not. He did leave it, and left Miller and the conductor in charge, and Miller was the only one who could run it. Grant that the motorman was not too sick to operate the car when Miller took charge, there is not a pretense that he was in the least negligent in handling it. There is admitted negligence, however, on the part of the company in placing the cars on the track with which he collided, as he could not see them on account of the poor light on his car and the dust stirred up by an automobile. In all probability, this accident would have occurred if the regular motorman had been on, and he would have been mangled, and the company would have to compensate him, instead of appellee.

In 20 Am. & Eng. Ency. of Law, page 106, the rule is succinctly stated thus:

"The mere fact that injuries sustained by an employee were inflicted while he was acting in disobedience of well-known rules will not relieve the master of liability. There must be a connection between the disobedience of the rule and the injury received. The contributory negligence of the injured party that will defeat a recovery must have contributed as the proximate cause of the injury."

And there are authorities from many States cited to sustain it.

In the case of *Gamble v. Akron, Bedford & Cleveland Railroad Co., supra*, the court said on this point:

"But if it be conceded that Walborn was in a prohibited position at the time he was fatally injured, it seems to us that the same result must be reached. The blunder of the train dispatcher put everybody on the train in peril. His act was the sole and proximate cause of the collision. Not a thing that Walborn did contributed to bring about a collision, and he heroically died at his post in trying to prevent it."

Miller, an employee of appellant, was doing the proper thing in a careful manner, without negligence on his part, when he collided with the cars which had admittedly been negligently left on the track. I am unable to see the connection of Miller's supposed violation of the rules with the negligence of appellant and the collision, so as to defeat his right to recover damages. In my opinion, this is one of the cases wherein, if Miller was acting in disobedience of a rule, it does not relieve the master from liability.

It is said in the opinion that:

"It is true there is proof by Miller that the conductor had not long been on the road, and did not understand how to operate a car. Still he was in charge of it, and he knew nothing of any disability on the part of the motorman, or of his intention to leave the car, until he had left it. It is true that he then allowed Miller to operate the car down toward the barn; but as the motorman had been left behind, in view of the short time that elapsed before the collision, Miller should be regarded as simply a volunteer."

Sullivan, the conductor, agreed with Miller that he had only been in the service of the company a short time and did not know how to operate a car, and he also testified that he knew when the motorman left the car. The court indicates that the distance traveled after the motorman got off the car before the collision was very short, and that Sullivan, the conductor, therefore did not have time to prevent appellee from running or stopping the car. The proof shows, without contradiction, that they traveled a considerable distance, at least four blocks or more, from the place the motorman got off to the place of the collision, which was certainly a sufficient distance to allow the conductor to order Miller to stop running the car; but he made no effort to do so; although, as stated in the opinion, he was in charge of the car, and his conduct after the regular motorman left shows that he consented to Miller running the car.

For these reasons, I dissent from the opinion of the court.

Watts v. Montgomery Traction Co.

(Alabama — Supreme Court.)

1. **VIOLATION OF ORDINANCE AS NEGLIGENCE PER SE.** — A violation of a statute or an ordinance is negligence *per se*, and a person proximately injured thereby may recover for such injuries against the violator of the law.
2. **VIOLATION OF ORDINANCE AS CONTRIBUTORY NEGLIGENCE.** — Where the violation of a statute or ordinance, enacted for the benefit of the party who seeks to invoke its violation as distinguished from the public, proximately causes an injury complained of, it may be pleaded as a defense.
3. **ORDINANCE REQUIRING VEHICLES TO KEEP TO RIGHT OF STREET; COLLISION WITH AUTOMOBILE; VIOLATION OF ORDINANCE; CONTRIBUTORY NEGLIGENCE; EVIDENCE.** — An ordinance requiring vehicles to keep to the right of the center of the street was not intended for the benefit of street railways or to keep vehicles off of street car tracks. Hence, a street railway company, sued for damages to an automobile struck by one of its cars while in the center of the street, cannot plead a violation of the ordinance as a defense.
Such ordinance is not competent evidence, it appearing that the plaintiff was to the right of the center of the street.
4. **FAILURE OF CHAUFFEUR TO SIGNAL STREET CAR; CONTRIBUTORY NEGLIGENCE.** — A chauffeur driving his machine on a street car track is not guilty of negligence in failing to signal a car, unless he knew it was approaching.

PLAINTIFF appeals from judgment for defendant. Reported 57 So. 471.

STATEMENT OF FACTS.

The action was for damages to an automobile, caused by the automobile being struck by a car and demolished; the automobile at the time being run ahead of the car and in the same direction as the car.

Plea 8 is as follows:

"Defendant says: That the accident occurred on one of the streets of the city of Montgomery, within the limits of said city. That at said time, and for a long time, there had been an ordinance of the city of Montgomery in force and effect, namely, section 1093 of the City Code of Montgomery, reading as

Violation of Ordinance as Proof of Negligence. — The question whether the violation of an ordinance is negligence *per se* or merely evidence of negligence is discussed in a note to *Memphis St. Ry. Co. v. Haynes*, 3 St. Ry. Rep. 810, 815, 816.

Collision with Automobile. — See notes to *Garfield v. Hartford*, etc., St. Ry. Co., 6 St. Ry. Rep. 130; *Clarke v. Connecticut Co.*, 7 St. Ry. Rep. 323. As for imputation of negligence of driver of car to passenger therein, see note to *Kneeshaw v. Detroit United Ry.*, 8 St. Ry. Rep. 615. See also *Huddy on Automobiles* (3d Ed.), §§ 113 and 114.

follows: 'Sec. 1093. Any person who willfully fails to keep to that side of the street which is to the right of the driver while driving any vehicle through the streets * * * must on conviction be fined not less than \$1.00 nor more than \$100.00.' That on the day and date of the alleged injuries of the said automobile the same was being driven by one Felder, who negligently and in violation of said ordinance failed to keep to that part of the street on his right, but drove the same along the middle of said street, and in that part of the street where defendant's tracks are located, so that defendant's car could not safely pass same without colliding therewith, and the negligence of said driver of said automobile and violation of said ordinance, to keep to the right of the street, contributed proximately to the injuries complained of in the complaint."

The fifth ground of demurrer was that the ordinance referred to was not passed, according to the averments of said plea, for the benefit of the defendant, or its employees engaged in the business of the defendant.

J. T. Letcher, for appellant.

Ray Rushton and *W. M. Williams*, for appellee.

Opinion by ANDERSON, J.:

The decisions as to the legal effect of violating a statute or ordinance are not harmonious. In some cases it is held that such violation is not negligence *per se*, but that it is competent evidence of negligence, and may be sufficient to justify a jury in finding negligence in fact. 29 Cyc. 437, and cases cited in note. However, it is settled in Alabama, and we think it is the weight of authority, that a violation of a statute or an ordinance is negligence *per se*, and a person proximately injured thereby may recover for such injuries against the violator of the law. *Kansas City R. R. v. Flipppo*, 138 Ala. 487, 35 South. 457; *Sloss-Sheffield Co. v. Sharp*, 156 Ala. 289, 47 South. 279; *Wise v. Morgan*, 101 Tenn. 273, 48 S. W. 971, 44 L. R. A. 548; *Parker v. Barnard*, 135 Mass. 116, 46 Am. Rep. 450; *Newcomb v. Boston Prot. Dpmt.*, 146 Mass. 596, 16 N. E. 555, 4 Am. St. Rep. 354; *Terre Haute R. R. v. Williams*, 172 Ill. 379, 50 N. E. 116, 64 Am. St. Rep. 44; *Rosse v. St. Paul R. R.*, 68 Minn. 216, 71 N. W. 20, 37 L. R. A. 591, 64 Am. St. Rep. 472.

We are not cited to and have found no Alabama case where the violation of a statute or ordinance by the injured party was pleaded by the defendant by way of contributory negligence; yet we see

no reason why such a violation, if proximately causing the injury complained of, cannot be set up as a defense to the simple negligence charged in the complaint. Such a defense has been approved, and we think properly so, in the cases of *Broschart v. Tuttle*, 59 Conn. 1, 21 Atl. 925, 11 L. R. A. 33; *Weller v. Chicago R. R.*, 120 Mo. 635, 23 S. W. 1061. The statute or ordinance violated, however, must have been enacted for the benefit of the party who seeks to invoke its violation as distinguished from the public generally or a class to whom the ordinance necessarily applies. 29 Cyc. 438; *L. & N. R. R. Co. v. Murphree*, 129 Ala. 432, 29 South. 592; *Cent. of Ga. Ry. v. Sturgis*, 129 Ala. 573, 43 South. 96.

A municipality would no doubt have the right, under its police power, to regulate the travel upon its streets so as to prevent congestion and collision, and could thereby protect all persons using the streets, including street cars; but it is manifest that the ordinance in question was not intended for the protection of street railways, as the wording and meaning of same does not exclude vehicles from their tracks. The ordinance does not require the drivers of vehicles to keep off of the street railway tracks, but only requires them to keep on the side of the street to the right; that is, they must remain to the right of the center of the street. If they do this, they do not violate the ordinance, notwithstanding they may be upon the track of a street car line. It may be that most of the street car tracks are laid in the center of the street, and an ordinance requiring vehicles to stay to the right of the track, if there is space enough for them to do so, would no doubt be a reasonable one; but such is not the present ordinance, as it only requires the vehicle to be to the right of the center of the track. Again, there may be street car tracks laid within either side of the streets, and, if a driver kept to the right of the center of the street, he would not violate the ordinance, although he may drive upon or along the street car track. It is plain that the ordinance in question was not intended to keep vehicles off of street car tracks or for the protection of street car companies.

Plea 8, if not otherwise faulty, was subject to grounds 5, 11 and 12 of the plaintiff's demurrer, and the trial court erred in not sustaining same.

The negligent failure of the plaintiff's agent, Felder, to holler, warn or signal the defendant's motorman is a mere conclusion. There is nothing in the plea to indicate that Felder knew of the

approach of the car, and he cannot be said to be guilty of negligence for failing to give a signal to stop the car unless he knew it was approaching.

Aside from the infirmity of the eighth plea, the trial court erred in admitting the ordinance in evidence, over the objection of the plaintiff, as it was immaterial and irrelevant. The undisputed evidence shows that the auto was on the right-hand side of the street. The automobile was astride the south rail of the track, and which said south rail was twelve feet from the south curb. The north rail was fifteen feet from the north curb, and was therefore in the center of the street, and the auto was to the right of said north rail and was upon the right-hand side of the street. See testimony of Berry, page 16 of the record.

The judgment of the Circuit Court is reversed, and the cause is remanded.

Reversed and remanded. All the justices concur, except DOWDELL, C. J., not sitting.

Kalver v. Metropolitan St. Ry. Co.

(Missouri — Kansas City Court of Appeals.)

1. **DERAILMENT OF CAR; INJURY TO PERSON ON SIDEWALK; PRIMA FACIE NEGLIGENCE.** — Where a person lawfully on a sidewalk is injured by the derailment of a street railway car he makes out a *prima facie* case by showing such facts.
2. **SAME; COMPLAINT.** — The complaint in such an action need not allege the facts on which the plaintiff bases his charge that the derailment was caused by the negligence of defendant.
3. **SAME; BURDEN OF PROOF.** — The burden is on a street railway company to show that the derailment of a car was accidental, and not due to negligence.
4. **SAME; ORDER OF PROOF.** — The plaintiff in such a case is not required to go into the issue of the cause of the derailment until the defendant, in the discharge of its burden, has offered evidence tending to show the accidental origin of the injury.

Injury to Person upon Sidewalk. — The cases discussing the liability of a street railway company for injuries to a person upon a sidewalk are collated in a note to *Bender v. Louisville Ry. Co.*, 7 St. Ry. Rep. 690.

Derailment of Car. — As to liability of street railway company for derailment of car, see *Nellis on Street Railways* (2d Ed.), § 283.

5. **SAME; QUESTION FOR JURY.** — It is a question for the jury whether a motor-man should have discovered a loose cobblestone on the track in time to prevent a derailment.
6. **SAME; PROXIMATE CAUSE.** — Where it appears from the evidence that a car was derailed and the front end of it struck a horse and wagon, threw them on the sidewalk and one or both of them hit a person on the sidewalk, there is a direct causal connection between the negligence causing the derailment and the injury.
7. **SAME; DAMAGES.** — Eight hundred dollars is not excessive damages for being knocked down and bruised by a wagon which was thrown on the sidewalk by a derailed car.

DEFENDANT appeals from judgment for plaintiff. Reported 148 S. W. 130.

John H. Lucas and *Chas. N. Sadler*, both of Kansas City, for appellant.

H. J. Latshaw and *Jesse E. James*, both of Kansas City, for respondent.

Opinion by **JOHNSON, J.:**

Plaintiff sued to recover damages for personal injuries caused by the derailment of an electric street car operated by defendant on Independence avenue in Kansas City. The petition alleges that plaintiff

"was lawfully upon said Independence avenue, and upon the south side thereof, * * * when one of defendant's east-bound electric cars was on account of the carelessness and negligence of defendant * * * allowed, permitted and caused to run off of the track and leave the track and to run over said street and the pavement thereon to or near the south side of said street and near which plaintiff was standing and working, thereby throwing, pushing and shoving said wagon, and forcing said wagon with great force and violence against the sidewalk and building on the south side of said street, thereby greatly injuring plaintiff."

The answer is a general denial. The trial resulted in a verdict and judgment for plaintiff for \$800. Defendant appealed.

Independence avenue runs east and west, is paved with asphalt, and at the place in question is a business street. Defendant operates a double-track street railway on this street; the south track being used for east-bound cars. The distance between the south rail of this track and the curb is thirteen feet and eight inches, and the distance from the curb to the property line nine feet and six inches. Plaintiff operated a feed store on the south side of the street. His one-horse delivery wagon was standing

in the street next the curb, and plaintiff and his son were loading the wagon from the store. The front wheels of an east-bound car, running eight or ten miles per hour, suddenly jumped the track, and, turning southward, ran to and on the curbing, crashing into the wagon and horse, just as plaintiff emerged from the store, carrying a bale of hay. Plaintiff testified:

"You see I have a hook in lifting a bale of hay. I got the bale to my face in front of the wagon. When the car struck I was just in the door, stepping onto the sidewalk. The car passed onto the wagon, and the horse kicked me, and I fell down with the bale of hay."

The horse was killed and the wagon was demolished. Whether the wagon, horse, bale of hay, or all three inflicted the injuries, which consisted of numerous bruises and contusions, is not made clear in the evidence. The statement of plaintiff that the horse kicked him appears from the facts and circumstances to be a mere supposition. The definite facts disclosed by his evidence are that the front end of the car struck the horse and wagon, threw them on the sidewalk, and, in turn, one or both of them hit plaintiff, who was on the sidewalk, and injured him. Plaintiff did not allege, and in his evidence in chief did not attempt to show, the cause of the derailment. At the close of his evidence, defendant requested the giving of a peremptory instruction, but the request was refused, and defendant then introduced evidence to the effect that the derailment was accidental. It was shown that there was no defect in the track or in the car, and experts testified that sometimes derailments occur under such conditions. Over the objections of defendant, plaintiff in rebuttal was permitted to introduce evidence tending to show that some of the stone or granite blocks set on each side of the rail had become loose and out of place, and that three of these blocks were lying on the surface of the street, and from the facts and circumstances appearing in this evidence the inference is reasonable that the derailment was caused by one of the front wheels striking and running over a broken part of one of these blocks, and that preceding cars that day had struck these obstructions, but had not been derailed. The paving of which the granite blocks had been a part was laid by defendant, and it was admitted at the trial that an ordinance was in force which required defendant to pave the street in between and eighteen inches on the outside of its tracks.

Counsel argue that the court erred in overruling the peremptory

instructions asked by defendant at the close of plaintiff's evidence and again at the close of all the evidence. First, it is insisted that the petition does not state a cause of action, and that the defect is of such character that it was not cured by verdict. The statute (section 1794, Rev. St. 1909) provides that a petition must contain

"a plain and concise statement of the facts constituting a cause of action without unnecessary repetition."

"The whole theory of the practice act is that facts and not conclusions should be pleaded."

Humphreys v. Milling Co., 98 Mo., loc. cit. 552, 10 S. W. 144.

"A petition must state all the facts which it will be necessary for the plaintiff to prove in order to make out a *prima facie* case."

Rodgers v. Insurance Co., 186 Mo., loc. cit. 255, 85 S. W. 371.

Plaintiff does not allege the facts on which he predicates his charge that the derailment of the car was caused by negligence of defendant. Defendant contends these facts were an integral part of his *prima facie* case, and therefore should have been pleaded; while plaintiff argues that the only burden the rules of practice required him to carry in making out a *prima facie* case of negligence was to plead and prove that his injury was caused by the derailment of the car while he was in the lawful use of a public street. We decided this precise point recently in the case of *Baker v. Railroad*, 142 Mo. App., loc. cit. 359, 126 S. W. 764, where we held that when a plaintiff showed he was on the public sidewalk where he had a right to be, and was injured by the derailment of a car running on a street railway track owned and operated by the defendant, he made out a *prima facie* case of negligence, and cast the burden on the defendant to show that the derailment was not due to negligence, but to unavoidable accident or to some cause beyond its control. The rule of *res ipsa loquitur* is not restricted to cases where the injury was inflicted during the relationship of carrier and passenger. As is held in *McGrath v. Transit Co.*, 197 Mo., loc. cit. 104, 94 S. W. 874, the rule also applies to instances

"where the injury arises from some condition or event that is in its very nature so obviously destructive of the safety of person or property, and is so tortious in its quality as in the first instance at least to permit no inference save that of negligence on the part of the person in control of the injurious agency."

It is true there is no contractual relation between the operators of street cars and other users of the public streets as there is between carrier and passenger, nor does a street railway company owe to others using the streets the duty of exercising more than reasonable care for their safety, but the facts that the consequences of a derailment of a street car running at high speed along a busy thoroughfare generally are serious, that people are accustomed to act on the presumption that a car will not leave its track, and that the cause of a derailment is a fact about which the company possesses vastly superior means of knowledge, induce us to hold, as we did in the Baker Case, that the burden is on the defendant to show that the derailment was accidental, and not due to negligence. The petition alleged all of the constitutive facts of the cause of action asserted.

What we have just said answers the objection of defendant that the evidence introduced by plaintiff relating to the cause of the derailment belonged to his evidence in chief, and was not proper rebuttal. Plaintiff was not required to go into the issue of the cause of the derailment until defendant, in the discharge of its burden, had offered evidence tending to show the accidental origin of the injury. Then it became proper for plaintiff to meet such evidence by showing that the cause of the derailment was negligence.

Further, defendant insists that the fact of the car being derailed by running over a loose cobblestone of itself is no proof of negligence. It was a question for the jury to determine whether or not the motorman in the exercise of reasonable care should have discovered the obstruction in time to prevent the derailment. Other answers to the argument on this point might be given, but this suffices for present purposes.

There is no merit in the position that we should hold as a matter of law that no direct causal connection is shown by the evidence between the negligence and the injury.

"The proximate cause of an event must be understood to be that which, in a natural and continuous sequence, unbroken by any new cause, produces that event, and without which that event would not have happened. Proximity in point of time or space, however, is no part of the definition. That is of no importance, except as it may afford evidence for or against proximity of causation. The negligence which is the proximate cause of the injury authorizing a recovery is not necessarily the immediate cause, but the culpable act in the chain of causation nearest the injury."

Boyce v. Railway Co., 120 Mo. App. 168, 96 S. W. 670. Certainly defendant should have anticipated that a natural consequence of the derailment of a car and its subsequent running on the pavement might be a collision with another vehicle on the street and the injury of those in and about such vehicle. The horse and wagon were but an agency in the transmission of the dangerous force turned loose by defendant's negligence, and were not an independent and intervening cause of the injury.

The demurrer to the evidence was properly overruled.

Objections to the rulings of the court on evidence have been considered, and are pronounced ill founded. The point that the court erred in not granting a new trial on the ground of newly discovered evidence was not properly preserved in the trial court, and therefore is not before us for determination. We cannot say the verdict is excessive. We have a strong suspicion that plaintiff magnifies trifling bruises into a serious injury, but his evidence is substantial, and the assessment of damages is well within its substance. The credibility of plaintiff and his witnesses was an issue for the jury, as was the weight of their evidence.

There is no substantial error in the record, and the judgment is affirmed. All concur.

Provoost v. International Railway Company and Crosstown Street Railway Company of Buffalo.

(New York — Appellate Division, Fourth Department.)

COLLISION WITH PASSENGER ATTEMPTING TO PASS BEHIND CAR AFTER ALIGHTING; ORDINANCE FORBIDDING CAR TO PASS STANDING CAR; CONTRIBUTORY NEGLIGENCE. — It is gross negligence for a street surface railroad operating in a city to run a car at the rate of thirty miles an hour without sounding any signal past another car which is standing at a street intersection for the purpose of discharging passengers. Especially is this so where an ordinance of the city forbids one car to pass another which has stopped at a crossing to discharge or receive passengers until the latter car has started on its course and has cleared at least twenty feet, etc.

Contributory Negligence of Person Passing Around Rear of One Car in Front of Another. — The question of the contributory negligence of a passenger alighting from a car and then passing around the rear thereof in front of a car on another track is discussed in a note to *Stack v. East St. Louis, etc., Ry. Co.*, 7 St. Ry. Rep. 224.

As a person alighting from said standing car may be presumed to have known of the city ordinance and had a right to believe that the railroad company would obey it, he cannot be charged with contributory negligence as a matter of law where, having alighted and while attempting to pass behind the car, he was struck and killed by a car coming in the opposite direction and driven with the gross negligence aforesaid, if it appears that he took the first opportunity to ascertain whether another car was approaching, but was unable to avoid it owing to its excessive rate of speed, etc.

PLAINTIFF appeals from judgment in favor of defendant. Reported 136 N. Y. Supp. 131.

Vernon Cole, for appellant.

Dana L. Spring, for respondents.

Opinion by McLENNAN, P. J.:

Plaintiff's intestate, at about eleven o'clock on the morning of January 5, 1908, alighted from one of defendant's Main street cars, north bound, at the crosswalk on the north side of Bryant street, at the intersection of Bryant street and Main street, in the city of Buffalo. The defendants at this point have two tracks. The north-bound cars run upon the easterly track while the westerly track is used for the south-bound cars. The space between the inner rails at this point was 4.4 feet. While attempting to cross defendants' tracks, using the crosswalk, a few feet in the rear of the car from which he had just alighted, the intestate was struck by a south-bound car which approached from the north at a rate of speed of about thirty miles an hour, without ringing the bell or giving any other warning and without slackening its speed, and this notwithstanding the north-bound car was still standing at the corner to discharge and take on passengers. The deceased was hit and thrown to the pavement in front of the south-bound car, passed under its fender and was pushed a distance of about 170 feet before the car was stopped. He was then unconscious and was removed to a hospital, where he died within a half hour without regaining consciousness. The deceased was fifty-eight years of age, in perfect health and possessed of all his faculties.

No witness was produced who saw the deceased alight from the north-bound car, but from the testimony of those who were with him earlier in the day and knew of his intention to visit

members of his family who lived near Bryant street, the inference is warranted that he had just alighted from the north-bound car, and was attempting to cross the street upon the crosswalk in the rear of the standing car.

We have no difficulty in reaching the conclusion upon the facts shown that the defendants were guilty of gross negligence in running one of their cars at a speed approaching thirty miles an hour past another car which was standing at a street intersection for the purpose of discharging passengers. In the exercise of ordinary care the defendants should have used caution in so passing. In addition to that there was at this time in force in the city of Buffalo an ordinance which provided:

"No driver or other person having the charge and control of any street railway car within the city of Buffalo shall permit or allow such car to pass any other car at any crossing for the discharge or reception of passengers until such standing car shall have started on its course and cleared at least twenty feet. Nor shall any driver or other person in charge of such standing car put the same in motion while a car on the parallel track is approaching within fifty feet."

The point to which defendants' counsel directs most of his argument, however, is that of contributory negligence. One witness testifies that he first saw the deceased at about the center of the north-bound tracks proceeding west; that while he still had one foot on the north-bound tracks he was seen to turn his head to the right and almost at the same instant to throw up his hands and attempt to take a step backward, but that he was hit by the approaching car before he had retreated at all. This testimony is corroborated by the other witnesses, some of whom were in the car which struck the deceased. From this it would seem that the deceased took the first opportunity he had to ascertain whether a car was approaching from the north, but that owing to the excessive rate of speed at which the car was running he did not have time to avoid it.

The trial court held that under these circumstances the deceased was guilty of contributory negligence. We think, however, that it cannot be so held as a matter of law, but that it is for the jury to say whether under all the circumstances the deceased exercised the care which he should. He had the right to expect that the defendants would operate their car under such a situation as this in a reasonably careful manner, even if it were not brought to a full stop as required by the ordinance. Had defendants' car been

proceeding at a moderate rate of speed under such circumstances the deceased might have had ample opportunity to protect himself. We think that while the deceased was called upon to exercise due care to discover whether a car was approaching from the north, yet he was not called upon to exercise the extraordinary degree of care which would be necessary in such a situation to avoid a street car traveling at a speed so excessive under the circumstances here shown.

Further, it cannot be assumed that the deceased was ignorant of the ordinance referred to. He had the right to believe that the defendants would not violate such ordinance. That, of course, would not authorize him to proceed blindly, without the exercise of any care at all, but in view of the ordinance and of the fact that he did look at his very first opportunity, we think it cannot be said as a matter of law that he was guilty of contributory negligence. The jury should be allowed to pass upon that question as well as that of the defendants' negligence.

It is urged, however, that the case of *Reed v. Metropolitan St. Ry. Co.*, 3 St. Ry. Rep. 666, 180 N. Y. 315, is decisive of this appeal. The case of *Maynard v. Rochester Railway Co.*, 136 App. Div. 212, is also claimed to be controlling here. The facts in *Reed v. Metropolitan St. R. Co.* were somewhat similar to those in this case, and some statements in the opinion seem to give force to respondents' contention. An examination of the record in that case, however, shows that the car which struck the plaintiff there was proceeding at not to exceed two miles an hour, and that the motorman rang the gong continuously in approaching and passing the standing car. It is, therefore, apparent that the exercise of the slightest degree of care by the plaintiff in that case would have enabled him to avoid injury. The case of *Maynard v. Rochester Railway Co.* was reversed upon the facts as well as upon the law. This appears clearly in the opinion, and is also shown by the further fact that a motion was subsequently made in this court by the plaintiff in that case to amend the decision so as to show that the reversal was upon questions of law only. This motion was denied. 143 App. Div. 957.

We think neither of those cases is controlling here. The Court of Appeals has sustained a recovery in cases where the facts were similar to the case at bar. In *Pelletreau v. Metropolitan St. R. Co.*, 74 App. Div. 192, aff'd without opinion, 174 N. Y. 503, a similar state of facts was shown and a verdict for the plaintiff was

rendered. It there appeared that the cars were propelled by cable power, and the maximum speed obtainable was seven miles an hour. The evidence disclosed, we think, no greater degree of care on the part of the plaintiff there than is inferable from the facts in this case as to the conduct of the deceased. The recovery was sustained by the Court of Appeals.

In *McGreevy v. Buffalo Railway Co.*, 9 Misc. Rep. 726, aff'd without opinion, 145 N. Y. 621, a quite similar state of facts was presented. The evidence as to the degree of care exercised by the plaintiff's intestate in that case was less satisfactory than in the case at bar, and the evidence as to the speed of the approaching car was somewhat in conflict, being estimated at from two to twelve miles an hour by the different witnesses. The Court of Appeals sustained a recovery for the plaintiff in that case.

As before stated, the record in this case shows that the south-bound car was proceeding at a rate approaching thirty miles an hour; that the gong was not sounded nor any other warning given. The ordinance of the city of Buffalo required the defendants to operate their cars in a very careful manner under such circumstances, and it may be presumed that the deceased knew of such ordinance and that he had a right to believe that the defendants would obey it. The evidence as to the care exercised by the deceased presented a question of fact for the jury as to whether the deceased exercised the care which an ordinarily prudent person should under such circumstances.

In the case of *Craven v. International R. Co.*, 3 St. Ry. Rep. 714, 100 App. Div. 157, this court considered a situation quite similar to the case at bar, involving the duty of the defendant under the ordinance referred to above, and the question of contributory negligence was held to be one of fact for the jury.

We conclude that the judgment appealed from should be reversed and a new trial granted, with costs to appellant to abide event.

All concurred; SPRING, J., not sitting.

Judgment reversed and new trial granted, with costs to appellant to abide event.

Jenree v. Metropolitan St. Ry. Co.

(Kansas — Supreme Court.)

CITY ORDINANCE AUTHORIZING CONSTRUCTION AND MAINTENANCE OF STREET RAILWAY OVER VIADUCT; LIABILITY FOR INJURIES SUSTAINED FROM DEFECTIVE SIDEWALK FORMING PART OF VIADUCT. — A city ordinance granted to a street railway company the right to construct, maintain and operate its railway over a viaduct forming a part of a street in the city. One of the conditions was that the railway company should repair and maintain in good condition and safe for public travel all parts of the viaduct. The ordinance was accepted, and the railway was constructed and operated. A sidewalk forming a part of the structure, but not the part used by the railway company, was suffered to become out of repair and unsafe for use in consequence of which the plaintiff, while traveling on the sidewalk, was injured. *Held*, the plaintiff may recover directly from the railway company the damages resulting from the injury.

The ordinance further provides that the railway company shall respond to the city and save it harmless from damage resulting from acts and negligence of the railway company. *Held*, this provision of the ordinance merely secures to the city the right to be reimbursed in the event that its own liability, which under the law still exists, shall be enforced. It does not confine the railway company's liability to the city alone.

(Syllabus by the Court.)

DEFENDANT appeals from a judgment for the plaintiff. Reported 121 Pac. 510.

O. L. Miller, C. A. Miller and Nathan Cree, for appellants.

James F. Getty, for appellee.

Opinion by BURCH, J.:

An ordinance of the city granted to the railway company the right to construct, maintain, and operate street railways upon the streets of the city and upon and over certain viaducts and bridges forming portions of such streets. Section 25 of the ordinance contained the following provision:

"Said railway company shall re-floor, repair and maintain in good condition and safe for public travel all parts of the aforesaid bridges and viaducts, including the viaduct approaches."

Duty of Street Railway Company as to Maintenance of Bridges, etc. — The obligation of a street railway company to maintain and repair bridges, culverts, etc., over which its tracks run is discussed in a note to *Sawin v. Connecticut Valley St. Ry. Co.*, p. 244.

The terms of the ordinance were accepted by the railway company and a line of street railway was constructed upon and operated over what is known as the "Seventh Street Viaduct," over the tracks, yards and grounds of the Union Pacific and Chicago, Rock Island & Pacific Railroad Companies. A sidewalk forming part of the viaduct was negligently suffered to become out of repair and dangerous for public use, in consequence of which the plaintiff, while traveling upon it, was seriously injured. She recovered damages against both the city and the railway company, and both appeal.

The railway company denies liability under the section of the ordinance referred to, and reinforces its contention by appealing to another section, numbered 13, which reads as follows:

"In constructing, repairing and operating such street railway said company shall use every reasonable and proper precaution to avoid damages or injury to persons or property, and shall at all times respond to the city of Kansas City, and save it harmless from all and every damage, loss, cost or expense caused or occasioned by reason of any act or negligence of said company in the construction, reconstruction, repairing or repaving of said streets, or the operation of said street railway, or by reason of any and every act done under the provisions of this ordinance."

The argument is that the ordinance is merely a private contract between the city and the railway company; that section 25 merely determines between the parties which one of them shall be to the expense of keeping the viaduct in repair and safe for public use; that section 13 limits the liability of the railway company to respond in damages to actions by the city; and that the plaintiff, not being privy to the contract and being only incidentally and indirectly benefited by it, is not entitled to sue for a breach of it. The sidewalk is six feet wide, and is supported by cantilevers on the east side of the viaduct. West of the sidewalk is a roadway for vehicles, and the railway track is laid upon this portion of the structure. The railway company made no use of the sidewalk and the regulation concerning it had no reference to the construction, maintenance or operation of the railway itself, so that the duty, default and liability of the railway company, if any existed, lay outside the scope and boundaries of its ordinary business. The petition counted upon the negligence of the company in suffering the sidewalk to become out of repair and unsafe for use. The ordinance was pleaded as the source of the company's duty to keep

the sidewalk in proper condition. If the duty existed, it was created by that instrument.

The railway company refuses to view the ordinance as anything but a private contract. It is more than a contract, and there are cogent reasons for giving to section 25 the effect of a public statute. It is not necessary, however, to rest the decision upon this ground, and the obligation of the railway company may be treated simply as one which was contractually assumed. In granting to the railway company the right to occupy and use the streets for railway purposes, the city was acting in its governmental capacity for the welfare of the general public. Its private, proprietary affairs were not involved, except as they might be related in the most incidental way to the public ends to be attained. The benefit resulting from a secure sidewalk was one to be reaped by the public. The maintenance of such a way was a matter of public concern. The duty to keep the sidewalk in a condition which would prevent it from becoming a public nuisance, and which would permit all pedestrians, including the plaintiff, to use it in safety was a public duty, and the manifest purpose of section 25 was to cast this duty which the city owed to the traveling public, including the plaintiff, upon the railway company as a condition to the street railway grant. The city was not engaging a contractor or employing an agent or servant to perform for it and on its behalf the work of inspection, repair, reconstruction, and the like essential to the maintenance of a secure way. It was taking advantage of an opportunity to shift the whole burden of taking those steps upon another who should stand, in relation to the public safety and convenience, in the city's place and stead. The obligation being a public one, to be performed for the public benefit, the party assuming it was responsible to the public. Therefore the contract was one for the benefit of the plaintiff as a member of the public.

The principle involved was apprehended and stated with reasonable clearness by Lord Abinger in the case of *Winterbottom v. Wright*, 10 M. & W. 109, 114, which is one of the familiar landmarks of the law on the subject of liability to third persons for the negligent breach of a contractual duty. The opinion contains the following observations:

"Where a party becomes responsible to the public by undertaking a public duty, he is liable, though the injury may have arisen from the negligence of his servant or agent. So, in cases of public nuisances, whether the act was done

by the party as a servant or in any other capacity, you are liable to an action at the suit of any person who suffers. Those, however, are cases where the real ground of the liability is the public duty, or the commission of the public nuisance. There is also a class of cases in which the law permits a contract to be turned into a tort; but unless there has been some public duty undertaken, or public nuisance committed, they are all cases in which an action might have been maintained upon the contract."

Perhaps the leading American cases in which the principle has been stated and applied are *City of Brooklyn v. Brooklyn City R. R. Co.*, 47 N. Y. 475, 7 Am. Rep. 469, and *McMahon v. Second Avenue Railroad Company*, 75 N. Y. 231. In the *City of Brooklyn Case* a portion of the opinion reads as follows:

"A municipal corporation by the conferring and acceptance of a charter with powers of opening and controlling streets and ways has put upon it the correlative duty to the public of keeping those ways in repair, so that they may be safe for the passage of the public. When one contracts with that corporation to keep any portion of those streets in repair in consideration of a license to use them to his benefit in an especial manner, he in effect contracts to perform that duty to the public in the place and stead of the municipality, and the way is given over to him for that purpose, and he takes it into his care and charge therefor, and his failure to perform his contract is a failure to do that duty, and the damages which naturally and proximately result from nonperformance are all the damages which naturally and proximately fall upon the corporation from the duty not being performed. The different principles which govern the different classes of cases grow out of the differences in the contracts with which the classes of cases are respectively concerned. The one relates to private matters alone. The other relates to matters with which the public and third persons are also concerned. And, as we read the decision in *Robinson v. Chamberlain*, 34 N. Y. 389 [90 Am. Dec. 713], that case goes on the same principle, or one near of kin. That was an action against the defendant, a contractor with the State to keep in repair a section of the canals, for an injury resulting to a boat of the plaintiff from a lock gate being out of repair. It was held that, by the contract of the defendant with the State, he assumed the duties and was invested with the powers of a public officer, and that the portion of canals covered by the defendant's contract was a public highway; that he, by his contract, assumed the duty of keeping in repair a public thoroughfare, and was therefore liable in a civil action to any one of the public sustaining special damage from his neglect to keep it in repair. His contract was not with the injured party, but with the State. But it was a contract to perform a duty to the public, for a neglect of which the State but for its sovereignty would be liable to the party injured. And so by the force of his contract, he having thereby assumed public duties, he was held liable to one injured by a neglect to perform them."

47 N. Y. 485, 7 Am. Rep. 469. In the *McMahon Case* the conclusion of the court is stated in the headnote to the opinion as follows:

"Where one contracts with a municipality to perform in its stead the duty resting upon it of keeping its streets in repair and safe for the passage of the public, and where because of neglect to perform the duty a cause of action arises against the municipality, the action may be brought by the party injured directly against the contractor." 75 N. Y. 231.

It is impossible to say that the plaintiff was a stranger to the contract. The subject of the undertaking was a sidewalk safe for use as such. The public interest in that subject cannot be refined away, and, unless mere fiction and form are to prevail over substance and fact, the contract was made for the benefit of every individual whose rights as one of the public might be specially affected. Because the city owed the plaintiff the duty to keep the sidewalk in repair and safe for travel, the plaintiff had a legal interest in the performance of the contract, and so became privy to it.

"To give a third party who may derive a benefit from the performance of the promise an action, there must be, first, an intent by the promisee to secure some benefit to the third party, and, second, some privity between the two, the promisee and the party to be benefited, and some obligation or duty owing from the former to the latter which would give him a legal or equitable claim to the benefit of the promisee, or an equivalent from him personally. It is true there need be no privity between the promisor and the party claiming the benefit of the undertaking, neither is it necessary that the latter should be privy to the consideration of the promise, but it does not follow that a mere volunteer can avail himself of it. A legal obligation or duty of the promisee [in this case the city] to him [the plaintiff] will so connect him with the transaction as to be a substitute for any privity with the promisor [the railway company] or the consideration of the promise, the obligation of the promisee furnishing an evidence of the intent of the latter to benefit him, and creating a privity by substitution with the promisor."

Vrooman v. Turner, 69 N. Y. 280, 283, 25 Am. Rep. 195. The words of the contract, "safe for public travel," were equivalent to "safe for the traveling public," and in principle the plaintiff as a traveler on the sidewalk stood toward the railway company in the same relation of privity that a mortgagee bears to a grantee of the mortgagor, who assumes and agrees to pay the mortgage debt. In the case of *Mott v. Water Co.*, 48 Kan. 12, 28 Pac. 989, 15 L. R. A. 375, 30 Am. St. Rep. 267, in which it was held that the water company was not liable to an individual for damages which it had agreed with the city to pay when occasioned by an insufficient supply, the city itself was under no obligation either to furnish water or to pay the contemplated damage. Here the

duty rests upon the city to keep the street safe for use and to pay all damages which result proximately from a breach of the duty. It may be observed, however, that the modern tendency is to hold that a contract made between a municipality and a public service corporation inures directly to the benefit of the individual citizen in the very cases in which the city rests under no legal duty or liability respecting the subject of the contract. *Ind. Dist. v. Le Mars Light & Water Co.*, 131 Iowa 14, 107 N. W. 944, 10 L. R. A. (N. S.) 859; *Pond v. New Rochelle Water Co.*, 183 N. Y. 330, 76 N. E. 211, 1 L. R. A. (N. S.) 958.

Section 13, upon which the railway company relies, must be interpreted in the light of the true meaning and effect of section 25. It is not clear that the damages suffered by the plaintiff fall within the terms of section 13. There is room for the contention that the city is to be indemnified only for damages resulting from the prosecution of street work in a negligent or otherwise wrongful manner. Leaving this question undetermined, however, the section merely secures to the city the right of reimbursement in the event that its liability which, notwithstanding the railway company's contract, remained uncanceled, should be enforced.

In the brief for the city reasons are given for reversing the judgment against the city in case it should be reversed as to the railway company. Because of the conclusion which the court has reached the question thus presented need not be decided.

The judgment of the District Court is affirmed. All the justices concurring.

Purcell v. Boston Elevated Ry. Co.

(Massachusetts—Supreme Judicial Court.)

1. CHILD STRUCK BY CAR AT CROSSING; CARE REQUIRED OF CHILDREN.—A child six and one-half years of age is old enough to be permitted to go upon the street unattended.

In an action for personal injuries for being struck by a car at a crossing she must show that she exercised the degree of care which an ordinarily prudent and careful girl of her age is accustomed to use or reasonably may be expected to use under like circumstances.

Contributory Negligence of Children.—As to the contributory negligence of children, see notes and cases cited in 1 St. Ry. Rep. 326; 3 St. Ry. Rep. 59; 4 St. Ry. Rep. 63, 102.

2. **SAME; EVIDENCE OF CARE.** — The fact that a child six and one-half years of age knew that it was customary for a car approaching a standing one to sound a gong, that when she was behind a standing car she listened and did not hear any car coming, is evidence of some care.

DEFENDANT brings exceptions from verdict for plaintiff. Reported 97 N. E. 626.

Coakley & Sherman and R. H. Sherman, for plaintiffs.

F. W. Fosdick, for defendant.

Opinion by DE COURCY, J.:

The sole question in these cases is, was there evidence upon which the jury could find that Marguerite Purcell, hereinafter called the plaintiff, was in the exercise of due care? It is conceded that there was evidence of the defendant's negligence; and the case was submitted to the jury under instructions to which no exception was taken.

Upon the issue in question the evidence tends to show the following facts: At 4:45 P. M., on May 14, 1908, the plaintiff, who was nearly six and one-half years of age, stood at the southwest corner of Massachusetts and Park avenues in Arlington and looked both ways along Massachusetts avenue to see if any electric cars were approaching. She saw no car coming from the direction of Boston; and although her testimony was that the distance she could see was not "very far because it was a hill," and was equal to the distance "from the witness stand to a building across the street," which was estimated by counsel to be about 110 feet, the jury might adopt the motorman's statement that

"from the place of the accident to the top of the hill towards Boston the street is straight and one can see for a distance of 400 yards."

She saw a Boston-bound car coming from the north, or from Lexington, and waited at the edge of the sidewalk until this car stopped at the usual stopping place for in-bound cars, directly in front of and about ten feet distant from where she was standing. She then stepped upon the crosswalk, passed about four feet in the rear of this stationary car, and as she stepped upon the farther or out-bound track was struck by a car coming from Boston. She also testified that when she was walking behind the standing car she listened but did not hear any car coming; and the jury could

find that the motorman did not ring the gong, although the defendant's rules required him to do so when passing standing cars. There was evidence that the out-bound car which struck the plaintiff was going quite fast, and that after the collision it did not stop until it went twenty or twenty-five feet, or across Park avenue.

The plaintiff was concededly old enough and possessed of sufficient intelligence and experience to be permitted to go upon the street unattended. The standard by which her conduct must be tested, however, is not that of an adult. See *Kennedy v. Worcester Consolidated Street Railway*, 210 Mass. 132, 96 N. E. 78. She must show that she exercised the degree of care which an ordinarily prudent and careful girl of her age is accustomed to use or reasonably may be expected to use under like circumstances. It was a question of fact for the jury whether her conduct measured up to that standard. *McDermott v. Boston Elevated Ry.*, 1 St. Ry. Rep. 325, 184 Mass. 126, 68 N. E. 34, 100 Am. St. Rep. 548; *Burns v. Worcester Consolidated Street Ry.*, 5 St. Ry. Rep. 454, 193 Mass. 63, 78 N. E. 740.

From the plaintiff's statement that when she was behind the standing car she listened and did not hear any car coming, considered in connection with her knowledge of the running of electric cars as shown by the testimony of her mother, the jury could infer that the plaintiff knew of the custom to sound the gong on a car that was approaching a standing one, and that she relied somewhat upon the fact that she heard no warning gong from the car which struck her. *Murphy v. Boston Elevated Ry.*, 204 Mass. 229, 90 N. E. 398. This was evidence of some care, and is sufficient to distinguish the case at bar from those where the evidence shows an entire absence of care on the part of the plaintiff. *Mullen v. Springfield Street Railway*, 164 Mass. 450, 41 N. E. 664; *Stackpole v. Boston Elevated Ry.*, 193 Mass. 562, 79 N. E. 740; *Holian v. Boston Elevated Ry.*, 5 St. Ry. Rep. 406, 194 Mass. 74, 80 N. E. 1, 11 L. R. A. (N. S.) 166. And the jury may have believed that the failure of the plaintiff to hear the noise of the approaching car was due to its distance at the time, and that the intervening space was traveled in a few seconds by reason of the high speed at which the car was running. We are of opinion that the cases were rightly submitted to the jury.

Exceptions overruled.

Hottenbrink v. Boston Elevated Ry. Co.

(Massachusetts — Supreme Judicial Court.)

1. **INJURY TO PASSENGER SLIPPING ON STEP WHILE ALIGHTING; PRESENCE OF TOBACCO SPIT ON STEP; NEGLIGENCE.** — The momentary presence of tobacco spit on a car step does not render the company liable for injuries to a passenger slipping on such step in the absence of evidence that the conductor knew the saliva was there or that it had been on the step for a considerable period of time.
2. **SAME; NEGLIGENCE OF CONDUCTOR IN FAILING TO SEE SALIVA ON STEP.** — Where a conductor's position on the rear platform enabled him to see only the outer edge of the step, he was not negligent in failing to discover saliva on the step before a passenger fell.

PLAINTIFF brings exceptions from verdict for defendant. Reported 97 N. E. 624.

W. P. Murray and *E. F. Hodgdon*, for plaintiff.

Sheldon E. Wardwell, for defendant.

Opinion by DE COURCY, J.:

There was evidence for the jury of the plaintiff's due care, and we do not understand that the defendant contends to the contrary. The sole question here is that of the defendant's negligence, involved in the presence of some tobacco spit of the size of a silver dollar or half dollar on the rear step of the car.

Even if it be assumed that the presence of tobacco spit would produce a slippery condition on the car step, the plaintiff was bound to show that the defendant's conductor knew it was there,

Negligent Condition of Steps of Street Car. — In *Nellis on Street Railways* (2d Ed.), § 288, it is said: "A street car company is required to exercise the highest degree of care to keep its platforms and steps in safe condition for use in the season when operated, so far as it practically can do so, in consideration of the climate, temperature and condition of the air with respect to snow, moisture and frost. It is liable for permitting snow and ice to remain for an unreasonable length of time on the steps of its cars, where a passenger would be likely to slip upon it, but it is bound to only ordinary care under the circumstances, in view of the danger to be apprehended."

Slippery Condition of Steps. — The question of the liability of a street railway company for injuries arising from the slippery condition of the steps of a street car is discussed in 7 St. Ry. Rep. 777.

or by the exercise of the care owed to the plaintiff would have seen and removed it.

There is no evidence that the conductor knew the saliva was there. No witness in the case, with the exception of the plaintiff and the child Clausina Bookhaut, testified that the alleged condition existed even at the time of the accident; and no witness testified to its existence before the plaintiff alighted. The momentary presence of such a substance on the step would not render the defendant liable. *Goddard v. Boston & Maine Railroad*, 179 Mass. 52, 60 N. E. 486; *Lyons v. Boston Elevated Railway*, 204 Mass. 227, 90 N. E. 419. There was nothing in its appearance from which the inference could be drawn that it had been upon the step for a considerable period of time. *Anjou v. Boston Elevated Railway*, 208 Mass. 273, 94 N. E. 386. The inference that it must have been there for two minutes, or since the preceding stop at H or I street, is merely conjectural, for it might have come from some passing teamster or pedestrian or otherwise.

And the evidence fails to show that the conductor was negligent in failing to see this substance on the step before the plaintiff fell. His position on the rear platform, to the left of the controller, would enable him to see only the outer edge of the step. It was not something to be anticipated like the accumulation of mud and slime on rainy days (*Kingston v. Boston Elevated Railway*, 207 Mass. 457, 93 N. E. 573), or of snow and ice during our winter season. *Foster v. Old Colony Street Railway*, 182 Mass. 378, 65 N. E. 795. Nor did the testimony disclose any rule of the company imposing upon the conductor a special duty to examine the car steps for tobacco spit. *Kingston v. Boston Elevated Railway*, 207 Mass. 457, 93 N. E. 573.

On the evidence presented the plaintiff was not entitled to go to the jury on the issue of the defendant's negligence.

Exceptions overruled.

Gurrie v. New York & North Shore Traction Co.

(New York — Appellate Division, Second Department.)

1. **COLLISION CAUSING DEATH OF TEAMSTER; NEGLIGENCE; EVIDENCE.** — Action to recover for the death of a teamster who was struck and killed in the night time by a trolley car in a sparsely settled district while he was endeavoring to extricate his vehicle from the defendant's right of way where it had become stalled. Evidence examined, and *held*, that the plaintiff failed to establish the negligence of the defendant.
2. **DUTY OF MOTORMAN IN SPARSELY SETTLED DISTRICTS.** — A motorman driving a trolley car on tracks from four to six feet from the main highway on which there were no crossroads and only one house within a distance of a mile, is not bound to have his car under the same control as is required in populous districts having intervening streets at short intervals.

DEFENDANT appeals from a judgment for plaintiff. Reported 135 N. Y. Supp. 833.

DUTY OF MOTORMAN AS TO CONTROL OF STREET CAR.

1. **In General.**
2. **At Street Crossings.**
 - a. **In General.**
 - b. **Pedestrian Crossing Track.**
 - c. **Vehicle Crossing Track.**
3. **Between Crossings.**
 - a. **In General.**
 - b. **Pedestrians.**
 - c. **Children.**
 - d. **Vehicles Driven Along Track.**
 - e. **Vehicles Crossing Track.**

1. **In General.** — In a general sense the question of the duty of a motorman in keeping his car under control is closely connected with the speed with which the car is run. Reference, therefore, to the following notes in this series, illuminates the question discussed in this note. Notes on the liability of a street railway company for an injury arising from running a car at a dangerous or negligent rate of speed, 1 St. Ry. Rep. 242, 261, 587, 636; 2 St. Ry. Rep. 520; 3 St. Ry. Rep. 411, 465, 796; 4 St. Ry. Rep. 71. See also the discussion of the liability for running a car at full speed through crowded streets in 3 St. Ry. Rep. 464, and the note relative to the duty to control a car which is approaching a street intersection in 2 St. Ry. Rep. 706.

In accordance with the underlying principles of the law of negligence requiring a street railway company to exercise reasonable care to avoid injury to persons on or near its tracks, it is the duty of a motorman to exercise a reasonable degree of care in keeping his car at all times under such control as to avoid injury to other persons. *Currie v. Consolidated Ry. Co.*, 81 Conn. 383, 71 Atl. 356; *Payne v. Waterloo, etc., Ry. Co.*, (Iowa) 133 N. W. 781;

James A. MacElhinny, for appellant.

George F. Hickey (*M. P. O'Connor*, on the brief), for respondent.

Opinion by **WOODWARD, J.**:

On the 27th day of October, 1910, at about 7:10 P. M., the plaintiff's intestate was driving a team attached to a heavy load of lumber on the North Hempstead Turnpike between Great Neck Road and Little Neck Road, near Manhasset, Nassau county. The defendant operated an electric surface railroad upon the highway, and at this particular point the tracks were placed at the south side of the highway, which was about sixty feet in width. The roadway is macadamized for a space of about eighteen feet in the center, and between the macadam and the first rail of the defend-

Fullerton v. Metropolitan St. Ry. Co., 37 App. Div. 386, 55 N. Y. Supp. 1068. But the degree of care to be used in keeping a car under control depends upon the circumstances of each particular case. Greater care is required in some cases than in others. *Westphal v. St. Joseph, etc., St. Ry. Co.*, 1 St. Ry. Rep. 394, 134 Mich. 239, 96 N. W. 19, 10 Det. L. N. 439. When close to a street crossing where pedestrians and vehicles usually cross, it is the duty of the motorman to have the car under better control than in the middle of a block. *United Rys. & Elec. Co. of Baltimore v. Carneal*, 110 Md. 211, 72 Atl. 771. When running along a populous street greater care is required than when running through a rural district. See the case reported in full above. It is negligence to run a car upon its own right of way and approach a frequented thoroughfare near a populous district at such a rate of speed that the car cannot be stopped within a distance of 750 feet. *Orofino v. New York State Rys.*, 7 St. Ry. Rep. 931, 128 N. Y. Supp. 279. Even on a country road the car "must at all times be kept so well in hand as not to expose others to unreasonable hazard. *Currie v. Consolidated Ry. Co.*, 81 Conn. 383, 71 Atl. 356.

When the motorman's view is obstructed it is his duty to keep his car under "complete control" until his view is unobstructed. *Engvall v. Des Moines City Ry. Co.*, 145 Iowa 560, 121 N. W. 12. As soon as a motorman sees that a dangerous situation has arisen and that a collision is imminent, it is his duty to place the car under control. *South Chicago City Ry. Co. v. Kinmare*, 117 Ill. App. 1, aff'd, 216 Ill. 451, 75 N. E. 179.

It is the duty of a street railway company so to construct its road and equip and operate its cars that the latter may be readily controlled by their operators under all conditions and in all circumstances reasonably to be anticipated. *Percell v. Metropolitan St. Ry. Co.*, 6 St. Ry. Rep. 741, 126 Mo. App. 43, 103 S. W. 115.

2. At Street Crossings. — a. In General. — At a street crossing where

ant's railroad there was a dirt apron about four or five feet wide. Between Great Neck Road and Little Neck Road is a distance of one mile, and in that distance there is no street or highway crossing North Hempstead Highway, and on the south side of the roadway there is not a single house, and but one on the northern side. The night of the accident was very dark, and it was raining a fine rain, and at the time of the accident there were no street lights burning in that locality. Michael Gurrie, plaintiff's intestate, as we mentioned, was driving a team on this highway heavily laden with lumber, and he was accompanied by one David Levi, who was likewise driving a team, with the same burden. These teams were en route from Brooklyn to Roslyn, going east, and neither of

persons and vehicles are almost constantly passing over the tracks of a street railway, ordinary care requires the motorman to keep his car under reasonable control so as to avoid a collision with a person or vehicle.

Idaho. — *Pilmer v. Boise Traction Co.*, 14 Idaho 327, 94 Pac. 432, 15 L. R. A. (N. S.) 254.

Illinois. — *O'Connell v. Chicago City Ry. Co.*, 150 Ill. App. 157; *Zyla v. Chicago City Ry. Co.*, 158 Ill. App. 401.

Indiana. — *Moran v. Leslie*, 33 Ind. App. 80, 70 N. E. 162; *Union Traction Co. v. Howard*, 88 N. E. 967.

Kentucky. — *Louisville Ry. Co. v. Knock's Admr.*, 117 S. W. 271, 142 Ky. 340, 134 S. W. 193.

Maine. — *Marden v. Portsmouth, etc., St. Ry.*, 3 St. Ry. Rep. 300, 100 Me. 41, 60 Atl. 530, 69 L. R. A. 300, 109 Am. St. Rep. 476; *Denis v. Lewiston, etc., St. Ry. Co.*, 104 Me. 39, 70 Atl. 1047.

Maryland. — *United Rys. & Elec. Co. of Baltimore v. Carneal*, 110 Md. 211, 72 Atl. 771; *United Rys. & Elec. Co. of Baltimore*, 7 St. Ry. Rep. 87, 78 Atl. 383.

Missouri. — *Aldrich v. St. Louis Transit Co.*, 101 Mo. App. 77, 74 S. W. 141; *Grout v. Central Elec. Ry. Co.*, 6 St. Ry. Rep. 827, 125 Mo. App. 552, 102 S. W. 1026.

New Jersey. — *Consolidated Traction Co. v. Glynn*, 59 N. J. L. 432, 37 Atl. 66; *Searles v. Elizabeth, etc., Ry. Co.*, 2 St. Ry. Rep. 706, 70 N. J. L. 388; 57 Atl. 134; *Kraut v. Public Service Ry. Co.*, 81 Atl. 751.

New York. — *Harvey v. Nassau Elec. R. Co.*, 35 App. Div. 307, 55 N. Y. Supp. 20; *Sesselmann v. Metropolitan St. Ry. Co.*, 76 App. Div. 336, 78 N. Y. Supp. 482; *Huther v. Nassau Elec. R. Co.*, 7 St. Ry. Rep. 535, 142 App. Div. 522, 126 N. Y. Supp. 1105.

Oregon. — *Donohoe v. Portland Ry. Co.*, 56 Oreg. 58, 107 Pac. 964.

Washington. — *Wilson v. Seattle, etc., Ry. Co.*, 6 St. Ry. Rep. 460, 55 Wash. 651, 104 Pac. 1112.

West Virginia. — *Ashley v. Kanawha Valley Tract. Co.*, 60 W. Va. 306, 55 S. E. 1016.

In *Zyla v. Chicago City Ry. Co.*, 158 Ill. App. 401, the court said: "It is

them was provided with a lantern. Plaintiff's intestate was accustomed to driving over this highway and knew the road. The turnpike, going east from the city line, is upgrade to the point of the accident, and continues upgrade to the top of the first hill beyond the point of the accident, a distance stated by the appellant to be 375 feet, and by the respondent to be 478.40. From the brow of the hill the highway drops down for a space of about 700 feet, at which point it is something over fifteen feet below the top of the first hill, and it then rises for a distance of about 900 feet to an altitude of something over fifty-two feet.

Gurrie, on the night in question, had driven his team off from the macadam, across the dirt wing, and had one of the wheels of

also well settled as a matter of law that it is the duty of a person in charge of an electrically propelled car to have such car within reasonable control on approaching cross thoroughfares, so that the same may be readily brought to a standstill and collisions avoided." In *Moran v. Leslie*, 33 Ind. App. 80, 70 N. E. 162, the court, speaking of the duty of a motorman, said: "It was his duty, when running the car along the street at such a place [near an intersection] to have it under such control as that he might be able to stop or check it to avoid collision." In *Grout v. Central Elec. Ry. Co.*, 6 St. Ry. Rep. 327, 125 Mo. App. 552, 102 S. W. 1026, it was said: "To run a car at a rate of speed so high along a street in a populous part of the city without reducing speed at street intersections, is not only negligence, but is a wantonly reckless act. * * * It is the duty of the operators of a car to keep it under reasonable control while passing through well-populated districts, and especially while approaching street crossings, where they have every reason to anticipate the presence of others whose right to the enjoyment of the street is equal to their own."

It is the duty of the motorman when approaching a street crossing to have the car "well under control." *Harvey v. Nassau Elec. R. Co.*, 35 N. Y. App. Div. 307, 55 N. Y. Supp. 20. "It is not enough that the speed shall be reduced, if that reduction of speed does not give the motorman that control of the car which is necessary to the equal rights of pedestrians and others at street intersections, and it is always a question for the jury whether the car is in such control." *Sesselman v. Metropolitan St. Ry. Co.*, 76 N. Y. App. Div. 336, 78 N. Y. Supp. 482.

When Passing Car Discharging Passengers.—When passing a car discharging passengers at a street crossing it is the duty of the motorman to have his car under such control that he can stop the same upon a moment's notice. *Creamer v. Louisville Ry. Co.*, 142 Ky. 340, 134 S. W. 193. In *Bremer v. St. Paul City Ry. Co.*, 6 St. Ry. Rep. 543, 107 Minn. 326, 120 N. W. 382, the court said: "The general rule is none the less certain that at a street crossing or at a place used as a street crossing, the motorman in charge of a car approaching one discharging passengers is bound to keep a sharp lookout for passengers or other persons who may attempt to cross the tracks behind

his wagon over the northern rail of defendant's track, when he stopped to rest his team. When he tried to start, he discovered that his wheel was in a rut and obstructed by the rail, and the team was unable to move the load. Levi, discovering his position, came up to advise and help, and finally drove his own team from the rear of Gurrie's wagon to a position in front, where he attached a rope to Gurrie's wagon and attempted to draw the load out, but without avail. At this stage one Dietz came along with another team, supplied with a lantern, and finding the plaintiff's intestate in trouble, took hold and attempted to assist. Gurrie's wagon had been in this position for about half an hour, and while they were at work in an effort to extricate him, Dietz saw the defendant's

the standing or moving car, to have his car under such control that he can stop it upon the appearance of danger, and to give such signals as will usually protect travelers who are in the exercise of ordinary prudence."

b. Pedestrian Crossing Track.—Due care on the part of a motorman when approaching a street intersection requires that he shall have the car under such control that the safety of a careful traveler thereon will not be endangered. *Searles v. Elizabeth, etc., Ry. Co.*, 2 St. Ry. Rep. 706, 70 N. J. L. 388, 57 Atl. 134; *Kraut v. Public Service Ry. Co.*, (N. J.) 81 Atl. 751. A motorman is not bound to put the car under control at the first sight of a pedestrian at a crosswalk; but where the pedestrian continues without looking for a car and apparently unconscious thereof, it is the motorman's duty to get ready to avoid striking such pedestrian. *Aldrich v. St. Louis Transit Co.*, 101 Mo. App. 77, 74 S. W. 141. It is the duty of those in charge of a car to keep a sharp lookout as they approach a street crossing and to slacken the speed of the car sufficient to enable them to have it under control, so as to avoid injuring those who may be crossing the street. *United Rys. & Elec. Co. of Baltimore v. Kolken*, 7 St. Ry. Rep. 87, 78 Atl. 383. A pedestrian has the right to rely on the motorman using due care in the management of his car, and due care means "having it under such control as occasion demands at a street intersection where people and vehicles are crossing." *Pilmer v. Boise Traction Co.*, 14 Idaho 327, 94 Pac. 432, 15 L. R. A. (N. S.) 254.

c. Vehicle Crossing Track.—A motorman, when approaching a public street, must anticipate that any person approaching such junction from either side may turn his team into it, "and shall then exercise all due care to have his car under such control as to be able to stop it at the crossing if necessary to avoid an accident. *Marden v. Portsmouth, etc., St. Ry.*, 3 St. Ry. Rep. 300, 100 Me. 41, 60 Atl. 530, 69 L. R. A. 300, 109 Am. St. Rep. 476. A motorman when approaching a junction is required to exercise due care and vigilance, according to the exigencies of the situation, to have his car under such control, in anticipation of the crossing of teams, that it may be stopped at the junction in season to prevent a collision with teams that may suddenly turn to drive over the track. *Denis v. Lewiston, etc., St. Ry. Co.*, 104 Me. 39, 70 Atl. 1047.

car coming from the east on top of the second hill, about three-quarters of a mile away. The car stopped at Great Neck Road, about half a mile away, and then came on toward the scene of the accident. Dietz told the men that the car was coming and to get the mules out of the way. Levi saw the car at the same time. Dietz said, "Some one better go down and stop her." Levi shouted to Gurrie that the trolley was coming; get them loose. Gurrie responded that he could not get the rope loose; it was too tight. At that time the car had not come over the nearest hill, less than 500 feet away. They could see the light of the car as it went down into the valley and came up the nearest hill. Obviously the defendant's motorman had no reason to anticipate this situation.

3. Between Crossings. — a. In General. — Although a motorman is not required to keep a street car under the same control between crossings as at crossings, the obligation imposed upon him to exercise reasonable care requires that between crossings he shall keep the car under such control as reasonable care requires, in order to avoid injury to persons and property upon the street.

Alabama. — Birmingham Ry., etc., Power Co. v. Demmins, 57 So. 404.

California. — Schierhold v. North Beach, etc., R. Co., 40 Cal. 447.

Connecticut. — Carroll v. Connecticut Co., 6 St. Ry. Rep. 354, 82 Conn. 513, 74 Atl. 897.

District of Columbia. — Capital Traction Co., 34 App. D. C. 559.

Illinois. — Chicago City Ry. Co. v. Tuohy, 95 Ill. App. 314, aff'd, 196 Ill. 410, 63 N. E. 997, 58 L. R. A. 270; Chicago City Ry. Co. v. Reddick, 139 Ill. App. 160.

Indiana. — Saylor v. Union Tract. Co., 5 St. Ry. Rep. 239, 81 N. E. 94.

Kentucky. — Leach v. Owensboro City Ry. Co., 137 Ky. 292, 125 S. W. 708; Louisville Ry. Co. v. Hutchcraft, 32 Ky. L. Rep. 429, 105 S. W. 983.

Louisiana. — Danna v. City of Monroe, 7 St. Ry. Rep. 892, 129 La. 138, 55 So. 741.

Michigan. — Quirk v. Rapid Ry., 130 Mich. 654, 90 N. W. 673, 9 Det. L. N. 189; Ablard v. Detroit United Ry., 3 St. Ry. Rep. 410, 139 Mich. 248, 102 N. W. 741.

Minnesota. — Flannigan v. St. Paul City Ry. Co., 68 Minn. 300, 71 N. W. 379; Gray v. St. Paul City Ry. Co., 87 Minn. 280, 91 N. W. 1106.

Missouri. — Moritz v. St. Louis Transit Co., 2 St. Ry. Rep. 619, 102 Mo. App. 657, 77 S. W. 477; Funck v. Metropolitan St. Ry. Co., 133 Mo. App. 419, 113 S. W. 694; Childress v. Southwest Missouri R. Co., 141 Mo. App. 667, 126 S. W. 169.

North Dakota. — Acton v. Fargo, etc., Ry. Co., 7 St. Ry. Rep. 499, 20 N. Dak. 434, 129 N. W. 225.

New Jersey. — Adams v. Camden, etc., Ry. Co., 69 N. J. L. 424, 55 Atl. 254.

New York. — Fullerton v. Metropolitan St. Ry. Co., 37 App. Div. 386, 55

The improved part of the highway was four to six feet from the track which he was using, there were no cross-roads, or roads running into the highway between the two main roads above referred to, and only one house in a distance of one mile. Under such circumstances, he was not bound to have his car under that

N. Y. Supp. 1068; *Miller v. Buffalo, etc., Traction Co.*, 149 App. Div. 396, 134 N. Y. Supp. 380.

Texas. — *Dallas Consol. Elec. St. Ry. Co. v. Illo*, 32 Tex. Civ. App. 290, 73 S. W. 1076.

Even though there appears to be no one upon the street, it is the duty of the motorman to have the car under reasonable control. *Fullerton v. Metropolitan St. Ry. Co.*, 37 N. Y. App. Div. 386, 55 N. Y. Supp. 1068, wherein the court said: "While there happened to be no one on the street at that time, yet it was clearly the duty of the motorman to keep his car under reasonable control, so that he could manage it with sufficient promptness to stop it promptly if occasion arose to do so."

b. Pedestrians. — It is the duty of a motorman to have his car under reasonable control so as not to injure a pedestrian crossing the tracks between street crossings. *Leach v. Owensboro City Ry. Co.*, 137 Ky. 292, 125 S. W. 708. The motorman has a right to assume that a person standing on the track some distance ahead of the car will step out of the way, and he is not bound to stop the car until he has reason to believe that such person is likely to be injured. *Lyons v. Bay Cities Consol. Ry. Co.*, 115 Mich. 114, 73 N. W. 139. But he must keep the car under ready control so that it may be readily stopped if the pedestrian's danger is found to be imminent. *Capital Tract. Co. v. Apple*, 34 App. D. C. 559. Where a person is walking upon a street railway in the highway a sufficient length of time in full view of the motorman of a car approaching from behind, the latter is bound to bring his car under control or give the footman notice in time to prevent an injury. *Quirk v. Rapid Ry.*, 130 Mich. 654, 90 N. W. 673, 9 Det. L. N. 189. Where a motorman sees an old man crossing the track, with nothing to indicate to the motorman that he is aware of the approaching danger, he should put his car under control until he has good reason to believe the pedestrian is aware of his approach, and should stop, if possible and necessary to avoid a collision. *Saylor v. Union Tract. Co.*, (Ind. App.) 5 St. Ry. Rep. 239, 81 N. E. 94.

c. Children. — Children are especially favored in law and protected by the courts. When a child of tender age is approaching a street railway track, and in dangerous proximity thereto, the car should be brought and kept under control until there no longer exists a possibility that the child will get on the track and be run over. *Danna v. City of Monroe*, 7 St. Ry. Rep. 892, 129 La. 138, 55 So. 741; *Gray v. St. Paul City Ry. Co.*, 87 Minn. 280, 91 N. W. 1106; *Childress v. Southwest Missouri R. Co.*, 141 Mo. App. 667, 126 S. W. 169. By bringing and keeping the car under control is meant that the motorman should cut off the power, reduce the speed and keep the brake chain wound up, so that the car may be stopped instantly within one or two feet. *Danna v. City of Monroe*, 7 St. Ry. Rep. 892, 129 La. 138, 55 So. 741. In Chicago

control which is demanded in populous districts, with intervening streets at short intervals, and the practical operation of suburban lines, the demand for rapid transit, all warrant the operation of cars under these conditions at a high rate of speed.

With the plaintiff's intestate and the other two men at work to

City Ry. Co. v. Tuohy, 95 Ill. App. 314, *aff'd*, 196 Ill. 410, 63 N. E. 997, 58 L. R. A. 270, the court said: "If the motorman saw or ought to have seen that appellee, then less than six years of age, was in such situation or so acting as to expose him to danger from the advancing car, of which he was unaware, it was the motorman's duty to get the car so fully under control as to avoid injury if he could, and to give warning or take such other measures as would tend to prevent the accident." In *West Chicago St. Ry. Co. v. Schwartz*, 93 Ill. App. 387, it was held that the mere fact that a child leaves the curb does not require the motorman to immediately slacken speed, as he has a right to assume that the child would stop before reaching the track.

d. Vehicles Driven Along Track. — Where a car is approaching a vehicle driven along a street railway track in the same direction in which the car is proceeding, it is the duty of the motorman to bring his car under control so as to avoid a collision with the vehicle. *Birmingham Ry., etc., Power Co. v. Demmins*, (Ala.) 57 So. 404; *Carroll v. Connecticut Co.*, 6 St. Ry. Rep. 354, 82 Conn. 513, 74 Atl. 897. See also *Miller v. Buffalo, etc., Traction Co.*, 149 N. Y. App. Div. 396, 134 N. Y. Supp. 380. In *Flannagan v. St. Paul City Ry. Co.*, 68 Minn. 300, 71 N. W. 379, the court said: "When a motoneer discovers a vehicle on the track a short distance ahead of him, it is his duty to have the power which propels the car under his control, and to use it so as to avoid a collision with such vehicle if he can. In *Acton v. Fargo, etc., Ry. Co.*, 7 St. Ry. Rep. 499, 20 N. Dak. 434, 129 N. W. 225, the court said: "In the case of a trolley car overtaking another vehicle directly in a line with its progress, and a possible obstacle in its way, a proper regard for the rights of others requires that the car be reduced to such control that it may be brought to a standstill if necessary."

e. Vehicles Crossing Track — The motorman is not required to check the car whenever a vehicle is close to the track and driven along the side thereof; he may assume that the driver of the vehicle will not attempt to drive on the track in front of the car. *Birmingham Ry. & Light Co. v. Clark*, 148 Ala. 673 (mem.), 41 So. 829. But under all the circumstances of the case the motorman may be negligent in not having his car under the proper control. *Dallas Consol. Elec. St. Ry. Co. v. Illo*, 32 Tex. Civ. App. 290, 73 S. W. 1076. As soon as a motorman sees that there is danger of a collision with a vehicle passing diagonally across the track it is his duty to acquire control of the car. *Moritz v. St. Louis Transit Co.*, 2 St. Ry. Rep. 619, 102 Mo. App. 657, 77 S. W. 477. In *Muncie St. Ry. Co. v. Maynard*, 5 Ind. App. 372, 32 N. E. 343, the court said: "Those in charge of an engine upon a street car track are not required or under obligations to immediately stop the engine upon seeing a horse or team by the side of the track that is manifesting fright, unless the situation and all the circumstances would cause a reasonable man to see and believe that damage to the property could not otherwise be avoided."

get the wagon free from its position right down to the time when the defendant's car came over the hill, less than 500 feet away, neither Gurrie nor any one of the men appears to have made a move to give the defendant any notice of their situation, and it appears from the record that there was a slight curve just as the car came over the hill, so that the lights, which illuminated the tracks for a distance of 200 or 300 feet ahead, would not follow the tracks until the car had been brought around to the straight line. After this car was in sight for the second time, and less than 500 feet away, with a downgrade in front of it, Dietz appears to have run toward the car, swinging a lantern, and he says he had reached a point twenty-five to fifty feet from the front wagon, which was fastened to the second by a rope and standing at nearly right angles to the track, when the car passed him, and a moment later collided with the rear wheel of the front wagon and then passed on a few feet, where it hit the mules, killing one of them, and came to a stop without any serious injury to the car, and without in any manner injuring any of the passengers, or, so far as appears, jarring them to any great extent. Certainly, if this car was running at the rate of thirty miles per hour, and had not slackened its speed at all at a distance of fifty feet from the first wagon, it could hardly have been stopped in the short distance remaining, without more serious results than the testimony discloses. The wagons were not tipped over, nor, with the exception of the crushing of the wheel of the first wagon, does there appear to have been any serious damage to either of them.

If the car was being operated at thirty miles per hour, and it seems improbable that it was, the time that it would take to traverse a distance of 500 feet was not a long time to give notice of the situation to the defendant. The fact that Dietz ran a distance of fifty feet, swinging a lantern (and this is probably twice the distance he actually ran, for he places it from twenty-five to fifty feet), was not notice to the defendant that the plaintiff's intestate, with his team, was fastened in the tracks. The night was dark and rainy. The glare of his headlights and the watching of his slippery tracks would naturally confine his vision to the space illuminated by his headlights, and he might not see an ordinary hand lantern at the first moment that it was displayed, or be able to comprehend its meaning on the instant. The first and most natural impulse would be to accept it merely as a signal to stop to take on a passenger, or it might be easily understood that he might

properly regard it merely as some one passing along the highway, and, until the demonstration became visible and obviously intended to convey a warning of danger, he would not be negligent in not applying his brakes and making an effort to stop. The undisputed evidence is that, as soon as the motorman saw and comprehended the warning, he applied his brakes and made every effort to stop, but the car was running on a downgrade, on a wet, slippery track, and, as we read the record, there was no evidence that this car would, under the circumstances, have been stopped within the distance that must have intervened after the warning was given. The car weighed twenty-four tons, and even if running only at eight or nine miles an hour upon a downgrade, upon a wet track, would be very difficult to stop in a short space, and if every traction car traversing a suburban highway on a dark night was to be stopped every time a lantern appeared in the highway, there would be more complaint than at present about the delays in transportation. We fail to discover the negligence of the defendant.

The judgment and order appealed from should be reversed, and a new trial granted; costs to abide the event. All concur.

Grant v. Bangor Ry. & Electric Co.

(Maine — Supreme Judicial Court.)

1. **SPEED AND CONTROL OF CAR.** — The speed at which a car may be properly run and the kind of control which should be exercised over it must depend to some extent upon the surrounding circumstances and the situation ahead.
2. **SAME; INJURY TO CHILD; NEGLIGENCE OF MOTORMAN.** — Where a motorman approaching a street crossing, a nearby playground, an obstruction on one side of the street, and a little child five or six feet from the track and apparently oblivious of the approaching car, maintains his speed at such a rate and to within such close proximity that when the child turned and attempted to walk across the tracks he could not sufficiently control the car to avoid striking her, he is guilty of negligence.
3. **SAME; CONTRIBUTORY NEGLIGENCE OF MOTHER.** — Where a mother, obliged to go to a market a short distance off to obtain something for supper, left her five-year-old child on the sidewalk with a sister nine years old with strict instructions as to watchfulness, and in less than ten minutes the

Contributory Negligence of Parent Permitting Child to Be in Street. — In *Nellis on Street Railways* (2d Ed.), § 429, it is said: "The parents of a child of tender age are required to exercise a reasonable degree

child was struck by a street car and killed, the mother is not chargeable with contributory negligence.

4. **SAME; CONTRIBUTORY NEGLIGENCE OF CHILD.** — Evidence examined and *held*, that a child about five years of age was not guilty of contributory negligence in going upon the track in front of an approaching car.

DEFENDANT moves for new trial after verdict for plaintiff. Reported 83 Atl. 121.

Fellows & Fellows, of Bangor, for plaintiff.

E. C. Ryder, of Bangor, for defendant.

Opinion by CORNISH, J.:

This is an action on the case brought by the plaintiff, as administratrix of the estate of Ida Bernice Grant, her deceased child five years and three months old, to recover damages at common law for injuries sustained by her intestate by reason of being struck and run over by a car of the defendant on Harlow street in the city of Bangor, about 5:30 p. m. July 13, 1910, from which injuries the child died a few hours later. The case is before the law court on defendant's motion to set aside the verdict as against the evidence.

The following facts are fairly established:

Mrs. Grant lived on the second floor of the National block on the corner of Harlow and Franklin streets. Harlow street runs in a general northerly and southerly direction, and the car in question was on its regular route, having come into Harlow street from Cumberland street at a point 482 feet north of the place of the accident, and was passing southerly along the center of Harlow street toward Center street. Harlow street is one of the busy streets of the city, and the surroundings are such that motormen have special instructions not to run too fast on that street. The accident occurred about five feet below the Prospect street crossing, and in front of the playground in the yard of the high school. At this point the city was excavating a reservoir, so that the entire sidewalk and a portion of the street itself was blocked by the ex-

of care and vigilance in guarding and protecting it from dangers to which its own want of experience may subject it. But the law does not require the parent to suspend his business and keep his child, when at home, every moment under his eye. The fact that such a child is found in the street unattended or accompanied by other children too young to protect it, is presumptive evidence of negligence on the part of the parents, guardian or custodian, but such presumption may be overcome by proof that the parents or custodian have exer-

cavated earth, leaving a space of only two or three feet between the outside of this pile of earth and the track of the defendant. This narrow space was the walk in use. Cumberland street makes a sharp descent into Harlow street, and from the junction there is a continuous downgrade of two and one-half per cent. on Harlow street past the place of accident toward Center street. The motorman had been in the employ of the defendant since May 30, 1910, was a spare hand, and had been on this run three days.

Mrs. Grant, the mother, was obliged to go to a nearby market to purchase something for supper and left her five-year-old child for a few minutes on the sidewalk with the injunction to stay there, which the child promised to do. At the same time she called her older daughter, a girl of nine, and told her to watch her sister, which she also promised to do. The mother was gone only about ten minutes, but the accident happened before her return.

It appears that the child did not remain where she was left, but walked along the sidewalk to the excavation and was seen standing by the reservoir about five or six feet from the track and eight feet from the crosswalk on Prospect street. She was looking into the reservoir with her back toward the approaching car. Then, in the language of an eyewitness called by the defendant,

"She started across the track slowly until she was about in the middle of the track, when she turned slightly and she saw the car, and she didn't know whether to continue and go across or come back. She seemed kind of dazed, and the car struck her on the forehead and knocked her down and run over her."

It further appears from the motorman's own testimony: That, as soon as he turned into Harlow street from Cumberland street, he saw the child standing near the track by the reservoir, and he watched her as she stood there all the time he was coming down the street, his vision being unobstructed. That he was coasting along Harlow street with the power shut off; that the car was moving in his judgment about seven or eight miles an hour. That he did not apply the brakes until he saw the child start to cross the street.

cised reasonable care and supervision over the child and were not at fault because of its escape into the street. Whether or not it is negligence to permit a young child to go into the street alone, or to send it unattended by a competent guardian, and thus expose it to danger, may be a question of fact or of law. The courts usually regard it as a question of law when the child is *non sui juris*, and, therefore, incapable of avoiding the dangers to which it would naturally be subjected."

That he was then about a car length or thirty feet distant. That he immediately put on the brake and reversed the power, but it was too late. The car struck the little girl where she was in the center of the track and ran over her. Reversing the power caused a fuse to blow out, which locked the wheels, and the car slid a distance of two and one-half car's length, or seventy-five feet, before it stopped. That the rail was wet and muddy owing to the work that was going on.

Witnesses for the plaintiff made the speed much greater than seven or eight miles an hour, some calling it fifteen or twenty, and others simply stating that the car was going very fast, so fast as it came out of Cumberland street and continued its course down Harlow street as to attract their attention. The distance which the car went after the accident would seem to confirm this view; the motorman making it seventy-five feet, other witnesses more than 100.

Such is the picture, and as is usual in this class of cases, where it is fairly drawn, the legal conclusions that follow are quite apparent.

1. Defendant's negligence:

From the above statement of facts it is difficult to resist the conclusion that the motorman failed to exercise that degree of prudent and watchful care which the situation demanded, especially in using that degree of precaution in reducing the speed of the car and having it under his immediate control which the exigencies required.

The speed at which a car may be properly run and the kind of control which should be exercised over it must depend to some extent upon the surrounding circumstances and the situation ahead. No specific rate can be arbitrarily fixed. A speed of thirteen miles an hour on Upper Main street in Lewiston under the there existing conditions was not considered necessarily dangerous and reckless in *Malia v. St. Ry. Co.*, 107 Me. 95, 77 Atl. 541, while a much less rate was demanded where the track was near the sidewalk and private driveways were in frequent use in *Butler v. Railway Co.*, 3 St. Ry. Rep. 327, 99 Me. 149, 58 Atl. 775, 105 Am. St. Rep. 267, or in approaching public street junctions, as in *Denis v. Railway Co.*, 104 Me. 39, 70 Atl. 1047. A similar degree of caution should be observed in passing public playgrounds or where children are in the street.

"The driver of a horse car in a street where there are children may well be required to manage his car with reference to all the risks that may reasonably be expected, and among these may be reckoned the risks arising from the heedlessness and indiscretion of children in the street."

Collins v. So. Boston R. R., 142 Mass. 301, 7 N. E. 856, 56 Am. Rep. 675.

The motorman, in the case at bar, admits that he saw this little girl as she was standing only five or six feet from the track when he was nearly 500 feet away. She stood there facing away from the car and apparently unaware of its approach. With the indiscretion of childhood, she might be expected to step across the track; at least, it might not be unexpected. Yet, with this combination facing him, a street crossing, a nearby playground, an obstruction on one side of the street, and a little child perilously near the track and apparently oblivious of the approaching car, the motorman maintained his speed up to such a rate and to within such close proximity that when the child turned and attempted to walk across the tracks he could not sufficiently control the car to avoid collision. His efforts then were too late. And yet, it was not the unexpected, but what might reasonably be expected, which happened, and the reasonably prudent motorman would have foreseen it and guarded against it, either by stopping the car completely or by having it under such control that he could stop it almost instantaneously. This man did neither.

Nor does the alleged wet and slippery condition of the rails afford sufficient excuse. If that condition existed, it was known to no one better than to the man who had been running on this same circuit during the past three days while work upon the reservoir had been in progress, and therefore greater care was imposed upon him to counteract that condition by extra precautions, and by running his car at a lower speed and under better control than usual.

Upon the question of defendant's negligence, we think the verdict of the jury cannot be said to be manifestly wrong.

2. Contributory negligence on the part of the mother:

The second point raised in defense is that no recovery can be had because the child was negligently permitted by her mother to be upon the street unattended at the time of the accident. The standard of age at which a child is chargeable with parental negligence cannot be absolutely fixed, although within certain limits it may be approximately determined.

"There doubtless is an age where the court can say as a matter of law that a child cannot exercise any care under any circumstances. There is also an age where the court can say as matter of law that a minor is capable of exercising some care under circumstances like those in question. * * * The limits of these two classes are not settled by our decisions."

Sullivan v. Boston Elevated Ry., 192 Mass. 37, 43, 78 N. E. 382, 383.

The test, of course, is the capacity of the child to exercise care for itself. In the application of this test it has been held that a child of nineteen months was of such tender age as to be incapable of exercising such care as a matter of law, *Gibbons v. Williams*, 135 Mass. 333; so a child of twenty months, *Grant v. Fitchburg*, 160 Mass. 16, 35 N. E. 84, 39 Am. St. Rep. 449; of two years, *Wright v. Railroad Co.*, 4 Allen (Mass.) 283; of two years and four months, *Callahan v. Bean*, 9 Allen (Mass.) 401; of three years and ten months, *Cotter v. Railroad Co.*, 180 Mass. 145, 61 N. E. 818, 91 Am. St. Rep. 267.

On the other hand, such capacity has been held to be possessed by a child of nine years, *Brown v. Railway Co.*, 58 Me. 384; of ten, *Colomb v. Railway Co.*, 100 Me. 418, 61 Atl. 898; and of twelve, *Gleason v. Smith*, 180 Mass. 6, 61 N. E. 220, 55 L. R. A. 622, 91 Am. St. Rep. 261. Between these two extremes lies a zone with shadowy and indefinite boundaries.

But, however young the child may be, the negligence imputable to the parent or custodian from the mere presence of the unattended child in the place of danger is only *prima facie* and not conclusive. *Gibbons v. Williams*, *Grant v. Fitchburg*, *Wright v. Railroad Co.*, *Callahan v. Bean*, *supra*, and *O'Brien v. McGlinchy*, 68 Me. 552.

The facts and circumstances in explanation of the child's presence are always to be considered. No hard and fast rules as to the care of children can be laid down, and the financial condition of the family and the other cares devolving upon the parents are not to be ignored.

As is said in Thompson on Neg., vol. 1, p. 306, in discussing this question:

"Small children have a right to light, air and exercise, and the children of the poor cannot be constantly watched by their parents."

In the case at bar, the family, which was apparently in limited circumstances, consisted of the mother and two girls, aged five and nine, and they occupied a second story tenement. The mother

had been calling upon a friend the afternoon of the accident, having the younger child with her and leaving the older at home. Just as she reached home, she found that she was obliged to go to a market a short distance off in order to obtain something for supper. Instead of taking the little child with her again, she left her in the care of the nine-year-old sister with strict instructions as to watchfulness. She expected to be and was gone less than ten minutes. To hold that, under these circumstances, the mother did not use that degree of care which an ordinarily prudent woman in her station in life and under the same circumstances would exercise is too severe, and such has been the tendency of the decisions, where the question has been held to be for the jury and a verdict in favor of the plaintiff has been allowed to stand.

To illustrate:

A mother allowing a child two years and ten months old to go with her sister, a child of five years and four months, to play in a vacant lot at the side of the house, and the lot being unfenced and unguarded and fronting on a public street. *McNeil v. Boston Ice Co.*, 173 Mass. 570, 54 N. E. 257.

The mother of a child three years old, having hung out the clothes in the yard, while the child was playing therein, went into the house to set the table for dinner and left the child playing alone inside an open gateway leading into the street. *Creed v. Kendall*, 156 Mass. 291, 31 N. E. 6.

A boy between four and one-half and five years old was permitted by a sick mother, who had two younger children, to play about the room, but while she was asleep he escaped from the house, first to a neighbor's, and then to the street. *Slattery v. O'Connell*, 153 Mass. 94, 26 N. E. 430, 10 L. R. A. 653. A boy of four was permitted to walk in the streets of a city under the care of his sister, who was nearly eleven. *Collins v. Railroad Co.*, 142 Mass. 301, 7 N. E. 856, 56 Am. Rep. 675. Of like effect are *Hewitt v. Taunton Street Ry. Co.*, 167 Mass. 483, 46 N. E. 106; *Ingraham v. Street Ry.*, 207 Mass. 451, 93 N. E. 692.

We have not overlooked a line of decisions, many of which are cited by the learned counsel for the defendant, in which the court held that the parent or custodian did not exercise reasonable precaution in the care of the child. Such are *Callahan v. Bean*, 9 Allen (Mass.) 401; *Casey v. Smith*, 152 Mass. 294, 25 N. E. 734, 9 L. R. A. 259, 23 Am. St. Rep. 842; *Grant v. Fitchburg*, 160 Mass. 16, 35 N. E. 84, 39 Am. St. Rep. 449; *Cotter v. R. R.*

Co., 180 Mass. 145, 61 N. E. 818, 91 Am. St. Rep. 267. But a careful study of the facts in these cases differentiates them from the cases before cited. It is simply a question as to whether the facts of a particular case place it below or above the required standard. The Massachusetts court recognizes the distinction which is one of fact and makes each case as it is brought up fall into one class or the other as the facts may dictate. Applying the same rule here, we have no hesitancy in saying that the case at bar belongs to the class where the jury were justified in finding that the mother exercised reasonable care.

3. Want of due care on the part of the child:

This question arises only on the assumption that the intestate was of sufficient age and intelligence to be permitted to go alone upon the street on which electric cars were frequently running. If she had not attained that age and intelligence and there was no want of due care on the part of the mother, then this point is not involved.

Here, again, there is a zone between two limits which cannot be exactly fixed. *Sullivan v. Boston Elevated Ry.*, 192 Mass. 37, 78 N. E. 382, *supra*.

If the jury found in the case at bar that the intestate was capable of exercising care, then they must have found that she used that degree of care which the ordinarily prudent child of her age would have exercised under the same circumstances, and that finding we are not disposed to disturb.

It appears that she was standing near the track looking into the excavation, that others were about, that she was facing away from the car, and apparently unaware of its approach. There may have been a reason for this. Perhaps the gong was not sounded. The motorman testified that he used it, but many of the witnesses both on and off the car, and including some for the defendant as well as the plaintiff, did not hear it. Probably she did not. Under these conditions she walked towards and over the track. She did not dart across quickly, as if to dodge ahead of the car, but walked slowly with her head down. The only want of care which could be attributable to her would be her failure to look up the line to see if a car were coming. That is all that could be expected of an adult, and the law is not so unreasonable as to require so high a degree of watchfulness on the part of a child of five as of a mature man. The measure of care required was that degree or extent which ordinarily prudent children of her age and intelli-

gence are accustomed to use under like circumstances. That measure the jury have found she fulfilled.

The cases cited by the defendant are clearly distinguishable because of their peculiar facts. In some the child was more mature, as a child of eight years, in *Morey v. St. Ry.*, 171 Mass. 164, 50 N. E. 530; of nine, in *Young v. Small*, 188 Mass. 4, 73 N. E. 1019, 108 Am. St. Rep. 457; and of ten, in *Colomb v. St. Ry.*, 4 St. Ry. Rep. 361, 100 Me. 418, 61 Atl. 898; while in *Hayes v. Norcross*, 162 Mass. 546, 39 N. E. 282, and *Murphy v. Boston Elevated*, 3 St. Ry. Rep. 345, 188 Mass. 8, 73 N. E. 1018, the children, though only between five and six years of age, were on the street by the permission of the parents and so conducted themselves as to be considered reckless even for that age in attempting to run across the street and to dodge a closely approaching car in one case and a team in the other. The case at bar more nearly resembles *Lynch v. Smith*, 104 Mass. 52, 6 Am. Rep. 188, and *Sullivan v. Railway Co.*, 192 Mass. 37, 78 N. E. 382, *supra*.

It is the opinion of the court that the jury were warranted in their findings upon all branches of the case, and the entry must therefore be,

Motion overruled.

United Rys. & Electric Co. of Baltimore v. Durham.

(Maryland — Court of Appeals.)

1. **COLLISION WITH VEHICLE CROSSING TRACK; EXCESSIVE SPEED; PROXIMATE CAUSE.** — Unless the excessive and improper speed of a car was the direct and proximate cause of an injury no recovery can be had upon such ground.
2. **SAME; FAILURE TO LOOK AND LISTEN; CONTRIBUTORY NEGLIGENCE.** — Where plaintiff stopped his wagon about twenty-five or thirty feet from a crossing to permit a north-bound car to pass, but failed to look and listen as he approached the south-bound track, but drove close thereto, where his view was obstructed by the car which had just passed, and in crossing the second track was struck and injured, he was guilty of contributory negligence and cannot recover.

DEFENDANT appeals from a judgment for plaintiff. Reported 83 Atl. 154.

Duty to Look and Listen. — As to the duty of the driver of a wagon to look and listen for approaching cars before crossing the tracks of a street railway company, see the note to *Wilson v. St. Louis Transit Co.*, 7 St. Ry. Rep. 1.

J. Pembroke Thom and Joseph C. France, for appellant.

D. G. McIntosh, for appellee.

Opinion by BRISCOE, J.:

It is not necessary to determine all of the questions raised by the record on this appeal, because, in the view we take of the case, we are of opinion that the court below committed an error in rejecting the defendant's third prayer, which is as follows:

"The defendant prays the court to instruct the jury that, under the pleadings and evidence in this case, there is no evidence legally sufficient to entitle the plaintiff to recover and their verdict must be for the defendant."

The suit was brought by the appellee against the United Railways & Electric Company of Baltimore City, a corporation, and the defendant, in the court below, to recover damages for personal injuries received by him while driving his market wagon with a team of mules along Willow avenue, a public road in Baltimore county, near the city limits. The plaintiff on the 15th of October, 1909, the night of the accident, was driving up Willow avenue to the York road, in a covered wagon drawn by two mules, and it was in attempting to cross the railroad tracks at the intersection of Willow avenue, the terminal of the York road, and the turnpike that the accident occurred. At this point the York road runs north and south, and Willow avenue enters it from the east, and the plaintiff at the time of the accident was coming west on Willow avenue.

The plaintiff's account of the accident, as stated in his testimony, is as follows:

"The last stop I made that evening was at Mr. Long's on the York road, and, just about the time I left there I asked him the time of the day, and he said it was ten minutes past seven. It was a dark night; so I came up Willow avenue, around up Willow avenue to the York road, to the railroad. When I first got to the railroad there was a car coming, going to Towson, ringing the bell. I stopped, so did the car stop, and let off some passengers, and when it started I looked down the track. It was about the time of the evening when the cars run a little thick. I looked down the track, and saw no cars coming down the track. I looked up the track, and didn't see any cars coming, and then I started across. When I pulled up on the first track I looked up the track again. I saw no car, and I didn't look any more until I got on this other track. I didn't drive fast. I had a right heavy wagon and in the neighborhood of 1,000 pounds in it. I saw the car about six or eight feet from me before it struck me. That is the last thing I remember. When the car struck me I didn't even feel the shock of the car or anything of the kind."

On cross-examination he testified that he had traveled on the same road as on the evening of the accident for about twenty years, and ever since he was eighteen years old, and that the car was six or eight feet from him when he first saw it.

"Q. You kept looking to see whether the car was coming? A. No; I looked the first time, until I looked the second time. Then I saw the car was on me. Q. When you looked the second time the car was on you? A. Yes, sir. Q. Then you looked before you got on the north-bound track and looked, did you? A. Yes, sir. Q. The next time you looked the car was on you? A. I was on the north-bound track when I looked up the track. I saw the car was not coming down. I didn't see it when I looked the first time, but when I looked again the car was right on me, about six or eight feet from me."

He further testified that the curtains of the wagon were down, that he was driving in a slow walk, and he supposed this obstructed the view, as it tore the curtain "right off when I went through." There was evidence that one could see a long distance up the track, but, if a car was coming up and one going down ahead of it, you could not see the car coming down. There was also evidence to the effect that the headlight and all the lights inside of the south-bound car were burning, but there was no light upon the wagon driven by the plaintiff. The motorman testified that he did not see the wagon and team until within thirty or forty feet of it, and used every effort to stop the car and prevent the accident, when he discovered the situation of the plaintiff.

The evidence as to the excessive speed of the car at the time of the accident is not very definite, but unless the improper speed was the direct and proximate cause of the injury, and that the injury would not have occurred but for the excessive speed, there could be no recovery upon this ground. *P. W. & B. R. R. v. Stebbing*, 62 Md. 517; *Hayes v. Railroad Co.*, 111 U. S. 228, 4 Sup. Ct. 369, 28 L. Ed. 410; *B. & O. R. R. Co. v. State*, 62 Md. 479, 50 Am. Rep. 233.

Upon the proof we think this is a clear case of contributory negligence upon the part of the plaintiff, and there is nothing in the record to take it out of the operation of the rules and principles established by this court in *Meidling's Case*, 97 Md. 77, 54 Atl. 612; *McNab's Case*, 94 Md. 728, 51 Atl. 421; *Manfuso's Case*, 102 Md. 257, 62 Atl. 754; *Hatcher's Case*, 103 Md. 78, 63 Atl. 214; *Brehm's Case*, 114 Md. 302, 79 Atl. 592; *Hickok's Case*, 104 Md. 659, 65 Atl. 434, and *Winter's Case*, 115 Md. 69, 80 Atl. 651. While the plaintiff in this case stopped his wagon about

twenty-five or thirty feet from the crossing in order to permit the north-bound car to pass, he neglected as he approached the second track to use that care and caution required of him; that is, to continue to look until the south-bound track, the real point of danger, was reached. If, as the proof shows, he drove to the second track where his view was obstructed by the south-bound car which had just passed, and proceeded in the manner testified to by him to drive across the second track, on a dark night, with no light on his wagon and with curtains down, he was guilty of negligence directly contributing to the accident.

In *Manfuso v. Western Md. R. Co.*, 102 Md. 257, 62 Atl. 754, it is said by the settled law of this State certain well-defined and imperative duties are imposed upon persons before they make the attempt to cross the tracks of a railroad company. They are bound under all circumstances to look and listen for approaching trains, and, if the crossing is one of more than ordinary danger and the view of the tracks is obstructed at or near the place of crossing, it is the duty of the traveler to stop, look and listen before he attempts to cross, and if a person neglects these necessary precautions, and in consequence of such neglect is injured by the collision with a passing train, he will be held to have contributed by his own negligence to the occurrence of the accident, and will not be allowed to recover for any injury he may have sustained. In *Winter v. United Rys. Co.*, 115 Md. 69, 80 Atl. 651, we said:

"The driver, when he halted at the north-bound gutter, was in a place of safety, and if he had then exercised such reasonable care as might be expected of an ordinarily prudent driver, and waited for a few seconds until the west-bound car had gone far enough on its way to uncover the view of the street for a reasonable distance west, he would have seen the east-coming Madison avenue car, and could easily have allowed it also to pass before attempting the crossing and thus have prevented the collision. * * *"

In *Hatcher v. McDermot*, 103 Md. 78, 63 Atl. 214, we held that the plaintiff was guilty of contributory negligence for crossing an electric railway on a public crossing without having again stopped, looked and listened for a car, after he left a point about 130 feet distant from the crossing, where he did stop, look and listen, but where his view was obstructed to some extent.

In the case at bar the plaintiff was familiar with the crossing and the surroundings because he stated that he had traveled the route for about twenty years. If he had stopped, looked and listened before attempting to cross the second track, after the

north-bound car had passed, he could not fail to have seen or heard the approach of the car in time to have avoided the accident. He had an unobstructed view of over 300 feet up the south-bound track, to have seen the approach of the car, with full headlight, and all the inside lights burning brightly, had he stopped and looked. In *Sparr v. United Rys. Co.*, 114 Md. 320, 79 Atl. 585, it is said:

"It is apparent that if he had looked before entering upon the track of the railway he would have seen the car approaching, and if he did look and did see the car he was guilty of negligence in attempting to cross in front of it. If, on the other hand, he did not see the car, it must have been because he did not look, and it was negligence on his part to venture to cross the track without observing the precaution of looking to see if a car was coming. Even if those in charge of the car saw the appellant before he got on the track they had a right to assume that he would stop in a place of safety, and not attempt to cross in front of the car."

And to the same effect are the cases of *McNab v. Rys. Co.*, 94 Md. 719, 51 Atl. 421, and *Heying v. United Rys. Co.*, 3 St. Ry. Rep. 330, 100 Md. 281, 59 Atl. 667.

Assuming, then, in this case, there was some evidence of excessive speed or negligence on the part of the appellee, there is no evidence to show that it has any causal connection with the accident itself, or showing that the injury was the direct consequence of such excessive speed. As was said by this court in *Heying v. Railways Co.*, 100 Md. 281, 59 Atl. 667, if the plaintiff was guilty of contributory negligence, the question of negligence *vel non* on the part of the defendant becomes immaterial; for if there was no negligence on its part there can be no recovery, and if there was, the same result would follow because of the plaintiff's contributory negligence. In the present case the evidence shows that the plaintiff's negligence was the last and final negligent act, and it becomes unnecessary to discuss further this branch of the case. *Heying v. Railways Co.*, 3 St. Ry. Rep. 330, 100 Md. 281, 59 Atl. 667; *P. W. & B. R. R. Co. v. Stebbing*, 62 Md. 517; *C. & P. R. R. Co. v. State*, 73 Md. 77, 20 Atl. 785, 25 Am. St. Rep. 571; *McNab v. Railways Co.*, 94 Md. 729, 51 Atl. 421; *Philips v. W. & R. Ry. Co.*, 104 Md. 455, 65 Atl. 422, 10 Ann. Cas. 334.

Being of opinion that the plaintiff in this case was guilty of contributory negligence, and that the case should have been withdrawn from the jury on that ground, the judgment will be reversed, and, as there can be no recovery, a new trial will not be awarded.

Judgment reversed, without a new trial, with costs.

Lynch v. Public Service Corporation.

(New Jersey — Court of Errors and Appeals.)

1. INJURY TO CHILD COASTING IN PUBLIC STREET; COLLISION WITH CAR. —

Where a child coasting in a public street was injured by a collision with a street car, caused by the negligence of the motorman in starting the car after he had been warned of the approach of the sled, a recovery may be had, although coasting in a public street be regarded as a public nuisance.

2. SAME; NEGLIGENCE; CONTRIBUTORY NEGLIGENCE; QUESTION FOR JURY. —

Evidence examined and *held*, that the question of the negligence of the motorman and the contributory negligence of the plaintiff was for the jury.

PLAINTIFF brings error from judgment for defendant. Reported 83 Atl. 382.

Benjamin M. Weinberg, of Newark, for plaintiff in error.

Lefferts S. Hoffman, of Newark (*Leonard J. Tynan* and *Howard McSherry*, both of Newark. on the brief), for defendant in error.

Opinion by VROOM, J.:

The accident upon which this suit was based occurred at about 5:30 in the afternoon of January 7, 1910, in the city of Newark, at the corner of Montclair and Mt. Prospect avenues. The plaintiff, a child of thirteen years, was riding down Montclair avenue on a bobsled with a number of other persons, and the injury she received was occasioned by the bobsled coming into collision with a trolley car of the defendant company.

It appeared from the evidence that Montclair avenue was a street used by children and others for coasting, and that on the afternoon in question many had taken advantage of the sport. Montclair avenue runs east and west, and is intersected by Mt. Prospect avenue, which runs north and south, and upon the latter the defendant runs and operates trolley cars; that the trolley company was aware of the use of Montclair avenue for coasting appears, and it caused all of its cars at that time which were going

Injury to Child. — As to the liability of a street railway company for injuries to a child struck by a car, see *Nellis on Street Railways* (2d Ed.), §§ 408-410.

Contributory Negligence of Child. — As to the contributory negligence of a child struck by a street car, see *Nellis on Street Railways* (2d Ed.), § 428.

north to stop at the first or southerly crossing, and all the cars going south to stop at the first or northerly crossing. It appeared that a number of boys stood at the corner of Montclair and Mt. Prospect avenues from time to time and signaled to the sleds and also to the cars. The plaintiff had by invitation made two trips down on the bobsled in question, and the accident occurred on the third trip. The sled was equipped with a bell, which was kept ringing all the way down the hill. The sled was about twelve feet in length, and could be steered.

On the trip when the accident occurred a young man stood at the corner of the avenues in question and signaled to the sleds to come down the hill. Soon after he did this he saw a car coming along Mt. Prospect avenue from the south, and which was then about a block away. Fearing the car was not going to stop, he ran towards it the length of a lot about eighty-five feet, and signaled it to stop. The car, as it got to him, slowed up; he jumped from the track, when the motorman put on a burst of speed and ran his car across Montclair avenue and collided with the bobsled. It also appeared that the person steering the sled saw the car slow up and then start again; whereupon he started to turn his sled up Mt. Prospect avenue, and would have made the turn, but the car put on the burst of speed, which caused the collision. The plaintiff received severe and permanent injuries as a result of the collision.

At the close of the plaintiff's case the defendant moved for a nonsuit, which was granted by the court, and judgment entered thereon.

In granting the motion for a nonsuit, the trial judge said that

"on a motion to nonsuit two questions arise in this case: First, is there evidence tending to show that there was want of due care in the operation of the car which was a cause of the accident. Secondly, does it appear that the plaintiff by her own fault contributed to the injury? In this question the word 'fault' is used, not in a popular sense, but in a legal sense. There is evidence to go to the jury on the question whether the car was operated with due care. I pass at once to the other question, which is this: Does it appear from the plaintiff's own case that her own fault was a proximate, direct and immediate contributing cause of the injury? The declaration alleges that the bobsled was lawfully crossing Mt. Prospect avenue. If this be true the plaintiff was not at fault. Is it true? The decision of the motion to nonsuit turns on the answer to this question."

He further went on to say that an act which seriously interferes with the legitimate use of a public highway and endangers

the safety of the travelers upon it is a public nuisance, and that one who voluntarily and intelligently participates in such act is, in a legal sense, a wrongdoer; but he added that coasting on a public highway was not always and necessarily a public nuisance; that it depended on circumstances. He further held that to coast downhill on a bicycle, if under control, was not a nuisance, and it would not be a nuisance to coast downhill on runners, provided it is in the power of the person who guides the vehicle to check and stop it if occasion requires; but that it was improper to launch upon a highway a traveling body of great weight, which is incapable of control as to its speed, and capable of imperfect control as to its direction.

The contention on the part of the defendant was even broader than the ruling of the trial court. It was that the plaintiff interfered with its rights upon the public streets, and that, against the company, she was a trespasser, and the duty of the company was such as is due to any trespasser, to wit, merely to refrain from wilfully injuring her.

We think the view taken of the case by the trial court was erroneous. The granting of the nonsuit at the close of the plaintiff's case could be justified only upon the ground that the act of the plaintiff was a public nuisance, in fact, a nuisance *per se*, the existence or nonexistence of which is admittedly a question of law purely. If the act was not a public nuisance, then whether or not the particular thing, act, omission or use of property complained of was in fact a nuisance was to be determined by the jury. 21 Am. & Eng. Ency. 621.

We cannot concede that coasting upon a public street is an illegal act so as to constitute it a public nuisance. Public highways are intended for pleasure uses as well as business uses; and it is difficult to see why a sled coasting downhill should be said to be a public nuisance any more than sleigh drawn by horses going down the same highway.

The matter of the coasting or sled riding in a public street has been a subject of decision in several jurisdictions; and we agree with the contention of the plaintiff in error that the most logical opinion upon the subject is that of Justice Cooley, in the case of *Burford v. Grand Rapids*, 53 Mich. 98, 18 N. W. 571, 51 Am. Rep. 105, where he held that

"coasting does not necessarily interfere with the customary use of the street, and might be indulged in with no serious inconvenience to any one not only in

many places in the country towns, but even within the limits of incorporated cities and villages. We are accustomed to make our public ways four rods in width, but it is not expected that the whole four rods will be occupied for travel; and it is possible to make use of parts of the public highway without encroaching at all upon the portions kept in repair and used for passage.

* * * It could not be seriously contended that for the municipal authorities to permit coasting upon such a street would be to license a public nuisance. On the contrary, as the sport is healthful and exhilarating, it seems sufficiently proper, if the street is not put to other public use, that this diversion be allowed, if not expressly sanctioned. The sport itself is not entirely foreign to the purposes for which public ways are established; for the use of these ways for pleasure riding is perfectly legitimate, and coasting is only pleasure riding in a series of short trips repeated over the same road, not differing essentially from the riding in sleighs, of which so much is seen on the streets of northern cities, when suitable weather and proper conditions invite to their enjoyment."

See also *Hutchinson v. Concord*, 41 Vt. 272, 98 Am. Dec. 584; *Faulkner v. City of Aurora*, 85 Ind. 130, 44 Am. Rep. 1; *Jackson v. Castle*, 80 Me. 119, 13 Atl. 49.

If it be true that the plaintiff was engaged in a sport which, when indulged in in the public streets, amounted to a public nuisance, yet we think that if her injury resulted from the negligence of the motorman, and not from any negligence on her part, she was entitled to recover. *D., L. & W. R. R. Co. v. Trautwein*, 52 N. J. Law 169, 19 Atl. 178, 7 L. R. A. 435, 19 Am. St. Rep. 442.

The question of the negligence of the motorman and the contributory negligence of the plaintiff was clearly for the jury. There was evidence which shows that the motormen of the defendant's cars were aware that the hill on Montclair avenue was being used by children and others for coasting, and that a young man was usually at the intersection of Montclair and Mt. Prospect avenues to warn trolley cars of the approach of coasters, and that the motorman of this particular car had received warning of the approach of this bobsled. Whether the plaintiff can be held negligent in doing what she did with these precautions having first been taken is for the jury; and whether the motorman, who apparently understood the signal by first slowing down his car and then disregarded it by putting on a "burst of speed," was himself negligent manifestly was a question for the jury.

The judgment of nonsuit must be reversed, and a new trial granted.

TRENCHARD, VOORHEES and VREDENBURGH, JJ., dissent.

Martin v. Old Colony St. Ry. Co.

(Massachusetts — Supreme Judicial Court.)

INJURY TO PASSENGER ALIGHTING FROM CAR BY DRESS CATCHING ON SAND-PLUNGER IN VESTIBULE; EVIDENCE; CONTRIBUTORY NEGLIGENCE; NEGLIGENCE; DUTY OF MOTORMAN. — Where a conductor had directed plaintiff with other passengers to leave the car by the forward door, and she had walked out upon the platform and reached the first step when her dress, which hung two inches from the ground, caught upon the sand-plunger and she was thrown down, the plaintiff cannot be held guilty of contributory negligence as a matter of law.

The plaintiff having been invited to pass through the vestibule, the duty devolved upon the motorman to protect her from any danger by the exercise of the highest degree of care consistent with the performance of his other duties.

Evidence that the motorman pressed the sand-plunger down into place immediately after the accident was admissible.

DEFENDANT excepts from verdict for plaintiff. Reported 98 N. E. 579.

Stebbins, Storer & Burbank, of Boston, for plaintiff.

Asa P. French and *Jas. S. Allen*, both of Boston, for defendant.

Opinion by DE COURCY, J.:

As the plaintiff was alighting from the front platform of the defendant's car the bottom of her dress caught upon the sand-plunger in the vestibule and she fell to the pavement. The plunger is a metal pin with a round head; it is inserted vertically in a hole in the floor within which it may move up and down freely, and is held in position by its own weight. When pushed down by the motorman's foot it presses against a lever upon which it rests, and thereby opens a valve in the sand box; and when the foot is removed a spring pulls the plunger back into place.

The jury were warranted in finding that there was no negligence in the conduct of the plaintiff contributing to the accident. The conductor had directed the passengers to leave the car by the forward door, and she had walked out upon the platform and reached the first step when her dress caught and she was thrown down.

Contributory Negligence of Passenger Leaving Car. — As to the contributory negligence of a passenger in leaving a street car, see *Nellis on Street Railways* (2d Ed.), §§ 363-366.

The bottom of her skirt hung two inches from the ground, and the defendant's contention that, as matter of law, she was careless because she failed to hold it up when alighting, is untenable.

And we cannot say that the evidence did not warrant a finding that the accident was due to the defendant's negligence. The jury specially found that the sandplunger was in improper condition. It is true the evidence on this point was meagre; but it would warrant a finding that the plunger projected farther above the floor than usual, and it could be inferred that this would not happen unless the pin was bent or worn, or otherwise out of order. The court rightly refused to give the eighth request. The defendant might be found liable for such an accident, even though the mechanism and appliances in the vestibule were in proper condition and adapted to perform the work for which they were installed. In alighting from the car the plaintiff had been invited to pass through the front vestibule and in close proximity to the electrical apparatus, brake gear and other equipment, and the duty devolved upon the defendant's motorman to protect her from any danger incident to their presence by the exercise of the highest degree of care consistent with the practical performance of all his other duties. If it became necessary for her to pass near a sandplunger which normally projected two inches above the floor and was likely to escape her notice, the jury could find that the motorman in the proper performance of his duty to her should have taken some precaution for her safety, either by temporarily removing the pin, or guarding it with his foot or warning her of its presence.

What has been said disposes of the requests for rulings. The evidence that a different sand appliance was used on some of the defendant's cars is immaterial in view of the jury's answer to the first special question. The testimony that the motorman pressed the sandplunger down into place immediately after the accident was rightly admitted. The witness added that when she released the plaintiff's dress she did not pull the pin up. This evidence tended to show at least that at the time of the plaintiff's injury the pin was out of place and higher than necessary or usual. *Kingman v. Lynn & Boston R. R.*, 181 Mass. 387, 64 N. E. 79.

Exceptions overruled.

Goldberg v. Boston Elevated Ry. Co.

(Massachusetts — Supreme Judicial Court.)

INJURIES; BOY AFTER PASSING BEHIND CAR HIT BY CAR ON ANOTHER TRACK; CONTRIBUTORY NEGLIGENCE; QUESTION FOR JURY.—Where a boy ten years of age, of average intelligence, about one hour after sunset, passed behind one car on the track nearest to the sidewalk which he had left, looked around that car but saw no car coming on the further track, went upon that track and was hit by a car coming thereon, and there was no light upon the car or gong sounded, but the street was unobstructed, the question of the boy's contributory negligence was properly submitted to the jury.

DEFENDANT excepts from verdict for plaintiff. Reported 98 N. E. 676.

John J. Mansfield, of Boston, for plaintiffs.

Cyrus Brewer, of Boston, for defendant.

Opinion by **SHELDON, J.**:

It is conceded that there was evidence of negligence for which the defendant was responsible. The right of each plaintiff to recover depends, therefore, upon the question whether the jury were warranted in finding that Joseph Goldberg was in the exercise of due care.

He was a boy of a little more than ten years of age, and was then of average intelligence. He undertook to cross Washington street in Boston, where the defendant operated two tracks of its electric railway, and cars were frequently passing thereon in each direction, as he knew. It was about 8 o'clock in the evening. He passed behind one car, on the track nearest to the sidewalk which he had left, looked around that car but saw no car coming on the further track, went upon that track and was hit by a car coming thereon. There was no light upon that car and no gong was sounded upon it, but the street was unobstructed.

If these were all the facts, and if the accident had happened in daylight and there had been nothing to interfere with his view of the approaching car, it would be difficult to say that he could be

Contributory Negligence of Person Stepping Behind One Car in Front of Another.—The question whether a person is guilty of contributory negligence in stepping from behind one car in front of another is discussed in a note in 7 St. Ry. Rep. 224.

found to have acted with the due regard for his own safety which is to be expected even from one of his tender age. *Stackpole v. Boston Elev.*, 193 Mass. 562, 79 N. E. 740; *Hoban v. Boston Elev. Ry.*, 5 St. Ry. Rep. 406, 194 Mass. 74, 80 N. E. 1, 11 L. R. A. (N. S.) 166; *Casey v. Boston Elev. Ry.*, 6 St. Ry. Rep. 733, 197 Mass. 440, 83 N. E. 867. But it was more than an hour after sunset, and the defendant's elevated structure must have tended more or less to darken that part of the street upon which the surface tracks were laid. How far this was remedied by the fact that it was not very dark, was for the jury to say. He had nearly crossed the further track when he was hit. The car that hit him was moving rather rapidly.

We have taken on these matters the view of the evidence which is most favorable to the plaintiff, as upon these exceptions we are bound to do. And it was for the jury to determine the effect of any inconsistencies in his testimony. *Picquett v. Wellington-Wild Coal Co.*, 200 Mass. 470, 473, 86 N. E. 899; *Doon v. Felton*, 203 Mass. 267, 270, 89 N. E. 539. On the whole case, as was said in *Sellon v. Boston Elev.*, 208 Mass. 507, 509, 94 N. E. 684, 685:

"It does not quite appear to be impossible to reach any other rational conclusion than that the plaintiff was careless."

And see *Purtell v. Jordan*, 156 Mass. 573, 577, 31 N. E. 652; *Magner v. Boston Elev.*, 209 Mass. 60, 95 N. E. 102; *Berry v. Newton & Boston St. Ry.*, 209 Mass. 100, 95 N. E. 95; *Purcell v. Boston Elev.*, 211 Mass. 79, 97 N. E. 626. The exceptions must be overruled.

So ordered.

Albrecht v. Rochester, Syracuse and Eastern Railroad Company.

(New York — Court of Appeals.)

ACTION FOR DEATH OF CHILD, NON SUI JURIS, WHO WAS STRUCK BY A TROLLEY CAR WHILE ON THE TRACK; DUTY OF DEFENDANT TO AVOID ACCIDENT; BURDEN OF SHOWING NEGLIGENCE OF DEFENDANT IS UPON THE PLAINTIFF.

— Where a child of tender age is seen approaching a railroad track by a motorman, it is his duty to use his best endeavor to save the child and not wantonly or carelessly run it down, but the burden of showing negli-

Injuries to Children.—The liability of a street railway company for injuries to children is discussed in *Nellis on Street Railways* (2d Ed.), §§ 408-410, 428.

gence is upon the party asserting it, and it, therefore, becomes the duty of plaintiff in an action to recover for the death of the child, to show either by experts or other witnesses that the car could have been stopped in time to have saved the child.

Upon examination of the facts with reference to the death of a child one year and three months old by being run over by a car on a trolley road, assuming that the question of negligence of the parents in permitting the child to escape upon the track was a question for the jury, *held*, that since the weight of the car that had to be stopped, its momentum, the grade and the conditions of the rails were all elements to be taken into consideration in determining whether the motorman discharged his duty, upon defendant's testimony upon these questions and in view of the fact that the plaintiff gave no evidence upon the subject, no question of fact was raised upon this branch of the case that justified the court in submitting it to the jury.

DEFENDANT appeals from a judgment in favor of the plaintiff. Reported 98 N. E. 332.

Ernest I. Edgcomb, for appellant.

Percival De Witt Oviatt, for respondent.

Opinion by HAIGHT, J.:

This action was brought to recover damages for the alleged negligent killing of the plaintiff's intestate. The decedent was a son of the plaintiff, one year and three months of age, who had escaped from the custody of his parents and walked out upon the defendant's right of way, where he was struck in the head by the step of the defendant's car as it was passing, causing the death of the child.

The plaintiff was a farmer residing in the town of Perinton, Monroe county, about half a mile west of the village of Fairport on the northern bank of the Erie canal. The defendant's right of way abuts upon and along the northern side of the canal, on which there are two tracks known as the west and the east-bound tracks. The plaintiff's residence is north of the defendant's right of way, his house facing upon the Basket road, so called, which runs across the defendant's right of way to the towpath of the canal, which is used as a highway for the residents in that locality. On the rear of plaintiff's house there is a private right of way that runs across the railroad tracks to the towpath. The house is surrounded by a fence with a gate opening out from the rear on to the private right of way.

On the morning of May 17, 1909, the child was placed in the custody of his sister, thirteen years of age, who was directed to watch him while his mother was engaged in her household duties. A rag peddler entered the gate and inquired for rags. The mother, from the inside of the house, answered that she had none, and then the sister of the child left him in the yard upon the ground while she ran over to her brother's house, known as the tenant house, for the purpose of seeing if there were any rags there. At the time the sister left the child upon the ground the gate was fastened with a hook through a staple down near the ground. After the sister had gone to the other house the rag peddler departed; whether he left the gate open or not is not disclosed by the evidence. The child did escape through the gate either by reason of its being left open by the peddler or by his picking the hook out of the staple and getting through himself. He then walked toward the railroad tracks and had reached a point about two feet distant from the first track when he was struck by the passing car.

The plaintiff, the father of the child, was at work in a lot between his residence and the tenant house plowing, about 400 feet distant. The tenant house was facing upon the railroad tracks, 302 feet east of the point of the accident. The car was approaching from the east, going west towards Rochester, and was running at a speed of about thirty-five miles per hour, the motorman saying it was from thirty-five to forty miles, the plaintiff stating that it was running at a high rate of speed, the mother of the child expressing it as flying. Beyond the tenant house there is a considerable curve in the road which soon shuts off the view of it from the point of the accident. Upon the house side of the right of way are a number of telegraph or telephone poles besides the poles that were used by the company for the support of the trolley wire, and a few feet east of the place of approach of the child was a large stump which also obstructed the view to some extent. We thus have a situation where the child, who was just able to walk, proceeding behind the stump, trolley and telegraph poles towards the railroad track and the car approaching from the east at the speed specified. As the car came in front of the tenant house the motorman first discovered the child approaching the track. Instantly he sounded the danger whistle and put on the emergency brakes and endeavored, as he claims, to his utmost to stop the car in time to save the child, but was unable to do so until after the child was hit and the car proceeded from 180 to 200 feet beyond the

place of the accident. The father of the child heard the danger signal, looked up and saw the car as it was passing the tenant house and also saw that his child was out within two feet of the tracks. He at once halloed and started to run toward the child. The mother heard the warning signal and looked out of the house and saw the car pass, but did not see the child. The child was dead when he was subsequently picked up from the ground.

The evidence, thus far, is without substantial dispute.

The plaintiff having rested, the defendant asked for a nonsuit upon the grounds that the law imposed upon the parents of this child the duty of using reasonable care to protect it from harm and danger, it being *non sui juris*. That it appears from the evidence that the parents failed to exercise such care and that the infant was thereby brought in danger and suffered death, and that the negligence of the parents in this regard is attributable to the child and, therefore, the plaintiff cannot recover. And further, that the plaintiff has failed to show that the defendant failed to perform any duty which it owed the plaintiff's intestate and has failed to show that the defendant was guilty of any neglect which caused the accident in question. The motion was denied and an exception was taken by the defendant. Thereupon the defendant produced evidence tending to show that the car weighed some thirty-eight tons; that it was running at a speed of thirty-five to forty miles per hour; that it was running upon schedule time and at its usual speed through the open country at this part of its route; that an experiment had been made with this car by the officers of the company at this place, in which it was tested as to whether the car could be stopped sooner when it was proceeding upon that speed, and that under the experiments made the car on each of the experiments stopped within its length of the place where the car stopped on the occasion of the accident; that the car at the time of the accident was proceeding down grade and that on that morning there was a mist which made the rails slippery.

The plaintiff, however, testified that, while the rails were wet earlier in the morning they had dried up at the time of the accident. At the conclusion of the evidence the defendant moved for direction of a verdict upon the same grounds upon which it had based its motion for a nonsuit, which motion was denied and another exception was taken.

Assuming that the question of the negligence of the parents in permitting the child to escape on to the railroad tracks was a ques-

tion for the determination of the jury, still we entertain the view that the plaintiff failed to show that the defendant's motorman was negligent. Not a witness was called, nor attempt made on the part of the plaintiff, to show that the car could have been stopped in time to save the child. It is true that after the child, approaching the track, came into the view of the motorman, it became his duty to use his best endeavors to save the child and not wantonly or carelessly run it down, but the burden of showing negligence rested upon the party asserting it, and it, therefore, became the duty of the plaintiff to show either by experts or other witnesses that the car could have been stopped in time to have saved the child. This is not a case in which the court or jury can take judicial notice of the time within which a car could be stopped. Such time depended upon the testimony that should have been given upon the trial. The only evidence we have upon the subject is the evidence furnished by the defendant and the experiments that its witnesses had made subsequently with the car which caused the accident. Assuming that the car was running at a speed of thirty-five miles per hour, and that the child, approaching the track, came into the view of the motorman in front of the tenant house, he was then within six seconds of the child, and whatever he could do to save it, he had to do within that time. The sounding of the danger signal and the putting on of the emergency brake, while it did not occupy much time, it necessarily would a second or more, and yet during this time he was flying toward the child at the rate of upwards of fifty feet per second. The weight of the car that had to be stopped, its momentum, the down grade and the condition of the rails were all elements that had to be taken into consideration in determining whether the motorman discharged his duty. Adopting defendant's testimony, it could not have found that the motorman failed in this regard; and in view of the fact that the plaintiff has not supplied us with any evidence upon the subject, we are of the opinion that no question of fact was raised upon this branch of the case that justified the court in submitting it to the jury. *Chrystal v. Troy & Boston R. R. Co.*, 105 N. Y. 164.

The judgment should be reversed and a new trial granted, with costs to abide the event.

CULLEN, C. J., GRAY, VANN, WERNER, HISCOCK and COLLIN, JJ., concur.

Judgment reversed, etc.

Evansville, S. & N. Ry. Co. v. Evansville & E. Electric Ry.

(Indiana — Appellate Court.)

1. **CONTRACT BETWEEN RAILWAY COMPANIES; MONOPOLIES.** — A contract whereby one street railway company agrees to abandon, for a period of thirty-five years, its purpose and its franchise rights to construct and operate a road between certain points, gives the other company a monopoly and is against public policy.
2. **SAME; POWER OF RAILWAY COMPANIES TO CONTRACT.** — Railroad corporations are incapable of entering into contracts beyond the scope of their powers, expressed or necessarily implied, in furtherance of those expressly granted, or of absolving themselves from their obligations to the public, or from performing their corporate duties without legislative consent.
3. **MANDATORY INJUNCTION; WHEN GRANTED.** — A mandatory injunction is an extraordinary remedy, and will not be granted unless the complainant makes out a clear case.
4. **OPERATING AGREEMENTS; WHEN VALID.** — Traction companies may make valid traffic or operating agreements for the use by one of another's tracks, etc., where by so doing neither company incapacitates itself from performing its duties to the public, or does not create a monopoly in favor of one of the contracting parties.
5. **SAME; STATUTE.** — Section 5652, Burns' Statutes, 1908, providing for the sale or lease of street railway property by one company to another, does not authorize a contract which prohibits one company from operating its road in territory occupied by the other.

PLAINTIFF appeals from a judgment for defendants. Reported 98 N. E. 649.

MONOPOLISTIC CONTRACTS BETWEEN STREET RAILWAYS.

Any agreement between rival competing street railway companies tending to prevent the unrestrained use of their respective franchises is void as against public policy. *South Chicago City Ry. Co. v. Calumet Elec. St. Ry. Co.*, 171 Ill. 391, 49 N. E. 576, holding that an agreement that, in consideration of one company allowing the other to use the former's tracks so as to connect with the latter's track on another street, thus forming a loop, neither would ever cross the tracks of the other at a grade without written consent, is an agreement not to invade each other's territory, and is void as against public policy.

Two street railway companies, though their lines are parallel for a portion of their routes, may make traffic contracts for the partial use of their respective routes beyond the line of parallelism. *People v. O'Brien*, 111 N. Y. 1. One company may enter into a contract with another for the interchangeable use of the tracks of the two companies. *Jourdan v. Long Island R. Co.*, 6 St. Rep. 89, aff'd, 115 N. Y. 380, 22 N. E. 153. A street railway company authorized by its charter to build branches and extensions may employ, as a connecting link between its main line and the proposed extensions or branches, the tracks of another company for a short distance, under agreement with the

George A. Cunningham and Iglehart & Taylor, for appellant.

Albert W. Funkhouser, Arthur F. Funkhouser, Woodfin D. Robinson, and William E. Stilwell, for appellees.

Opinion by MYERS, J.:

Appellants, hereafter called the Newburgh Company, commenced this suit against appellees, the Evansville & Eastern Electric Railway, hereafter referred to as the Rockport Company, and certain named persons as its directors, also the Evansville Terminal Railway and the Evansville Railways Company, for a mandatory injunction requiring the Rockport Company, its officers, agents and employees to specifically perform the provisions of a certain alleged contract, and to deliver its cars, both freight and passenger, at Newburgh to appellant for transportation over its line, according to the terms of that contract, and that the Rockport Company, its officers, agents and employees, be enjoined from further refusing to perform said contract and from having any

latter company. *Hannum v. Media, etc., Elec. R. Co.*, 221 Pa. St. 454, 70 Atl. 847. A street railway company may make a traffic agreement with a railroad company by which cars of the latter company of the same character as those used by the former company may be run over the tracks of the former. *State v. Atlantic City, etc., R. Co.*, 6 St. Ry. Rep. 841, 76 N. J. L. 15, 69 Atl. 468.

In *New York* street railway companies are authorized to enter into contracts by which one grants to another the right to use and operate its road and to provide connections with a view, in practical effect, of uniting in one continuous line of railroad the road of different companies. In this respect there is no limitation except as to parallel lines. *Brooklyn El. R. Co. v. Brooklyn, etc., R. Co.*, 23 N. Y. App. Div. 29, 48 N. Y. Supp. 665. Even if the effect of the contract between two companies is to cause the abandonment of a portion of the road of one company, the agreement is not illegal or against public policy, if no detriment to the public results therefrom. *Prospect Park, etc., R. Co. v. Brooklyn, etc., R. Co.*, 84 Hun 516, 32 N. Y. Supp. 857. An agreement entered into between two companies having connecting railroads that one of them shall make no discrimination in the rate of fare over its road in favor of any other road and against the other party to the contract, there being no requirement that the rate of fare, in the absence of any discrimination, should not be as low as the former company may choose to make it, is not in violation of public policy. *Brooklyn El. R. Co. v. Brooklyn, etc., R. Co.*, 23 N. Y. App. Div. 29, 48 N. Y. Supp. 665.

The validity of an oral contract between railway companies providing for the use of each other's tracks, etc., is for the court, not for the jury. *Looney v. Metropolitan R. Co.*, 24 App. D. C. 510.

dealings with the Evansville Terminal Railway in violation thereof.

The complaint was in two paragraphs. Separate and several demurrers to each of these paragraphs, for want of facts by appellees other than the persons named as directors, who joined in a demurrer, were sustained, and, appellant refusing to plead further, judgment was rendered against it. The rulings of the court in sustaining the several demurrers are assigned as errors. The cause was appealed to the Supreme Court, and on the order of that court it was transferred to this court.

The questions controlling the decision of this case rest upon a proposition and its acceptance, both made a part of each paragraph of the complaint, and relied on by appellant as forming the contract made the basis of its cause of action.

That part of the proposition and acceptance at all material here is as follows:

"(1) The arrangement hereby proposed if entered into shall continue for the period of thirty-five years from the date the same becomes effective by the

A traffic agreement prohibiting a street railway company from building its tracks within a certain city is void. *Wilmington City Ry. Co. v. Wilmington, etc., Ry. Co.*, 8 Del. Ch. 468, 46 Atl. 12.

The Constitution of *Georgia* prohibits the purchase by one street railway company of stock of another where the effect or intent of the purchase is to defeat or lessen competition in their respective businesses or to encourage monopoly. *Trust Co. of Georgia v. State*, 109 Ga. 736, 35 S. E. 323, 48 L. R. A. 520.

But a street railway company in *New Jersey* may acquire the controlling interest in the stock of another street railway company. *State v. Atlantic City, etc.*, R. Co., 6 St. Ry. Rep. 841, 76 N. J. L. 15, 69 Atl. 468.

Section 5 of article 10 of the Constitution of *Texas*, prohibiting one railroad from acquiring title to a parallel and competing line, does not apply to street railways. *Scott v. Farmers', etc., Nat. Bank*, 97 Tex. 31, 75 S. W. 7, 104 Am. St. Rep. 835. Section 4 of article 17 of the Constitution of *Pennsylvania*, prohibiting the consolidation, lease, purchase or control by a "railroad, canal or other corporation" of the works and franchises of any other railroad or canal corporation owning a parallel or competing line, is not applicable to street railway companies. *Gyger v. Philadelphia City Pass. R. Co.*, 136 Pa. St. 96.

A merger of street railway companies is not forbidden in all cases. *In re Attorney General*, 125 N. Y. App. Div. 804, 110 N. Y. Supp. 186. As to the consolidation of street railway companies, see *Nellis on Street Railways* (2d Ed.), § 101. See also, as to the consolidation of street railway companies in the city of New York, *Burrows v. Interurban Metropolitan Co.*, 6 St. Ry. Rep. 856, 156 Fed. 389; *Continental Securities Co. v. Interborough Rapid Transit Co.*, 165 Fed. 945.

execution of a contract between us. (2) In consideration of the rights hereby granted to you by it, it is understood that all of the business of your company so far as transportation between Evansville and Newburgh is concerned shall be done under this contract, and all of your cars, both freight and passenger, shall make use of the track of our company between Evansville and Newburgh under the terms of this agreement. (3) The Evansville, Suburban & Newburgh Railway Company will upon the completion of your line from the end of its electrified tracks in Newburgh at the corner of State and Water streets, to Rockport, Indiana, transport your cars, passenger, freight and express, to and from Evansville, over its line, and allow you the use of its terminals, both freight and passenger, in Evansville, for said term of thirty-five years. The terms on which such service shall be conducted and the rental to be paid by your company to this company for the use of its terminals to be the subject of mutual agreement between the two companies, or in case an agreement cannot be reached, then this question is to be submitted to arbitration as hereafter provided. It is expressly understood that nothing in this agreement contemplates the doing by your company of any business between Newburgh and Evansville proper, and intermediate stations, and all the revenues derived therefrom shall belong to this company. In case of such disagreement each of the parties shall select an impartial arbitrator, and the two arbitrators so chosen shall select a third arbitrator and the award of the three arbitrators so chosen shall be binding upon the parties. * * * (4) You are to furnish first-class, modern, properly equipped cars acceptable to our company. We will furnish conductors and motormen for your cars while in use on our line and they shall collect all fares between Newburgh and Evansville. All of your cars while on our road shall be subject to the control and direction of our company. * * * (6) The right is reserved by this company to operate its freight trains and haul all freight on your tracks between State street in Newburgh, Indiana, and 'Archbold Coal Mines,' so as not to interfere with the operations of your passenger cars over the same. It is understood that the usual *per diem* charged for freight cars shall be made by the party entitled thereto in addition to its *pro rata* share of said freight and express tariff. * * * (10) On default by you in the payment of the amounts due monthly to this company, or on default by you in the performance of any of the other conditions herein required of you, this company shall have the right to give you notice in writing specifying wherein you are in default and requiring you within ten (10) days to correct the same. On your failure so to do within said time this company shall have the right upon giving an additional notice of ten (10) days in writing to terminate this contract, or it may at its option terminate the same by suitable legal proceedings. (11) All of your cars shall be of the standard gauge of the track of this company and shall be of approved construction and weight to operate over said track without damaging the same in any manner, and all of your cars shall be operated under such schedules as may hereafter be agreed upon by the two companies and not interfere with the cars of this company. * * * (14) The expense incurred in the sale of tickets and in providing and maintaining suitable passenger terminals and freight terminals in Newburgh shall be borne by each company *pro rata* according to the business done. (15) It is expressly understood that the rights granted to you over our road between Evansville and

Newburgh are not exclusive, and we reserve the right to operate our own cars, both freight and passenger, between said points as heretofore done by us and upon such reasonable schedules as shall accommodate the convenience of both of us. * * * (19) It is understood that such details of the arrangement hereby proposed as are not herein covered shall be determined by the mutual agreement of the parties as the occasion requires, and in case of disagreement by arbitration in the manner above provided. * * *

At the time of the acceptance, the parties agreed to the following interpretation of the proposition:

"It is the understanding that your company shall take charge of our cars at Newburgh and that your own conductor and motorman shall bring them into Evansville. That the amount which shall come to us and to you out of the fares for passengers to and from points east of Newburgh shall be adjusted between the two roads, and that all freight or express matter brought over the road to and from points east of Newburgh shall also be adjusted. That these matters, together with the amount that shall be paid your road for use of its tracks and terminals and the amounts which shall be allowed to our road for the use of the cars, are all matters to be settled by arbitration. It is also our understanding that the arbitration which is made shall not be conclusive for the whole time of the contract, but that successive arbitrations may be had at the request of either person at periods of say five years. It is also our understanding that the clause providing for the termination of the contract upon ten days' notice, to wit, section 10 of the contract, shall not apply to cases where there is a *bona fide* difference as to whether there is or is not a breach of the contract. Such breaches shall be submitted to arbitration also. It is also our understanding that nothing in the contract shall prevent the taking on or letting off of passengers by our cars between Newburgh and Evansville, and any clauses in the contract appearing to be contrary to this are only intended to refer to the fares which are to be taken and who shall be entitled to them."

The aforesaid proposition was dated April 25, 1906, and at that time appellant was operating a line of electric railway from Evansville to Newburgh. Prior to that time the Rockport Company had been incorporated to construct an electric line of railway from Evansville to Rockport, paralleling appellant's line to Newburgh, but, being unable to finance the proposed enterprise, it sought and obtained from appellant the proposition which, with the agreed interpretation, was accepted by the Rockport Company May 8, 1906. The Rockport Company thereafter constructed its road from Newburgh to Rockport, connecting with appellant's road at Newburgh, and together forming a through line between Evansville and Rockport which was opened for business in June, 1907. Under the contract between the two companies, all of the Rockport Company cars, both passenger and freight, were turned over

to appellant at Newburgh, and in charge of its agents, servants and employees they were run over appellant's track to Evansville, and from Evansville back to Newburgh, where they were released to the Rockport Company. It further appears that the Rockport Company aided, encouraged, and with the co-operation of its co-appellees violated and repudiated its contract with appellant by changing and transferring in part, and threatening to change and transfer all of its business, and the running of its cars between Newburgh and Evansville from appellant and its line of road and tracks to a parallel line of road since constructed between said two last-named points by the Evansville Terminal Railway, a corporation caused to be formed by the officers of the Rockport Company.

In the consideration of this case we will treat appellant's proposition and the interpretation placed thereon by the parties as one instrument, and hereafter, for the purpose of brevity, refer to them as the contract. This contract appellee (Rockport Company) insists is invalid for the following reasons: (1) The Rockport Company had no power to make the contract; (2) that the contract is void as being against public policy; (3) the contract is not of such nature that it can be specifically enforced. On the other hand, appellant contends that the facts disclosed show that the contract is expressly authorized by statute (section 5652, Burns 1908), but, if not so authorized, the two corporations clearly had the power to make it for the reason that it was no more nor less than a track-age or operating agreement and authorized by law as an incident to the business in which they were engaged.

The first question presented challenges the validity of the contract. Both parties to the contract were Indiana corporations. Their powers and authority are circumscribed by the street railway law in force September 7, 1861 (Laws 1861, c. 39), as amended and supplemented by later legislative enactments. Sections 4294, 5630 *et seq.* Burns 1908. Their business is public in its nature and directly involves public interests. For that reason they are invested with powers not given to individuals or strictly private corporations. *Board, etc., Tippecanoe Co. v. Lafayette, etc., R. R. Co.*, 50 Ind. 85, 108. Being granted these exceptional powers by the State, their rights and liabilities are to be construed and measured by the law applicable to that class of corporations known as *quasi* public. 1 Thompson Corp., §§ 32, 33.

In this case the extraordinary jurisdiction of the court is sought by one of the parties to compel the other to perform its part of a

certain contract. In view of the nature of that contract, the business affected, and the relief sought, it is important that we look to the probable consequences of its enforcement, and the interests, if any, to be affected thereby, before considering individual advantages. For it must be kept in mind that

“railroad corporations are regarded as public agencies owing duties to the public generally. Accordingly they can make no contract which shall prohibit them from serving the public as the future demands of business or concentration of population may require.”

Louisville, etc., Ry. Co. v. Sumner, 106 Ind. 55, 59, 5 N. E. 404, 406, 55 Am. Rep. 719.

It is apparent from the contract in question that the Rockport Company had agreed to abandon, for a period of thirty-five years, its purpose and its franchise rights obtained from the State to construct and operate a road between Evansville and Newburgh. This is so for the reason that it has expressly agreed: (1) That the transportation of all of its business between Evansville and Newburgh shall be done by appellant, and all its cars, both freight and passenger, between these two points, shall use appellant's track. (2) That appellant shall take absolute charge and control of the Rockport Company's cars at Newburgh and retain possession of them until they return to Newburgh. None of such cars shall stop to take on or put off passengers in the present corporate limits of Newburgh east of State street. (3) It shall do no business between Newburgh and Evansville proper and intermediate stations. (4) All revenues derived from business done between Newburgh and Evansville shall belong to appellant. (5) It agrees to furnish cars acceptable to appellant and of approved construction and weight to operate over appellant's track without damaging the same in any manner.

The observance of these stipulations by the Rockport Company eliminated it as a competing line between Evansville and Newburgh as completely as though it never existed. The control and management of its cars was limited to its track east of Newburgh, and its business with the public confined to such as originated or was consigned to points on its completed line. This condition, under the terms of the contract, was to continue for a period of thirty-five years, for it agreed that all of its business between Evansville and Newburgh should be done by appellant and under the latter's direction and control.

The Rockport Company held a franchise to construct and operate an electric line of railway between Evansville and Rockport by way of Newburgh. The acceptance of this franchise carried with it certain privileges and powers conferred only upon the theory that the purpose to be accomplished was the promotion of public interests by a legal entity regarded as a public agent. Hence the Rockport Company as a common carrier was charged with the performance of certain well-defined public duties which it could not at will cast aside and repudiate so as to defeat the purpose of its organization without offending the law of its creation. *State ex rel. Portland Nat. Gas Co.*, 153 Ind. 483, 53 N. E. 1089, 53 L. R. A. 413, 74 Am. St. Rep. 314. It does not follow from the mere fact that cars of the Rockport Company were run to Evansville that it was operating a road to that point, or that it had not abandoned any of its duties as a public service corporation. As further tending to illuminate the force of the contract in question, it appears that the Rockport Company's cars were for a time run over appellant's track forming a continuous line from Rockport to Evansville, yet their right to continue so to do depended upon whether they were acceptable to appellant, and of approved construction and weight. This provision of the contract, in the absence of any stipulation on the part of appellant to improve its road and track to meet the necessary demands of the new company, enabled it to control the size and construction of the Rockport Company's cars, if they would go to Evansville, for a period of thirty-five years, regardless of the rights, convenience or future reasonable demands of the public.

In the case of *Thomas v. Railroad Co.*, 101 U. S. 71, 83, 25 L. Ed. 950, the court, in speaking of a principle under which contracts such as we have here are invalid, not because they are strictly within the doctrine *ultra vires*, said:

"That principle is that, where a corporation like a railroad company has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions which undertakes, without the consent of the State, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void as against public policy."

In the case of *Union Pacific Ry. Co. v. Chicago, etc., Ry. Co.*, 163 U. S. 564, 581, 16 Sup. Ct. 1173, 1180 (41 L. Ed. 265), as

applicable to the question under consideration, the general rule is stated as follows:

"Railroad corporations possess the powers which are expressly conferred by their charters, together with such powers as are fairly incidental thereto; and they cannot, except with the consent of the State, disable themselves from the discharge of the functions, duties and obligations which they have assumed."

In the case of *Muncie Nat. Gas Co. v. City of Muncie*, 160 Ind. 97, 103, 66 N. E. 436, 439 (60 L. R. A. 822), the court, in speaking of *ultra vires* contracts, said:

"Without attempting to cover the whole ground, it may be said that, if a contract is of such character that had the corporation at once proceeded to execute it, its act would have been contrary to public policy, or expressly or impliedly prohibited by statute, or would in any degree disable the corporation from the performance of its statutory duties, the undertaking cannot be enforced by either party. To this extent the cases, English, Federal and State, are in reasonable harmony."

In the case of *American Express Co. v. Southern Indiana Express Company*, 167 Ind. 292, 78 N. E. 1021, it was said:

"All rules, practices, customs and usages designed to destroy competition in business, or necessarily having that effect, are inimical to the public well-being and were condemned by the common law."

In *State ex rel. v. Portland Nat. Gas Co.*, *supra*, the following language was used:

"It is an old and familiar maxim that 'competition is the life of trade,' and whatever act destroys competition, or even relaxes it upon the part of those who sustain relations to the public, is regarded by the law as injurious to public interests, and is therefore deemed to be unlawful on the grounds of public policy."

The last two quotations were quoted with approval in the case of *Tousey v. City of Indianapolis*, (Sup.) 94 N. E. 225, in which case it was held that the common-law rule is in no way modified in Indiana.

In the case of *Chicago, etc., R. Co. v. Southern, etc., Ry. Co.*, 38 Ind. App. 234, 70 N. E. 843, this court, in considering a contract whereby one railroad company agreed not to so construct its road or switches as to divert the benefits derived by another company from certain stone quarries, said:

"By this agreement the two railroad companies undertook to contract away the right of third parties, without their knowledge, and in defiance of the public duty devolved upon such companies"

and it was held that the contract had the effect of depriving the shipper of the benefits of competition and tended to create a monopoly in one of the contracting parties against public policy and contrary to the law which seeks to prevent the creation of monopolies and to foster fair competition.

The decided cases with marked unanimity hold that railroad corporations are incapable of entering into contracts beyond the scope of their powers, expressed or necessarily implied in furtherance of those expressly granted, or of absolving themselves from their obligation to the public, or from performing their corporate duties without legislative consent. *Board, etc., Tippecanoe Co. v. La Fayette, etc., R. R. Co., supra*; *Thomas v. Railroad Co., supra*; *Eel River R. R. Co. v. State*, 155 Ind. 433, 57 N. E. 388; *Peoria & Rock Island Ry. Co. v. Coal Valley Mining Co.*, 68 Ill. 489; *Richardson v. Sibley*, 11 Allen (Mass.) 65, 87 Am. Dec. 700; *Black v. Delaware & Raritan Canal Co.*, 22 N. J. Eq. 130; *Gulf, etc., Ry. Co. v. Morris*, 67 Tex. 692, 4 S. W. 156; *Florida Central, etc., R. Co. v. State of Florida*, 31 Fla. 482, 13 South. 103, 20 L. R. A. 419, 34 Am. St. Rep. 30; *St. Joseph, etc., R. Co. v. Ryan*, 11 Kan. 602, 15 Am. Rep. 357; *Central & Montgomery R. Co. v. Morris*, 68 Tex. 49, 3 S. W. 457; *Pennsylvania R. R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. Ed. 83; *Fanning v. Osborne*, 102 N. Y. 441, 7 N. E. 307; 1 *Elliott Railroads* (2d Ed.), § 359; 3 *Thompson Corp.*, § 2906.

The legal effect of the contract, and not its form or the alleged pretense for its execution, is of controlling influence in determining the remedy the parties may have for its enforcement, and mandatory injunctions will be granted only to prevent serious damage. 16 *Am. & Eng. Ency.* (2d Ed.) 343. A judicial approval and the enforcement of the contract in question would prohibit the Rockport Company, for a period of thirty-five years, from operating a road between Newburgh and Evansville, and have the effect of validating a contract of doubtful validity at most, when construed in the light of the objects intended to be accomplished by the granting of the franchise.

Here a mandatory injunction is prayed which should be allowed in a proper case, but as a rule courts will not grant an extraordi-

nary remedy unless the complainant makes out a clear case. But the decision in this case rests on other grounds.

Traction companies may make valid traffic or operating agreements for the use by one of another's tracks, terminals, equipment, etc., where by so doing neither company incapacitates itself from performing its duties to the public, or does not create a monopoly in favor of one of the contracting parties, or foregoes its charter rights to construct and operate a competing road, except such contract be authorized by the governing statute. 1 Elliott Railroads, § 357; *Union Pacific Ry. Co. v. Chicago, etc., Ry. Co., supra*.

In this case we are referred to section 5652, *supra*, as the statute authorizing the present contract. That statute has to do with a sale or lease, and we do not regard the contract before us as either. *Troy, etc., R. Co. v. Boston, etc., R. Co.*, 86 N. Y. 107. The Newburgh Company did not intend to buy the franchise of the Rockport Company between Newburgh and Evansville, nor did the latter company attempt to sell or lease the unconstructed portion of its road or other property. As we see the transaction, it amounted to a prohibition against one company operating its road in territory occupied by the other, and therefore is invalid on the ground that it tends to stifle competition and to create a monopoly. *Chicago, etc., R. Co. v. Southern, etc., Ry. Co., supra*.

For the reasons stated, we are not convinced that this is a case where the court can safely grant a mandatory injunction. Judgment affirmed.

HOTTEL, C. J., and LAIRY, FELT, ADAMS and IBACH, JJ., concur.

Zucker v. Whitridge.

(New York — Court of Appeals.)

ACTION FOR DEATH OF PEDESTRIAN STRUCK BY TROLLEY CAR; CONTRIBUTORY NEGLIGENCE OF PLAINTIFF'S INTESTATE; EVIDENCE; ERRONEOUS ADMISSION OF GENERAL CUSTOM OR MANNER OF CROSSING STREET BY PLAINTIFF'S INTESTATE TO PROVE EXERCISE OF CARE BY HIM WHEN INJURED. — Plaintiff's intestate was struck by a trolley car while crossing an avenue, running north and south, at its intersection with a street running east and

Contributory Negligence of Pedestrian. — As to the contributory negligence of a person struck by a street car, see Nellis on Street Railways (2d Ed.), §§ 419-424.

west. It was a dark and misty night, but there were electric lights at two of the corners and a gas light at another. On the avenue were two trolley tracks; the one on the east for north-bound cars, the one on the west for south-bound cars. As deceased came from the west, and until he reached the westerly curb of the avenue, his view to the south was somewhat obscured by the supporting columns and stairways of an elevated railroad and stations thereof, but during the last fourteen feet of the distance, from the westerly curb of the avenue to the north-bound trolley track, he had a clear view to the south and could have seen a well-lighted car approaching from that direction. The deceased was in the full possession of all his faculties, had frequently passed over this crossing and knew the locality well. In crossing the avenue he walked steadily along without turning his head or looking in any direction except straight ahead until just as he was stepping on the north-bound track, when he jumped back, as if he noticed the approaching car, but too late to escape being struck by it. Although the car was running fast and no gong was sounded or other warning given, the car was well lighted, and if the deceased had looked he could have seen it approaching, but he stepped directly in front of the car when in plain sight and he could have almost touched it. *Held*, that the burden of furnishing some evidence to show that the deceased had exercised some care rested upon the plaintiff, that the evidence submitted not only fails to establish such fact, but, on the contrary, shows that the deceased was guilty of contributory negligence as a matter of law.

A witness who had known the decedent for eight years, and during that period had walked with him through the streets of the city of New York and had crossed railroad tracks with him, was asked by the plaintiff: "State what you observed as to his manner of crossing railroad tracks in your company." Objection was made to the question as incompetent and immaterial, but it was overruled and an exception noted. The witness then answered: "When we were about to cross railroad tracks he usually looked to the right and to the left of him and put a restraining hand on my arm before crossing, to make sure that there were no vehicles of any kind coming." The defendant's counsel moved to strike out the answer as incompetent and not relevant to the issues in the case, but the motion was denied and an exception taken. On review of the authorities in this and other States, *held*, that the weight of authority is against admitting evidence of general conduct under proven circumstances to show conduct of the same kind under similar circumstances on a particular occasion, when there were eye-witnesses of the occurrence, including the person injured if he survived the accident, and that the evidence in question, even if relevant, should be held incompetent under the circumstances, because its probative force does not outweigh the inconvenience of a multitude of collateral issues not suggested by the pleadings, the trial of which would take much time, tend to create confusion and do little good.

DEFENDANT appeals from judgment in favor of plaintiff. Reported 98 N. E. 209.

Frederick J. Moses and *James L. Quackenbush*, for appellant.

Julius Henry Cohen and *Theodore B. Richter*, for respondent.

Opinion by VANN, J.:

Third avenue in the city of New York, running nearly north and south, crosses Eighteenth street almost at right angles. The defendant has two railroad tracks laid on the surface of the avenue at the point where it crosses the street, the easterly track being used for cars going north and the westerly for those going south. On the 18th of December, 1908, at about half past eight in the evening, the plaintiff's intestate, while walking easterly on the northerly crosswalk of Eighteenth street, as he was about to step over the westerly rail of the north-bound track, was struck by a north-bound trolley car and fatally injured. In this action, brought by his administratrix under the statute, the jury found a general verdict in her favor and the Appellate Division affirmed the judgment entered thereon, two of the justices dissenting. As the negligence of the defendant is not now denied, the primary question is whether the decedent was negligent as matter of law. This question depends on the testimony given in behalf of the plaintiff, for no witness was called by the defendant.

There is an elevated railroad structure over the avenue at the point in question with the usual stations, platforms and stairways, and when the accident happened a train was passing overhead. A south-bound car had just crossed Eighteenth street, which is a little more than thirty feet wide between curbs, and it was some distance south of the street when the decedent was struck. The night was dark and misty, but there was an electric light on the northeast and another on the southwest corner and a gas light on the northwest corner. Twelve iron columns each sixteen inches square supporting the elevated structure stood as follows: Three in the westerly sidewalk of the avenue, one on either side of Eighteenth street, four feet and three inches west of the west curb of the avenue and the third on the west curb of the avenue, the first and second being a little more than thirty feet apart and the second and third between fifty and sixty feet; three a few feet west of the south-bound track and three more a few feet east of the north-bound track and about the same distance apart north and south as the three first above described; three more in the easterly sidewalk situated about the same as the three in the westerly sidewalk. There were also the four stairways and the poles supporting the three lights.

The decedent was in the prime of life and in the possession of his faculties. As he walked easterly on the north crosswalk of

Eighteenth street the crossing was directly before him, but his view toward the south was somewhat obscured at some points by the stairways, columns, etc., until he reached the westerly curb of the avenue. He then had about eighteen feet to go before reaching the last column which obstructed his view, and while going this distance his vision was much less obstructed than before. From that column to the west rail of the south-bound track was four feet three inches; the rails of that track were four feet eight and one-half inches apart, and the distance between the nearest rails of the two tracks was five feet four inches, and while going this distance of a little over fourteen feet his view of the defendant's tracks was not obstructed at all, either to the north or south. He was walking at the rate of about three miles an hour, while the north-bound car was going at the rate of from fifteen to eighteen miles an hour, yet no gong was heard, or warning of any kind observed. It did not stop at the south crosswalk. As he lifted his foot to step over the west rail of the north-bound track he was struck on his right side by the left-hand front corner of a north-bound car, whirled around and thrown down, but not run over. The car stopped within from five to eight feet of his body. According to the only witness, who assumed to estimate the distance in feet, the car was from four to eight feet from him as he was about to step on the track. During the last fourteen feet of his journey he had a clear view to the south, and if he had looked in that direction he could have seen the north-bound car, which was fully lighted, and approaching rapidly. While walking that distance he was in a situation which required active vigilance. He lived nearby, frequently passed over this crosswalk, and knew the locality well. He had nearly twenty feet to go in order to safely clear both tracks, and over fourteen feet to go before reaching the west rail of the north-bound track. He did not halt, or vary his rate of speed, or turn his head, or look in any direction except straight ahead, so far as was observed by any of the four persons who saw the accident. Two witnesses were about fifteen feet behind him walking in the same direction, one of whom testified that he held his head "perfectly horizontal," in a "natural position," while the other said that he was walking "the same as anybody else * * * about the same" as the witness himself, and he added:

"I walk with my head up and look at everything when I am going to cross the cars."

While this warranted the inference that the decedent walked "about" as the witness did, it did not permit the inference that he looked at everything, as the witness said he did. Another witness testified that the head of the decedent was "level, I mean straight, just as a man would carry himself ordinarily." There was no different description of his carriage or conduct.

The trial court and a majority of the Appellate Division, apparently with some hesitation, announced as their opinion that the jury could have found from the evidence that if the decedent had looked he could not have seen the approaching car in time to save himself. I see no evidence in the record to justify this conclusion. While the view of the decedent was somewhat obstructed at first, for over four feet before he attempted to cross the first track, and for over fourteen feet before he attempted to cross the second track, his view both to the north and south was wholly without obstruction of any kind. If he looked at first, and found his view was not clear, he was bound to keep on looking, and not try to cross the tracks until he could see his way was free from danger. The trial court charged that:

"If the jury find that a south-bound car temporarily interfered with Zucker's view of the north-bound track, that fact made it incumbent upon him to be vigilant and to look again after the car had ceased to interfere with his view."

He did not look, or try to look at any time or place, so far as appears. He passed over the space where the view was clear apparently so absorbed in thought that he looked in no direction except straight ahead. No witness saw him look, or try to look, or turn his head, or make any movement as if he was looking, until, as one witness stated, as he was in the act of stepping on the last track when it appeared as if he noticed the car and tried to jump back, but the car caught him before he could escape.

The trial court also charged that the decedent

"did not have the right to rely on the motorman's stopping on the south crosswalk."

Moreover, if the decedent saw the car when it was at the south crosswalk, or near it, the theory upon which the case was submitted to the jury utterly failed and he was conclusively shown to be guilty of affirmative negligence.

The burden of furnishing some evidence tending to show that

the decedent used some care rested upon the plaintiff, but she did not meet it. Although two witnesses had him under observation all the time and two more the most of the time while he was traveling the last thirty feet toward a place of known danger, not one saw him look in any direction except straight ahead. During the last fourteen feet he crossed the westerly tracks and was about to cross the easterly, yet it did not appear, either from direct evidence or from circumstances, that he looked either to the right or the left as he walked this distance, and it conclusively appears that if he had looked he could have seen the approaching car, for it was no longer obstructed either by columns or the south-bound car. If there had been no eye-witness of the accident less evidence of care would have been required from necessity, but in such a case the jury could not find that care was exercised without some evidence, even if weak, to act upon. Here there was none. The surrounding circumstances did not show that the accident might have happened without negligence. While not obliged to look in any particular direction at any particular point, it was the duty of the decedent to look in both directions before he tried to cross the tracks, for he was familiar with the situation and knew the danger. The night was misty and dark, but the locality was well lighted; the north-bound car was fully lighted and all the witnesses had no difficulty in seeing the car, while some of them saw it when it was more than half a block away. The slight defect in his eyesight did not excuse him from looking, and it had but a slender bearing on what he could have seen if he had looked. As matter of law he was not obliged to stop and look, but it was his duty at least to look as he walked on and not blindly plunge into danger. He did not go on to the second track and get caught there before he could get off, for he was struck as he was going on and was thrown down but not run over. He stepped directly in front of the car when in plain sight and he could have almost touched it. *Reed v. Metr. St. Ry. Co.*, 3 St. Ry. Rep. 666, 180 N. Y. 315.

A majority of the judges are of the opinion that the decedent, upon the most favorable view of the evidence that can be taken in the interest of the plaintiff, was guilty of contributory negligence as matter of law. As we said in a late case:

"He knew that he was in a place of danger and it was his duty to exercise some care for his own safety, yet he took no care whatever. * * * Every person is bound to use reasonable care to avoid known dangers, and if he fails

in this duty to himself the loss ensuing does not fall on another whose negligence helped to bring about the result, for the law does not apportion negligence nor assign to each party responsibility for his own contribution. The one guilty of contributory negligence must bear the loss alone."

Volosko v. Interurban St. Ry. Co., 6 St. Ry. Rep. 249, 190 N. Y. 206, 209.

One other question requires attention on account of its importance and novelty. A witness who had known the decedent for eight years, and during that period had walked with him through the streets of the city of New York and had crossed railroad tracks with him, was asked by the plaintiff:

"State what you observed as to his manner of crossing railroad tracks while in your company."

Objection was made to the question as incompetent and immaterial, but it was overruled and an exception noted. The witness then answered:

"When we were about to cross railroad tracks he usually looked to the right and to the left of him and put a restraining hand on my arm before crossing, to make sure that there were no vehicles of any kind coming."

The defendant's counsel moved to strike out the answer as incompetent and not relevant to the issues in the case, but the motion was denied and an exception taken.

The learned justices of the Appellate Division divided in judgment on this question by the same vote of three to two as upon the other, but one of the majority in casting the decisive vote said:

"As to the evidence that the deceased customarily exercised care in crossing railroad tracks, I much doubt its admissibility, but, even assuming that it was incompetent, I am not persuaded that it tended in any appreciable degree to induce the verdict. At most it only tended to lend a tone of probability to the direct evidence that on the occasion of the accident Zucker apparently observed ordinary care in crossing the street."

The converse of the proposition involved was held by this court in *Eppendorf v. Brooklyn City & Newtown R. R. Co.*, 69 N. Y. 195. In that case one of the issues was whether the plaintiff was negligent in trying to board a slowly moving street car after it had nearly stopped in response to his signal. The court said, all the judges concurring except one who was absent:

"The offer of defendant's counsel to show that plaintiff was in the habit of jumping on defendant's cars when in motion was properly excluded. It is

impossible to perceive what bearing the evidence offered could have. * * * It was not offered to show that the plaintiff was generally careless or reckless, and if it had been, it would have been incompetent. The simple fact that he was in the habit of jumping upon the moving cars could have no bearing in this case. The sole question to be determined here, so far as relates to plaintiff's alleged contributory negligence, was the character of the plaintiff's acts under the circumstances existing at the time; and what he may have done at some other time under other circumstances could have no bearing upon that question." (p. 197.)

In an earlier case it had been held, one judge dissenting, that evidence of the intoxication of the flagman on previous occasions was immaterial, because

"his neglect on a former occasion, or his former intemperate habits, would not be sufficient to create negligence, or be any evidence of it, when this accident happened. The evidence objected to tended, like the suggestion that the railroad company did not own the highway, to create a prejudice in the mind of the jury, and invite punitive damages, not directly arising from the occurrence." *Warner v. N. Y. C. R. R. Co.*, 44 N. Y. 465, 472.

To the same effect is *Cleghorn v. N. Y. C. & H. R. R. Co.*, 56 N. Y. 44, 46, where Chief Judge Church said:

"Previous intoxication would not tend to establish an omission to give the signal on the occasion of the accident."

See also *Gorman v. N. Y., Chicago & St. L. R. R. Co.*, 194 N. Y. 488, 493.

In *Wooster v. Broadway & Seventh Avenue R. R. Co.*, 72 Hun 197, one of the issues was whether the driver of a coupé was negligent, and evidence given in behalf of the plaintiff tending to show that he was generally careful was held incompetent. Judge Follett, after citing authorities, said:

"It has been many times held that it is not competent for a plaintiff to give evidence that the person by whom the alleged negligent act was committed had previously committed similar acts, or that he was generally negligent or unskillful. The same rule is applicable to a plaintiff seeking to show that the acts of her servant did not contribute to the accident." (p. 198.)

In *Parsons v. Syracuse, Binghamton & N. Y. R. R. Co.*, 133 App. Div. 461, it was held that an administrator seeking to show that a decedent, who was killed while crossing a railroad track, used care at the time of the accident, may not give evidence of specific instances of care on the part of the decedent prior to the

accident although no eyewitness was present when it occurred. Mr. Justice Chester said:

"A man who is careful on one occasion may be careless on another. The circumstances at one time may be such as to induce prudence, while they might not at another time. But the worst feature of this class of evidence is that it presents issues for trial not tendered by the pleadings, and which the opposing party is not prepared to meet. If this evidence was competent for the plaintiff it would be just as competent for the defendant to prove that on prior occasions the plaintiff's intestate had been careless; that also on other nights when this engineer ran his engine over this crossing he had run it slowly; that he had his headlight burning; that he rang his bell and blew his whistle, and that he had been seen many times on prior occasions to observe all these precautions. It would also be competent for the plaintiff to dispute such testimony and to show that on prior occasions he had been careless. Thus the issues would be largely multiplied, and no party going to trial would know in advance what he would have to meet." (p. 462.)

In some States such evidence is regarded as competent. In New Hampshire it was held that the fact that a person killed at a grade crossing customarily stopped, looked and listened for trains at that point is competent to prove similar conduct at the time of the injury, in the absence of testimony by any eyewitness as to his behavior on that occasion. *Tucker v. Boston & Maine R. R. Co.*, 73 N. H. 132. No argument was made but the bare conclusion announced, earlier cases being cited which involved the custom of those running trains and of those injured at railroad crossings with reference to general care or carelessness. *State v. M. & L. Railroad*, 52 N. H. 528, 549; *Smith v. Boston & Maine Railroad*, 70 N. H. 53, 82. The argument used in the earlier case was that

"it would seem to be axiomatic, that a man is more likely to do or not to do a thing, or to do it or not to do it in a particular way, as he is in the habit of doing or not doing it. But this must be understood of acts which are done, or omitted to be done, without any particular intent or purpose to injure any one."

In a case in California where there was a conflict of evidence as to whether the plaintiff carelessly jumped off a train while it was moving, the railroad company was allowed to show that within the year preceding the accident the plaintiff had frequently traveled over that route and had frequently jumped off the cars while in motion. *Craven v. Cent. Pac. R. R. Co.*, 72 Cal. 345, 347. The court said:

"A sensible man, called upon, out of court, to determine whether or not a certain person had on a certain occasion carelessly jumped off a moving train of cars, and finding the direct testimony as to the matter conflicting, would naturally and properly give *some* weight to the fact that the person was in the habit of alighting from cars in that manner. * * *

In Kansas it was held that the fact that a man killed on a railroad crossing was careful and sober and had previously exercised due care in passing over the same crossing, tends to repel any inference of negligence arising from the mere fact that he went upon the track when a train was approaching, there having been no eyewitness of the collision until he was actually upon the track. The evidence does not appear to have been objected to, and it is assumed to have been competent without argument. *Mo. & Pac. Ry. Co. v. Moffatt*, 60 Kan. 113.

In Illinois evidence that the deceased was "habitually cautious and temperate" was held to be competent where there was no eyewitness of the accident, but otherwise not. *Chi., Rock I. & P. R. Co. v. Clark*, 108 Ill. 113, 117.

On the other hand, similar evidence has been held incompetent in several different States, as follows: In Wisconsin, to show that the person injured "was an habitually careless man" (*Propsom v. Leatham*, 80 Wis. 608, 612); in Pennsylvania, that the deceased "had made a practice of jumping from the elevator while in motion" (*Baker v. Irish*, 172 Penn. St. 528, 531); in Connecticut, that the intestate "was a careful and prudent driver" (*Morris v. Town of East Haven*, 41 Conn. 252); in Illinois, "that the deceased was in the habit of jumping on trains" (*Peoria & Pekin U. Ry. Co. v. Clayberg*, 107 Ill. 644, 648); in Iowa, in a case where there was some evidence that the deceased was asleep in his buggy when he drove on the track, that he had been "found asleep in his buggy" on other occasions (*Dalton v. Chi., Rock I. & P. R. Co.*, 114 Ia. 257, 259); in Maine, that in the opinion of those who knew the deceased well he was a cautious and careful man, no witness having seen the accident (*Chase v. Maine Cent. R. R. Co.*, 77 Me. 62, 65); in Massachusetts, specific instances of want of care in the engineer in his business of running trains within three months of the injury, before or after (*Robinson v. Fitchburg & Worcester R. R. Co.*, 73 Mass. 92, 95); also

"previous specific acts of negligence on the part of the engineer, known to the defendant's superintendent" (*Connors v. Morton*, 160 Mass. 333, 334).

Professor Wigmore seems to appreciate

"the probative value of a person's habit or custom as showing the doing on a specific occasion of the act which is the subject of the habit or custom,"

but he points out difficulties which arise in connection with such evidence. (§ 92.) Thus he says:

"Can there be a habit of not doing?" (§ 97.) "Is it possible to believe that careless action can ever be anything more than casual or occasional? If it is, are we not really predicating a careless disposition, rather than a genuine habit, and then are we not violating the rule against character in a civil action in employing such evidence? These doubts serve to explain the precedents that exclude such evidence; but it would seem that the doubts are not always well founded, and that such evidence is often of probative value, and is not attended by the inconveniences of character evidence." 1 Wigmore on Evidence, § 97.

The Messrs. Elliott, in their work on Evidence, say that

"evidence of personal habit is often of some probative value and is frequently admitted; but such evidence should not be admitted when to admit it would violate the character rule, and it cannot, ordinarily, be proved that a person did or did not do a certain thing at a particular time by showing that he acted in a certain way under similar circumstances at other times." 1 Elliott on Evidence, § 172.

In Thompson on Negligence it is said:

"Where there are *no witnesses* to the accident, evidence of the *habitual care* of the deceased is often admitted on the question of his exercise of due care at the time of the accident." 6 Thompson on Negligence, § 7140.

Mr. Greenleaf says:

"A habit of doing a thing is naturally of probative value as indicating that on a particular occasion the thing was done as usual, and, if clearly shown as a definite course of action, is constantly admitted in evidence. Nevertheless there are some instances in which habit may be thought to be obnoxious to the character rule, particularly a habit of intoxication or intemperance, and a habit of carelessness or negligence; and on these points there is no uniformity of ruling. The existence of a design, plan or intention to do a thing is of some probative value to show that it was done and instances of its use constantly recur." 1 Greenleaf on Evidence (16th Ed.), §§ 14j and 14k.

The weight of authority seems to be against admitting evidence of general conduct under proven circumstances to show conduct of the same kind under similar circumstances on a particular occasion, when there were eyewitnesses of the occurrence, including

the person injured if he survived the accident. We are not now called upon to decide whether evidence of the habits of a decedent in crossing railroads is competent when there is no eyewitness of the event. In this case there were four witnesses who saw what happened and described the conduct of the deceased as he walked to his death. A question of evidence, to some extent, is a question of sound policy in the administration of the law. Sometimes it is necessary to weigh the probative force of evidence offered, compare it with the practical inconvenience of enforcing a rule to admit it and decide whether, as matter of good policy, it should be admitted. Uniform conduct under the same circumstances on many prior occasions may be relevant as tending somewhat to show like conduct under like circumstances on the occasion in question. All relevant evidence, however, is not competent. Hearsay, although relevant, is held incompetent from public policy, because there is safer and better evidence to establish the fact. Parol evidence to vary a written agreement is relevant but incompetent, because sound policy requires that the writing should be presumed to express the final agreement of the parties. So, assuming the evidence in question to be relevant, I think it should be held incompetent under the circumstances, because its probative force does not outweigh the inconvenience of a multitude of collateral issues not suggested by the pleadings, the trial of which would take much time, tend to create confusion and do little good. As was said by Chief Justice Peters in *Chase v. Maine Central R. R. Co.* (*supra*):

"In many litigations, under such a test, there would arise a wager of character which would as unfairly settle the dispute as did formerly the wager of battle."

The rule of the average life is care, or else it would not long continue, yet the average man is conscious that he is not always careful, and, hence, habit on general occasions is uncertain evidence of care on a particular occasion. It is not enough of itself to establish the fact sought to be proved and at the most simply bears upon the probability. Habit is an inference from many acts, each of which presents an issue to be tried and necessarily involves direct and naturally invites cross-examination. The circumstances surrounding each act present another issue, and thus many collateral issues would be involved which would not only consume much time, but would tend to distract the jury and lead

them away from the main issue to be decided. From the want of previous notice the other party would not be prepared to meet such evidence, and after all the testimony of this character was in, the fact would remain that, as no one is always careful, the subject of inquiry, although careful on many occasions, might have been careless on the occasion in question.

We are of the opinion that the evidence objected to should be held incompetent, and that under the circumstances the error in admitting it should not be disregarded as harmless, for it may have led to the verdict.

The judgment should be reversed and a new trial granted, with costs to abide the event.

CULLEN, Ch. J., GRAY, HISCOCK, CHASE and COLLIN, JJ., concur; WILLARD BARTLETT, J., concurs on second ground discussed in the opinion.

Judgment reversed, etc.

Kent v. Jamestown Street Railway Company.

(New York — Court of Appeals.)

PROVISIONS OF THE RAILROAD LAW (CONS. LAWS, ch. 49, § 64) RELATIVE TO ACTIONS FOR INJURIES TO EMPLOYEES ARE APPLICABLE TO STREET SURFACE RAILROADS. — The legislature, by placing section 64 of the Railroad Law, formerly known as section 42a and as the Barnes Act, in the General Railroad Law and referring therein to all railroad corporations, intended it as a general act for the benefit of the employees of railroad corporations without regard to the form of their incorporation or the manner of their doing business; hence, it is applicable to a street surface railroad corporation.

DEFENDANT appeals from a judgment in favor of the plaintiff. Reported 98 N. E. 664.

Clinton B. Gibbs and *Layton H. Vogel*, for appellant.

Ford White, for respondent.

Employers' Liability Act. — The application of Employers' Liability Acts to street railway companies and their employees is discussed in *Nellis on Street Railways* (2d Ed.), § 456.

Opinion by CHASE, J.:

The plaintiff's intestate, a motorman engaged in running an electric car between the village of Falconer and the city of Jamestown, was killed in a collision with a similar car running upon the same track in the opposite direction, in violation of a signal that had been given to the motorman in charge of that car. The intestate's death resulted from personal injury while in the employment of the defendant, arising solely from the negligence of one of the defendant's employees intrusted by it as a part of his duty with the physical control or direction of the movement of the car which caused the collision. The employee of the defendant having the physical control or direction of the movement of the car that caused the collision was not a fellow servant of the intestate under section 64 of the Railroad Law (former section 42a). There is but one question requiring our consideration in this opinion, and that is, whether section 64 of the Railroad Law is applicable to a railroad organized as a street surface railroad corporation.

The defendant is organized as a street surface railroad corporation and is engaged in running cars in the city of Jamestown and to and from adjoining villages by electric power conveyed by trolley wires. By the express terms of said section of the Railroad Law it is applicable to

"all actions against a railroad corporation, foreign or domestic, doing business in this State, or against a receiver thereof."

It is not by its terms in any way restricted or limited to particular railroads, or to railroads organized for a particular purpose. It was not enacted as an independent statute, but it was added to the Railroad Law by chapter 657 of the Laws of 1906 and became section 42a of article 3 of the chapter, which by its own terms is to be known as the "Railroad Law." In 1906, when that section was added to the Railroad Law, railroads organized as street surface railroads had extended their mileage and so modified their manner of doing business that in many respects they resembled steam railroads. Some steam railroads have changed their motive power upon all or a part of their routes to electricity, and motormen are necessarily employed by railroads organized as steam railroads, and some of the employees of railroads are engaged during a portion of each day on cars propelled by steam, and during another portion of the day upon cars propelled by elec-

tricity. Railroads organized and known as street surface railroads frequently extend their routes outside and beyond the streets of cities and villages, and from village to village and from city to city. They run their passenger and freight cars at a rate of speed quite equal to that of an ordinary express train on a steam road, and stop at designated places.

The reasons for changing the common-law rule relating to negligence by a fellow servant are by many considered as controlling when applied to employees of street surface railroads as to employees of steam railroads. Electric and other cars commonly used by street surface railroads generally stop more frequently and run through less guarded territory than the cars of an ordinary steam railroad, but the whole system of doing business by street surface railroads has become intricate, and a system of signals and rules upon such roads, which must be literally obeyed, is becoming, if it is not now, as important as are signals and rules and their obedience upon steam roads.

The statutes relating to railroads of different kinds were amended, modified, consolidated and continued by chapter 565 of the Laws of 1890. They were again rearranged, modified and re-enacted by chapter 481 of the Laws of 1910. That act includes an article relating specially to street surface railroads, but by it all railroads must be organized under the second article thereof, and the third article relates to the construction, operation and management of railroads and applies generally to all railroads except as the sections are restricted and limited by their terms. If restrictions and limitation were intended by the Legislature the necessity of noting them was recognized. Some of the sections of that article (sections 50-108) are expressly limited to railroads operated by steam power, as will be seen by reference among others to sections 58, 71, 72, 73, 74, 76, 88, 89 and 99. Other sections in terms refer to steam and street surface railroads, as will be seen by sections 53, 56, 57 and 98, and others are limited to street surface railroads, as will be seen by sections 100 and 101. Several of the sections of said article that refer generally to a "railroad corporation" have been held to include in their provisions railroads organized as "street surface railroads."

Section 52 (former section 32) was so considered in *Evans v. Utica & Mohawk Valley R. Co.*; 44 Misc. Rep. 345. See *Lee v. Brooklyn Heights R. R. Co.*, 3 St. Ry. Rep. 708, 97 App. Div. 111.

Section 54 (former section 34) was assumed to include the

Brooklyn Heights Railroad Company, in *People ex rel. Linton v. B. H. R. R. Co.*, 69 App. Div. 549, aff'd 172 N. Y. 90.

Section 59 (former section 39) was held applicable to street surface railroads in *Goodspeed v. Ithaca Street Ry. Co.*, 2 St. Ry. Rep. 807, 88 App. Div. 147, and that judgment was affirmed in 184 N. Y. 351. The court, by Judge Gray, referring to that section, say:

"The courts below have deemed it generally applicable to all railroad corporations and, as I have reached the conclusion that the judgment was right, I will not discuss the question of its applicability and I will assume, in that respect, that the view of the courts below was correct."

In *Tullis v. Brooklyn Heights R. R. Co.*, 71 App. Div. 494, Judge Willard Bartlett, then speaking for the Appellate Division, second department, treated section 59 (former section 39) as including in its provisions street surface railroads. See *Enton v. Coney Island & B. R. R. Co.*, 136 App. Div. 800; *Bull v. N. Y. City Ry. Co.*, 192 N. Y. 361.

The courts have construed the general language referring to railroad corporations in sections of other articles of the chapter as including street surface railroads.

In *Matter of Brooklyn, Queens Co. & S. R. R. Co.*, 185 N. Y. 171, it was held that section 12 (former section 5) relating to the time when corporate powers cease, is applicable to street surface railroads. See *City of N. Y. v. Bryan*, 196 N. Y. 158.

In *Matter of Stillwater & Mechanicville Street Ry. Co.*, 171 N. Y. 589, this court held that section 22 (former section 12) is applicable to street surface railroads, and the court say (page 594):

"It will be observed that each of these provisions of the statute (former sections 34 and 35, present sections 54 and 55), to which reference has been made, expressly refers to *every railroad corporation*, and thereby includes every railroad incorporated under the provisions of section 2 of the act."

See *Village of Fort Edward v. Hudson Valley Ry. Co.*, 192 N. Y. 139.

The Legislature by placing section 64 of the Railroad Act, formerly known as section 42a and as the Barnes Act, in the General Railroad Act and referring therein to all railroad corporations should be held to have intended it as a general act applicable to all railroads incorporated within its provisions.

It was intended by the Legislature for the benefit of the employees of railroad corporations without regard to the form of their incorporation or the manner of their doing business.

It has been held by other courts in this State that said section applies to street surface railroad corporations. *Forton v. Cross-town Street Ry. Co.*, 63 Misc. Rep. 237, reversed, on a different ground, 137 App. Div. 420; *Riccio v. International Ry. Co.*, 63 Misc. Rep. 588; *Simons v. Brooklyn H. R. R. Co.*, 142 App. Div. 36; *Gorman v. B., Q. C. & S. R. R. Co.*, 147 App. Div. 21.

The accident causing the death of the intestate occurred October 3, 1910. At that time the Railroad Law (Laws of 1910, chapter 481) had been re-enacted and it is to be presumed that the Legislature in passing the act had knowledge of the construction theretofore placed upon its language by the courts.

The decisions of the courts of other States construing acts changing the common-law rule relating to the negligence of a fellow servant are not harmonious. The difference in such decisions is generally explainable by the difference in the language and purpose of the statutes construed.

The judgment should be affirmed, with costs.

CULLEN, Ch. J., GRAY, HAIGHT, VANN, WERNER and WILLARD BARTLETT, JJ., concur.

Judgment affirmed.

Farnsworth v. Tampa Electric Co.

(Florida.—Supreme Court.)

1. ACTION FOR PERSONAL INJURIES; CONTRIBUTORY NEGLIGENCE; ISSUES AND PROOF; PRESUMPTION OF NEGLIGENCE; BURDEN OF PROOF; INSTRUCTIONS; JURY; DUTY OF TRIAL JUDGE; QUESTION FOR JURY; APPEAL; NEW TRIAL.—In an action brought against a railroad company by one seeking to recover damages for injuries, whether to his person or his property, alleged to have been occasioned by the negligence of the defendant, there can be no recovery if the evidence establishes the fact that the plaintiff's own negligence was the sole cause of the injury, and this may be shown under the general issue.

Chapter 4071 of the Laws of Florida, Acts of 1891, p. 113, changed the common-law rule in actions brought against railroad companies in certain

Duty to Stop, Look and Listen.—As to the duty of the driver of a vehicle to look and listen before crossing the tracks of a street railway company, see the note to *Wilson v. St. Louis Transit Co.*, 7 St. Ry. Rep. 1.

particulars therein set forth, and section 2 thereof, now section 3149 of the General Statutes of 1906, provides that, if the plaintiff and the defendant company are both in fault, the plaintiff may recover, "but the damages shall be diminished or increased by the jury in proportion to the amount of default attributable to him." While contributory negligence as a defense in such an action should be pleaded, yet, where it appears from the proofs adduced by the plaintiff, the defendant company may avail itself of the same under the general issue.

Section 3148 of the General Statutes of 1906 creates the presumption that a person injured by the operation of a railroad was thus injured through the negligence of such road, which presumption it is incumbent upon the defendant railroad company, in an action brought against it, to overcome by proofs.

In any action seeking to recover damages for injuries to person or property, whether brought against a railroad company, in which action section 3148 of the General Statutes of 1906 would apply, or against some other defendant, alleged to have been caused by the negligence of the defendant, all that may properly be required of the plaintiff is to establish by competent evidence the negligence of the defendant in causing the injury, as laid in the declaration. The plaintiff cannot be required to show that he was not guilty of contributory negligence, the burden is the other way, and if the evidence is evenly balanced the fact of contributory negligence is not established, and upon this issue the verdict should be for the plaintiff. The only difference in this respect in an action brought against a defendant who does not come within the class enumerated in such section 3148, is that in such case the fact of injury is not made *prima facie* evidence of the negligence of the defendant.

To the jury is given the function of passing upon the credibility of the witnesses and the weight of the evidence, and it is error for the trial judge to usurp such function.

It is the duty of the trial judge to charge the jury upon the law of the case, and, since the jury must take the law from the trial judge and be guided by his utterances, it is of the utmost importance that he should charge the law applicable to the issues being tried correctly.

Questions of negligence and of contributory negligence are for the jury to determine when the facts are controverted.

A charge or instruction should not impose either upon the plaintiff or defendant a duty not shown to exist.

Where there is evidence to sustain the verdict, and no material error of law or procedure appear, the judgment will be affirmed, but, where it appears that an erroneous charge could reasonably have misled or confused the jury to the injury of the party complaining of it, a new trial will be granted.

In an action against an electric railroad company, seeking to recover damages for injuries alleged to have been occasioned by the negligence of the defendant company, where an instruction is given which erroneously defines the duty of the plaintiff to such defendant company or imposes an unnecessary or improper burden upon the plaintiff, the judgment rendered in favor of such defendant company should be reversed, unless

the evidence adduced was of such a character as would not reasonably have warranted any other than a verdict for the defendant company.

Contradictory charges or instructions should not be given, as their tendency necessarily is to confuse and mislead the jury.

Only such instructions should be requested by either the plaintiff or defendant as bear upon the law of the case and will aid the jury in trying and determining the issues, as unnecessary instructions afford opportunities for error, and are burdensome to the courts. When a large number of instructions are given, they are also well calculated to confuse and mislead the jury.

2. **USE OF HIGHWAYS; RIGHT OF STREET RAILWAY COMPANY; DUTY OF DRIVER OF VEHICLE TO STOP, LOOK AND LISTEN.**—Owners and operators of automobiles have the same right to use the streets and highways that owners and operators of other vehicles possess. All alike must exercise reasonable care and caution for the safety of others.

While the right of a street railway to that part of the street on which its tracks are laid is not an exclusive one, yet the rights are superior to those of the general public, except at street crossings, where the rights of both are equal.

The driver of a vehicle, whether automobile, carriage, wagon or other kind, about to cross a street railway track at a street crossing in a city, is not in every case required as a matter of law to stop, look and listen.

(Syllabus by the Court.)

PLAINTIFF brings error from judgment for defendant. Reported 57 So. 233.

V. H. Knight and *H. S. Hampton*, for plaintiff in error.

P. O. Knight, for defendant in error.

Opinion by SHACKLEFORD, J.:

An action was brought by the plaintiff in error against the defendant in error to recover damages for personal injuries and for injury to the plaintiff's automobile, in which he was riding and which he was operating at the time, alleged to have been received as the result of the collision of one of the cars of the defendant with the automobile of the plaintiff, at the intersection of Marion and Scott streets in the city of Tampa, which collision is alleged to have been caused by the negligence of the defendant.

The first error assigned is based upon the sustaining of a demurrer to the declaration, but, in view of the fact that the plaintiff filed an amended declaration, under which he could offer all the evidence admissible under the original declaration and no additional burden was thereby imposed on him, we must hold that the error, if any, in such ruling was harmless.

We consider it unnecessary to set out the pleadings. The defendant filed a plea of not guilty, and also two other pleas to which a demurrer was sustained. No plea of contributory negligence was filed. A trial was had, which resulted in a verdict and judgment in favor of the defendant. This judgment the plaintiff has brought here for review by writ of error and has assigned twenty-six errors. In view of the conclusion which we have reached, it becomes unnecessary to discuss these assignments in detail. We believe that the application of a few well-settled principles will enable us to make a proper disposition of the case.

In an action brought against a railroad company by one seeking to recover damages for injuries, whether to his person or his property, alleged to have been occasioned by the negligence of the defendant, there can be no recovery if the evidence establishes the fact that the plaintiff's own negligence was the sole cause of the injury, and this may be shown under the general issue. *Atlantic Coast Line R. R. Co. v. Crosby*, 53 Fla. 400, 43 South. 318, and *Seaboard Air Line Ry. v. Rentz*, 60 Fla. 449, 54 South. 20.

Chapter 4071 of the Laws of Florida, Acts of 1891, p. 113, changed the common-law rule in certain particulars that affect the result in this case. We have had occasion several times to construe the different sections of this chapter, so shall not go into any discussion thereof now. It is sufficient to say that section 2 thereof, which appears in the General Statutes of 1906 as section 3149, provides that, if the plaintiff and the defendant company are both in fault, the plaintiff may recover,

"but the damages shall be diminished or increased by the jury in proportion to the amount of default attributable to him."

See *Atlantic Coast Line R. R. Co. v. Crosby*, *supra*; *Atlantic Coast Line R. R. Co. v. McCormick*, 59 Fla. 121, 52 South. 712; *Florida East Coast Ry. Co. v. Smith*, 61 Fla. —, 55 South. 871. In the last-cited case, following prior decisions, it was held that,

"while contributory negligence as a defense to an action in tort should be pleaded and proven, yet, where it appears from the proofs of the plaintiff without objection, the defendant may avail itself of the same under the general issue."

Section 3148 of the General Statutes of 1906 creates the presumption that a person injured by the operation of a railroad was thus injured through the negligence of such road, which presumption

it is incumbent upon the defendant railroad company, in an action brought against it, to overcome by proofs. *Atlantic Coast Line R. R. Co. v. Crosby, supra*, and *Pensacola Electric Co. v. Bissett*, 59 Fla. 360, 52 South. 367. It is also true that in any action seeking to recover damages for injuries to person or property, whether brought against a railroad company, in which action the above-cited statute would apply, or against some other defendant, alleged to have been caused by the negligence of the defendant, all that may properly be required of the plaintiff is to establish by competent evidence the negligence of the defendant in causing the injury, as laid in the declaration. The plaintiff cannot be required to show that he was not guilty of contributory negligence, such burden being cast upon the defendant. Not only is it not essential that the whole evidence convince the jury that the plaintiff was not guilty of contributory negligence, the burden is the other way, and if the evidence is evenly balanced the fact of contributory negligence is not established, and upon this issue the verdict should be for the plaintiff. *Hainlin v. Budge*, 56 Fla. 342, 47 South. 825. The only difference in this respect in an action brought against a defendant who does not come within the class enumerated in section 3148 of the General Statutes of 1906 is that in such case the fact of injury is not made *prima facie* evidence of the negligence of the defendant. See *Pensacola Electric Co. v. Alexander*, 58 Fla. 337, 50 South. 673, and *Seaboard Air Line Ry. v. Smith*, 53 Fla. 375, 43 South. 235, and cases there cited.

It is elementary that to the jury is given the function of passing upon the credibility of the witnesses and the weight of the evidence, and it is error for the trial judge to trench upon or usurp such function. See *Garner v. State*, 28 Fla. 113, 9 South. 835, 29 Am. St. Rep. 232, and *Roberson v. State*, 40 Fla. 509, 24 South. 474. Section 1496 of the General Statutes of 1906, which we have several times construed, provides as follows:

"1496 (1088). Duty of judge to charge jury. — Upon the trial of all cases at law in the several courts of this State, the judge presiding on such trial shall charge the jury only upon the law of the case; that is, upon some point or points of law arising in the trial of said cause.

"If, however, upon the conclusion of the argument of counsel in any civil case, after all the evidence shall have been submitted, it be apparent to the judge of the Circuit Court, or County Court, that no evidence has been submitted upon which the jury could lawfully find a verdict for one party, the judge may direct the jury to find a verdict for the opposite party."

Although it may have been true in England at one time, as the old couplet has it:

“For twelve honest men have decided the cause
Who are judges alike of the facts and the laws.”

— Lord Mansfield’s variant of the second line.

“Who are judges of facts, but not judges of laws,” describes the situation as it has always existed in this State. This court has carefully guarded these respective functions of the trial judge and the jury, as a glance through its decisions will readily show. Since the jury must take the law from the trial judge and be guided by its utterances, it is of the utmost importance that the trial judge should charge the law applicable to the issues being tried correctly. We have also repeatedly held that questions of negligence and of contributory negligence are for the jury to determine when the facts are controverted, as in the instant case. See *German-American Lumber Co. v. Brock*, 55 Fla. 577, 46 South. 740. We have also held that “A charge should not impose upon a defendant a duty not shown to exist.” *Escambia County Electric Light & P. Co. v. Sutherland*, 61 Fla. —, 55 South. 83. It necessarily follows that neither should a charge impose upon a plaintiff a duty not shown to exist. We have also repeatedly held that

“where there is evidence to sustain the verdict, and no material errors of law or procedure appear, the judgment will be affirmed.”

Seaboard Air Line Ry. v. Moseley, 60 Fla. 186, 53 South. 718. We have likewise held that

“where it appears that an erroneous charge could reasonably have misled or confused the jury to the injury of the party complaining of it, a new trial will be granted.”

Atlantic Coast Line R. R. Co. v. Wallace, 61 Fla. —, 54 South. 893. We held that,

“where an error has been committed in defining the duty of a defendant electric company to its patrons to be harmless to the defendant, the evidence must be of such a character as would not reasonably have warranted any other than a verdict for the plaintiff.”

Escambia County Electric Light & Power Co. v. Sutherland, *supra*. The principle is likewise applicable in an action against an elec-

tric railroad company, seeking to recover damages for injuries alleged to have been occasioned by the negligence of the defendant company, where an instruction is given which erroneously defines the duty of the plaintiff to such defendant company or imposes an unnecessary or improper burden upon the plaintiff.

We have given all the evidence adduced our careful examination, but it would not be proper for us to express an opinion thereon, in view of the fact that we have reached the conclusion that the judgment must be reversed for certain errors which were committed by the trial judge in his instruction to the jury. It is sufficient for us to say that, as is usually true in these negligence cases, upon a number of points the evidence is conflicting, therefore we are unable to declare that the erroneous instructions, some of which we shall set out, were harmless to the plaintiff. Under proper instructions, we cannot say what verdict the jury might have rendered, acting as reasonable men, the test which we have applied. See *Pensacola Electric Co. v. Bissett*, 59 Fla. 360, 52 South. 367.

A large number of instructions were given, both at the request of the plaintiff and of the defendant, some of which are of a conflicting and contradictory nature and were well calculated to confuse and mislead the jury, but we shall not undertake to point out and discuss this phase. Again and again we have expressed our disapproval of the practice of requesting an unnecessarily large number of instructions. See *Gracy v. Atlantic Coast Line R. R. Co.*, 53 Fla. 350, 42 South. 903; *Atlantic Coast Line R. R. Co. v. Crosby*, 53 Fla. 400, 42 South. 318; *McCall v. State*, 55 Fla. 108, 46 South. 321. We would also refer to *Kinney v. City of Springfield*, 35 Mo. App. 97.

From the different instructions given at the request of the defendant we single out and copy the following, each of which is assigned as error:

"(11) The court charges you that it is the law that it is the duty of a traveler to exercise his sense of sight and hearing, and to look and listen for the approaching street car, and that his failure to do so is negligence. And, if necessary, it is also his duty to stop. (Exceptions noted to charge.)"

"(14) The court instructs you that it was the duty of the plaintiff, upon approaching the track of the defendant, and before going on the same, to exercise a proper degree of care and caution, and to have made a vigilant use of his eyes and ears for the purpose of ascertaining whether or not a street car was approaching, because it was negligence in the plaintiff to approach the track, or to walk or drive along or across the same, without first stopping and

looking up and down, because he was bound to presume that a car might be approaching.

"(15) With the coming into use of the automobile new questions as to reciprocal rights and duties of the public and that vehicle have an dwell continue to arise. At no place are those relations more important than at the grade crossings of railroads. The main consideration hitherto with reference to such crossings has been the danger to those crossings. A ponderous, swiftly moving locomotive, followed by a heavy train, is subject to slight danger by a crossing foot passenger, or a span of horses and a vehicle; but, when the passing vehicle is a ponderous steel structure, it threatens not only the safety of its own occupants, but also those on the colliding train. And when to the perfect control of such a machine is added the factor of high speed, the temptation to dash over a track at terrific speed makes the automobile, unless carefully controlled, a new and grave element of crossing danger. On the other hand, when properly controlled, this powerful machine possesses capabilities contributing to safety. When a driver of horses attempts to make a crossing, and is suddenly confronted by a train, difficulties face him to which the automobile is not subject. He cannot drive close to the track or stop there without risk to his horses, frightening, shying or overturning his vehicle. He cannot well leave his horses standing, and if he goes forward to the track to get an unobstructed view, and look for coming trains, he might have to lead his horses or team with him. These precautions the automobile driver can take, carefully and deliberately, and without the nervousness communicated by a frightened horse. It will thus be seen an automobile driver has the opportunity, if the situation is one of uncertainty, to settle that uncertainty on the side of safety, with less inconvenience, no danger and more safety than the driver of a horse. Such being the case, the law, both from the standpoint of his own safety and the menace his machine is to the safety of others, should, in meeting these new conditions, rigidly hold the automobile driver to such reasonable care and precaution as to go to his own safety and that of the public. If the law demands such care, and those crossing make such care, and not chance, their protection, the possibilities of automobile crossings accidents will be minimized. The duty of an automobile driver approaching tracks where there is restricted vision, to stop, look and listen, and to do so at a time and place where looking and where listening will be effective is a positive duty."

"(17) The duty of an automobile driver approaching a railroad crossing, where there is restricted vision, to stop, look and listen, and to do so at a time and place where stopping and where looking and where listening will be effective, is a positive duty."

We shall treat these assignments together. It will be observed that they instruct the jury that as a matter of law it is

"the duty of an automobile driver approaching a railroad crossing, where there is restricted vision, to stop, look and listen, and to do so at a time and place where stopping and where looking and where listening will be effective, is a positive duty,"

also that

"it was negligence in the plaintiff to approach the track, or to walk or drive along or across the same without first stopping and looking up and down, because he was bound to presume that a car might be approaching."

This doctrine was not only stated but repeated and emphasized. The instructions also lay special stress upon the duty of an automobile driver in approaching tracks to stop, look and listen, as distinguished from the driver of other kinds of vehicles.

The defects which vitiate these instructions are so obvious that extended discussion is not required. It was held in *House v. Cramer*, 134 Iowa 374, 112 N. W. 3, 10 L. R. A. (N. S.) 655, 13 Am. & Eng. Ann. Cas. 461, that

"operators of automobiles have the same right to use the highways that drivers of horses or other vehicles possess, but they must exercise reasonable caution for the safety of others, and in determining the degree of care required the character of the machine, its speed, size, appearance, manner of movement, noise and the like may be taken into consideration."

Also, see note to this case on page 463 of 13 Am. & Eng. Ann. Cas., where a number of authorities will be found collected. It is said in *Cunningham v. Castle*, 127 App. Div. 580, text 586, 111 N. Y. Supp. 1057, 1061:

"The automobile is not necessarily a dangerous device. It is an ordinary vehicle of pleasure and business. It is no more dangerous *per se* than a team of horses and a carriage, or a gun, or a sailboat, or a motor launch."

It was said in *City of Chicago v. Banker*, 112 Ill. App. 94, text 99:

"The fact that an automobile is a comparatively new vehicle is beside the question. The use of the streets must be extended to meet the modern means of locomotion."

The discussion in *Moses v. Pittsburg F. W. & C. R. R. Co.*, 21 Ill. 516, as to the right to the use of streets will be found profitable. Also, see *Brinkman v. Pacholke*, 41 Ind. App. 662, text 666, 84 N. E. 762. As was said in the note in 13 Am. & Eng. Ann. Cas., referred to above:

"Accordingly it has been generally held that the owner of an automobile has the same right as the owner of other vehicles to use highways or streets, and that like them he must exercise reasonable care and caution for the safety of others."

In fine, whatever may be our individual feelings toward the automobile, and we recognize the fact that some view it with less and some with more favor, it would seem to have come to stay with us, and we would hardly be warranted in classing it as "an undesirable citizen," and we most assuredly cannot treat it as an outlaw.

It is stated, we think correctly, in Clark's Street Railway Accident Law, § 103:

"While it is clear that the right of a street railway to that part of the street on which its tracks are laid is not an exclusive one, it is generally held that its rights are superior to those of the general public, except at street crossings, where the rights of both are equal."

Also, see Nellis on Street Railroad Accident Law, 270, 36 Cyc. 1495, and authorities cited in the notes.

While the authorities are not in entire harmony upon the point, the decided weight of authority is to the effect that the driver of a vehicle about to cross a street railway track is not, in every case, required as a matter of law to stop, look and listen. See Clark on Street Railway Accident Law, p. 293; Nellis on Street Railway Accident Law, 353 *et seq.*; 36 Cyc. 1537 to 1541. The law is thus stated by Judge Taft in *Cincinnati St. Ry. Co. v. Whitcomb*, 66 Fed. 915, text 919, 14 C. C. A. 183, 187:

"The exceptions to the charge of the court are very voluminous, very long, and many of them are quite frivolous. Generally, the exceptions to the charge may be comprehended under three heads: First, the court was asked to charge the jury that it was the absolute duty of Whitcomb not only to look and listen for the coming of the car, but also to stop, look and listen. It certainly is not the law that persons crossing street railway tracks in a city in a vehicle are obliged to stop before crossing, unless there is some circumstance which would make that ordinarily prudent. We have already held in the cases of *Railroad Co. v. Farra*, 66 Fed. 496, 13 C. C. A. 602, and *McGhee v. White*, 66 Fed. 502, 13 C. C. A. 608, that it is not the absolute duty, as matter of law, for one crossing a steam railway track to stop, look and listen, but that the necessity for stopping is to be determined by the circumstances, and is usually a question to be left to the jury, and so the court below in this case treated it. The rule cannot be stricter in respect to crossing a street railway than in crossing a steam railroad. The cases relied upon are chiefly Pennsylvania cases. In that State the Supreme Court has adopted a rule of law requiring every person to stop, look and listen before crossing the railroad track. This rule is not followed in other States, and certainly is not the law in the federal courts."

The Supreme Court of Massachusetts, in *Robbins v. Springfield St. Ry. Co.*, 165 Mass. 30, text 36, 42 N. E. 334, 335, has stated its view of the law as follows:

"The decisions of this court show that a distinction has been taken with respect to the duty to look and listen when crossing the tracks of a steam railroad where a railroad train has the exclusive right of way, and when crossing the tracks of a street railway company in a public street where the cars have not an exclusive right of way, but are run in the street in common with other vehicles and with travelers. The fact that the power used by the street railway company is electricity instead of that of horses has not been deemed by the court sufficient to make the rule of law which has been laid down concerning the crossing of the track of a steam railroad exactly applicable to a street railway."

We would also refer to *Tacoma Ry. & Power Co. v. Hays*, 110 Fed. 496, 49 C. C. A. 115, and *Chicago & Joliet Ry. Co. v. Wanic*, 230 Ill. 530, 82 N. E. 821, 15 L. R. A. (N. S.) 1167. The cases of *Hackney v. West Jersey & S. R. Co.*, 78 N. J. Law 454, 78 Atl. 747, 32 L. R. A. (N. S.) 266, and *Phillips v. Washington & Rockville Ry. Co.*, 104 Md. 455, 65 Atl. 422, 10 Am. & Eng. Ann. Cas. 334, especially the respective notes appended thereto, will prove serviceable.

There is no necessity for discussing the other assignments. It necessarily follows from what we have said that the judgment must be reversed.

WHITFIELD, C. J., and COCKRELL, J., concur.

TAYLOR, HOCKER and PARKHILL, JJ., concur in the opinion.

White v. South Covington & C. St. Ry. Co.

(Kentucky — Court of Appeals.)

1. **PASSENGER ASSAULTED BY CONDUCTOR; EXEMPLARY DAMAGES.** — Exemplary damages may be awarded to a passenger assaulted by a conductor where the jury believes that the assault was wantonly and maliciously inflicted.
2. **WHEN COMPANY LIABLE FOR ASSAULT COMMITTED BY CONDUCTOR.** — A street railway company is liable for assault upon a passenger by the conductor in charge of a car, whether the assault is committed in the interest of the company or as the result of personal malice. Mere insulting language will not excuse an assault.

EXEMPLARY DAMAGES FOR ASSAULT OR EJECTION OF PASSENGER.

If a servant of a street railway company maliciously, wilfully or wantonly assaults a passenger upon a street car, or maliciously, wilfully or wantonly ejects him therefrom when he is entitled to ride, the passenger will generally be entitled to recover exemplary or punitive, as well as compensatory, damages in an action by him against the company.

The company is liable if a conductor uses more force than necessary in repelling an attack made upon him by a passenger.

3. PLEADING; BURDEN OF PROOF. — Where, in action for an assault upon a passenger by a conductor, it is alleged in the petition that the conductor made the assault on the plaintiff while acting in the scope of his employment, and this was expressly denied by the answer, the burden of proof is upon the plaintiff.

PLAINTIFF appeals from a judgment for defendant. Reported 150 S. W. 837.

Howard M. Benton and *Judson A. Shuey*, both of Newport, for appellant.

L. J. Crawford and *L. J. Crawford, Jr.*, both of Newport, for appellee.

Opinion by NUNN, J.:

Appellant boarded one of appellee's cars in Cincinnati, Ohio, to go to his home across the river in Kentucky; and, according to appellant, while he was going through what is known as "Taylor's Bottom," before reaching Bellevue, he belched up a part of a

Alabama. — Birmingham Ry., etc., Power Co., 45 So. 164.

Arkansas. — Little Rock, etc., Elec. Co. v. Goerner, 80 Ark. 158, 95 S. W. 1007, 7 L. R. A. (N. S.) 97.

Georgia. — City & Suburban Ry. Co. v. Brauss, 70 Ga. 368.

Illinois. — Chicago Consol. Tract. Co. v. Mahoney, 230 Ill. 562; *Amann v. Chicago Consol. Tract. Co.*, 243 Ill. 263, 90 N. E. 673; *Kiley v. Chicago City Ry. Co.*, 90 Ill. App. 275, aff'd, 189 Ill. 384, 59 N. E. 794, 52 L. R. A. 626, 82 Am. St. Rep. 460.

Indiana. — Citizens' St. R. Co. v. Willoeby, 134 Ind. 563, 33 N. E. 627.

Kentucky. — Lexington Ry. Co. v. Cozine, 111 Ky. 799, 23 Ky. L. Rep. 1137, 64 S. W. 848, 98 Am. St. Rep. 430; Lexington Ry. Co. v. O'Brien, 3 St. Ry. Rep. 270, 27 Ky. L. Rep. 336, 84 S. W. 1170.

Minnesota. — Berg v. St. Paul City Ry. Co., 96 Minn. 513, 105 N. W. 191.

Mississippi. — Southern, etc., Tract. Co. v. Compton, 86 Miss. 269, 38 So. 629.

Missouri. — McNamara v. St. Louis Transit Co., 182 Mo. 676, 3 St. Ry. Rep. 514, 81 S. W. 880; *Tanger v. Southwest Missouri Elec. Ry. Co.*, 85 Mo. App. 28; *Ickenroth v. St. Louis Transit Co.*, 102 Mo. App. 597, 77 S. W. 162; *Summerfield v. St. Louis Transit Co.*, 108 Mo. App. 718, 84 S. W. 172; *Madigan v. St. Louis Transit Co.*, 5 St. Ry. Rep. 629, 117 Mo. App. 118, 93 S. W. 316; *Shelby v. Metropolitan St. Ry. Co.*, 141 Mo. App. 514, 125 S. W. 1189; *Mills v. Metropolitan St. Ry. Co.*, 157 Mo. App. 529, 137 S. W. 1006.

Ohio. — Scioto Valley Tract. Co. v. Crayvill, 29 Ohio Cir. Ct. 95; *Ann Arbor Ry. Co. v. Amos*, 97 N. E. 978.

sardine sandwich he had eaten just before getting on the car, and threw it out of the window to his right, but, according to appellee, he vomited and threw a part of it on his seat and on the car floor. Soon after this belching or vomiting, the conductor approached him, took hold of his shoulder, shook him, and told him to go to the back platform; that that was the place for him. The conductor started towards the back platform and appellant followed him, and, according to his testimony, he asked the conductor what he shook him for, and the conductor answered and told him, if he wanted to vomit, to vomit over the railing. All the witnesses testified that there were some angry words passed between them, and that the conductor struck appellant twice, breaking his nose, loosening some of his teeth and blacking one of his eyes, when, according to appellant and his witnesses, appellant had done nothing to the conductor to cause him to so treat him. The testimony of appellee tended to show that appellant's conduct and language were insulting and boisterous, and that appellant struck, or attempted to strike, the conductor before the conductor hit him. We have stated only enough of the substance of the testimony to show what issues of fact were made.

Pennsylvania.—*Artherholt v. Erie Elec. Motor Co.*, 27 Pa. Super. Ct. 141; *Adams v. Beaver Valley Tract. Co.*, 41 Pa. Super. Ct. 403.

Tennessee.—See *Knoxville Tract. Co. v. Lane*, 103 Tenn. 376, 53 S. W. 557, 46 L. R. A. 549.

In *Berg v. St. Paul City Ry. Co.*, 96 Minn. 513, 105 N. W. 191, the court said: "Where the act is shown to have been wanton, or malicious, or fraudulent, or oppressive, and of such a character as to indicate that he acted with a reckless disregard of the rights of the plaintiff, the jury in their discretion may award to the plaintiff, in addition to his compensatory damages, such further reasonable sum as exemplary damages as they deem just; but the plaintiff is not entitled to such damages as a matter of legal right in any case." In *McNamara v. St. Louis Transit Co.*, 3 St. Ry. Rep. 514, 182 Mo. 676, 81 S. W. 880, the court said: "To entitle the plaintiff to punitive or exemplary damages the act complained of must have been maliciously done, for the law does not punish civilly a person for doing an unintentional wrong. It compensates the person wronged, but inflicts no punishment upon the offender."

To entitle the plaintiff to exemplary damages it is not necessary to prove "express malice," if the proof shows that the conductor acted with a wanton, wilful or reckless disregard of the plaintiff's rights; in such case malice will be inferred. *Chicago Consol. Tract. Co. v. Mahoney*, 230 Ill. 562. Express or actual malice can but rarely be proven directly, but malice may be and commonly is inferred from the wilful doing of a wrongful act. *Summerfield v. St. Louis Transit Co.*, 108 Mo. App. 718, 84 S. W. 172.

The court gave the jury three instructions. The first was objected to by appellant, and the second, which was upon the measure of damages, was objected to by appellee because it allowed the jury to find exemplary damages for appellant if it believed the injuries were wantonly and maliciously inflicted upon him by appellee's servant. We have not been cited to, nor do we know of, any authority condemning this instruction. All the authorities in this State upon the subject sustain it.

The first instruction is as follows:

"If the jury believe from the evidence that on the 17th day of July, 1911, while plaintiff was a passenger upon defendant's car, the conductor in charge and control of said car, not in his necessary or to him apparently necessary self-defense, assaulted, beat and bruised the plaintiff, and as the direct and proximate result thereof the plaintiff was injured, they will find for the plaintiff. On the other hand, if the jury believe from the evidence that the plaintiff on the occasion in question was disorderly or abusive and insulting to the conductor then and there in charge and control of said car, and the said conductor used no more force than was reasonably necessary to eject said plaintiff from said car, or if the jury believe from the evidence that on the occasion in question the plaintiff himself was the aggressor, and while on the car as a passenger thereof cursed and abused the conductor, or assaulted him,

Punitive damages may be awarded where it appeared that the conductor, using obscene language, grasped a passenger by the neck and threw him off the car. *Amann v. Chicago Consol. Tract. Co.*, 243 Ill. 263, 90 N. E. 673. The intentional kicking, without just cause or excuse, by a street car conductor, of a boy who is attempting to board the car to become a passenger, will justify an award of exemplary damages, although the conductor thought the boy was trying to steal a ride. *McNamara v. St. Louis Transit Co.*, 182 Mo. 676, 81 S. W. 880, 66 L. R. A. 486. Where the conductor wilfully assaulted the passenger because the latter inadvertently rang up a fare, exemplary damages are proper. *Artherholt v. Erie Elec. Motor Co.*, 27 Pa. Super. Ct. 141. Where the conductor and the plaintiff had an altercation and thereafter the conductor followed the passenger to the steps of the car and struck him with an iron bar as he was alighting, exemplary damages may be allowed. *Neuer v. Metropolitan St. Ry. Co.*, 143 Mo. App. 402, 127 S. W. 669.

A street railway company is liable for punitive damages where its conductor wilfully refuses to honor a valid transfer under circumstances of insult and aggravation, followed by an assault upon the passenger. *Little Rock, etc., Elec. Co. v. Goerner*, 80 Ark. 158, 95 S. W. 1007, 7 L. R. A. 97. Where the acts of the servants of a street railway company in ejecting a passenger are wilful, and with a wanton disregard of the rights of others, exemplary damages may be allowed. *Summerfield v. St. Louis Transit Co.*, 108 Mo. App. 718, 84 S. W. 172. Where a passenger was ejected in the middle of the street in the mud, when there was a crossing within a short distance, punitive damages may properly be allowed. *City & Suburban Ry. Co. v. Brauss*, 70 Ga.

the conductor had a right to defend himself, and even though they may believe from the evidence under such a state of case that more force was used by the conductor than was necessary to defend himself, if the plaintiff was the aggressor they will find for the defendant."

It was the duty of appellee to use care to safely transport appellant to his destination, and to protect him from insult and injury at the hands of others or its servants.

In 6 Cyc., p. 601, it is said:

" * * * Therefore the carrier is liable for assault upon a passenger by the conductor in charge of the train or car in which the passenger is riding, whether the assault is in the supposed interest and discharge of a supposed duty to the carrier or is made as the result of personal malice or desire for revenge for an affront." etc.

See also the cases of *Sherley v. Billings*, 8 Bush 147, 8 Am. Rep. 451, and *L. & N. R. R. Co. v. Donaldson*, 43 S. W. 439, 19 Ky. Law Rep. 1384. The rule above stated, of course, only applies when the assault takes place while the person is actually a passenger, and, of course, as stated in 6 Cyc., p. 602:

"If the servant of the carrier acts only in justifiable self-defense as against an assault by the passenger, the carrier will not be liable; but no provocation, consisting in mere insulting language, will excuse an assault."

368. In a case where the mere removal of a passenger from the car might be lawful, if the conductor uses excessive force or his acts are wanton, exemplary damages may be recovered. *Tanger v. Southwest Missouri Elec. Ry. Co.*, 85 Mo. App. 28. Where the expulsion of a female from a street car in the presence of a score of people was wrongful, and to some extent rough and forcible, the question of exemplary damages may be submitted to the jury. *Ann Arbor Ry. Co. v. Amos*, (Ohio) 97 N. E. 978.

Where a passenger is ejected by a conductor through an honest mistake of the latter, and excessive force is not used, though the ejection is wrongful, the passenger cannot generally recover exemplary damages in action for the injuries sustained.

Arkansas.—*Little Rock Tract. & Elec. Co. v. Winn*, 4 St. Ry. Rep. 42, 75 Ark. 529, 87 S. W. 1025.

Colorado.—*Denver Tramway Co. v. Cloud*, 6 Colo. App. 445, 40 Pac. 779.

Minnesota.—*Pine v. St. Paul City Ry. Co.*, 50 Minn. 144, 52 N. W. 392, 16 L. R. A. 347; *Berg v. St. Paul City Ry. Co.*, 96 Minn. 513, 105 N. W. 191.

Mississippi.—*Vicksburg R. Power & Mfg. Co. v. Marlett*, 78 Miss. 872, 29 So. 62.

Missouri.—*Madigan v. St. Louis Transit Co.*, 5 St. Ry. Rep. 629, 117 Mo. App. 118, 93 S. W. 316.

New York.—*Hamilton v. Third Ave. R. Co.*, 53 N. Y. 25; *Muckle v. Rochester Ry. Co.*, 79 Hun 32, 29 N. Y. Supp. 732, 6 St. Ry. Rep. 193; *Eddy v. Syracuse Rapid Transit Ry. Co.*, 50 App. Div. 109, 63 N. Y. Supp. 645. See

In the case of *St. Louis Southwestern Ry. Co. v. Berger*, 64 Ark. 613, 44 S. W. 809, 39 L. R. A. 784, it is stated, in effect, that, if a conductor uses force greatly in excess of that necessary or which would appear to a reasonably prudent person under like circumstances to be necessary in repelling an attack made on him by a passenger, the company is liable. In the case of *B. & O. R. R. Co. v. Barger*, 80 Md. 23, 30 Atl. 560, 26 L. R. A. 220, 45 Am. St. Rep. 319, the court said, in effect, that an assault by a conductor upon a passenger is not excused or the liability of the carrier defeated by the fact that the passenger had used grossly profane and abusive language to the conductor without provocation. See also *I. C. R. Co. v. Gunterman*, 135 Ky. 438, 122 S. W. 514. These authorities appear to be in line with all the authorities on the subject, except the case of *Wise v. South Covington & Cincinnati Ry. Co.*, 17 Ky. Law Rep. 1359, 34 S. W. 894. That case was appealed to this court twice, and Wise was appellant both times, and this court reversed the lower court each time. A reversal was had on the second appeal because, as said by the court:

"On the return of the case the instructions given authorized an assault by the defendant's agent on the plaintiff, if he (Wise) first used indecent or

also *Rowe v. Brooklyn H. R. Co.*, 71 App. Div. 474, 75 N. Y. Supp. 893; *Jacobs v. Third Ave. R. Co.*, 75 N. Y. Supp. 679.

Ohio. — *Carr v. Toledo Trac. Co.*, 10 Ohio Cir. Dec. 296.

Where, through an error of a former conductor or for some other reason, a conductor refuses in good faith to accept a transfer tendered to him and ejects the passenger, exemplary damages are not proper. *Little Rock Trac. & Elec. Co. v. Winn*, 4 St. Ry. Rep. 42, 75 Ark. 529, 87 S. W. 1025; *Vicksburg R. Power & Mfg. Co. v. Marlett*, 78 Miss. 872, 29 So. 62; *Muckle v. Rochester Ry. Co.*, 79 Hun 32, 29 N. Y. Supp. 732, 6 St. Ry. Rep. 193; *Eddy v. Syracuse Rapid Transit Ry. Co.*, 50 App. Div. 109, 63 N. Y. Supp. 645; *Carr v. Toledo Trac. Co.*, 10 Ohio Cir. Dec. 296.

If a conductor, using no more force than is necessary, ejects a passenger under the mistaken belief that such passenger has not paid his fare, no case is presented for the allowance of punitive damages. *Madigan v. St. Louis Transit Co.*, 5 St. Ry. Rep. 629, 117 Mo. App. 118, 93 S. W. 316.

Where a conductor, without previous ill will and without unkind words, declines to receive an intoxicated man as a passenger, and when the latter attempts to board the car pushes him on the breast so that he falls and is injured, exemplary damages are not properly awarded. *Greenwood v. Union Tract. Co.*, 30 Pa. Super. Ct. 488.

Where a passenger brings an action for ejection in the form of an action for breach of the carrier's contract to carry him, exemplary damages cannot be recovered. *Moon v. Interurban St. Ry. Co.*, 85 N. Y. Supp. 363.

abusive language, calculated to provoke the agent or excite him to the commission of the wrong, if any, complained of by the plaintiff."

This ruling is in line with the authorities above cited, but the opinion proceeded by saying that the jury should have been instructed as follows:

"For the plaintiff the jury should have been told that if the plaintiff, whilst on defendant's car as a passenger, was cursed and abused by its conductor, the company is liable; and if the abuse and maltreatment, if any existed, was continued to the sidewalk, and the plaintiff knocked down and maltreated by the conductor, the company is responsible, unless the jury further believe the plaintiff to have been the aggressor, and while on the car cursed and abused the conductor or assaulted him, either on or off the car, then the conductor had the right to defend himself, and, further, under such a state of case, if more force was used by the conductor than was necessary to defend himself, if the plaintiff was the aggressor, the company is not responsible. This, it seems to us, presents the law of the case."

We presume that by inadvertence the court used "or," instead of "and," in the phrase "cursed and abused the conductor or assaulted him," or that the mistake was made by the printer. The same must be true of the omission of the word "no" from between the words "if" and "more" in the phrase "if more force was

In *Hamilton v. Third Ave. R. Co.*, 53 N. Y. 25, the court said: "The object of damages is to punish the defendant and to restrain him and others from doing the like acts in future. But when there has been no intentional offense committed, when a party has not only done what he honestly believes to be his duty, punishment is not deserved. There is no occasion for an example, for none is necessary. It is only to cases of moral wrong, recklessness or malice that this public consideration applies. In such cases the law uses the suit of a private party as an instrument of public protection, not for the sake of the suitor, but for that of the public. It is not the form of the action that gives the right to the jury to give punitive damages, but the moral culpability of the defendant."

In some jurisdictions a street railway company is not liable for exemplary damages on account of the wrongful act of its servant where it did not authorize or ratify the act. *Peterson v. Middlesex, etc., Trac. Co.*, 3 St. Ry. Rep. 622, 71 N. J. L. 296, 59 Atl. 456; *Robinson v. Superior Rapid Transit Ry. Co.*, 94 Wis. 345, 68 N. W. 961, 34 L. R. A. 205, 59 Am. St. Rep. 897; *Vassau v. Madison Elec. Ry. Co.*, 106 Wis. 301, 82 N. W. 152. See also *Di Benedetto v. Milwaukee, etc., Light Co.*, 149 Wis. 566, 136 N. W. 282. The retention of the servant committing the wrongful act in the employ of the street railway company, after knowledge of the act, is evidence tending to show a ratification of his act. *Robinson v. Superior Rapid Transit Ry. Co.*, 94 Wis. 345, 68 N. W. 961, 34 L. R. A. 205, 59 Am. St. Rep. 897.

used by the conductor than was necessary to defend himself, if the plaintiff was the aggressor." The last three words, "was the aggressor," should have been omitted from the phrase last copied, and the words, "if the plaintiff first assaulted the conductor," inserted in their stead. As it was, the jury might have concluded that Wise was the aggressor by the use of insulting language, for which the case was reversed on the second appeal. There should also be inserted for appellee between the words "conductor" and "than" the words, "exercising a reasonable judgment under the circumstances." To this extent the above opinion is modified. From what we have said it will be seen that the instruction given in this case is clearly erroneous. Instruction No. 3 is also erroneous, and should be modified so as to conform to the views expressed in this opinion.

Appellant also claims the court erred in placing the burden of proof upon him. It was alleged in the petition that the conductor made the assault on appellant while acting in the scope of his employment, and this was expressly denied by answer. Therefore, the burden was upon appellant in this respect at all events, and the court did not err in the matter. We are also unable to say that the court erred in allowing the amended answer to be filed.

In *New York* the recovery of exemplary damages against the master is not permitted for the act or negligence of his servant, unless he has authorized his misconduct, or ratified it, or unless the conduct complained of is that of the servant while he is in the service, after his unfitness for it is known to the latter. *Muckle v. Rochester Ry. Co.*, 79 Hun 32, 29 N. Y. Supp. 732, 6 St. Ry. Rep. 193. In *Eddy v. Syracuse Rapid Transit Ry. Co.*, 50 App. Div. 109, 63 N. Y. Supp. 645, the court said: "Exemplary damages are awarded by way of punishment, and to make an example of the defendant for a wilful or malicious wrongful act, and to prevent a repetition of the wrong by him, or for a wrongful act, though not wilful or malicious, yet of such a character as to indicate a reckless disregard of the rights of others. It would not be just to mulct a railroad company in exemplary damages for the first act of misconduct toward passengers by one of its conductors of previous good character and conduct, and whom it had no reason to believe would be guilty of misconduct. Well-considered precedents preclude the recovery of exemplary damages in such cases, and while public policy requires that the common carrier shall be held liable in compensatory damages for the wilful or malicious or wrongful acts of its conductors, no public policy demands the extension of the rule to authorize a recovery for exemplary damages when the employer has not been guilty of negligence in employing or retaining the conductor, and has not ratified his wrongful act."

It came rather late, but it does not appear that the lower court abused its discretion in the matter.

For these reasons, the judgment of the lower court is reversed, and cause remanded for further proceedings consistent with this opinion.

Ohio Electric Ry. Co. v. Village of Ottawa.

(Ohio — Supreme Court.)

AUTHORITY OF MUNICIPAL CORPORATION TO COMPEL STREET RAILWAY COMPANY TO LIGHT ITS BRIDGE WITHIN LIMITS OF SUCH CORPORATION; APPLICATION OF RAILROAD STATUTES TO STREET RAILROADS. — A municipal corporation has no authority to compel an interurban or street railroad company to light its bridge or railroad within the limits of such corporation. Section 1536—176, Revised Statutes 1908, applies only to steam railroads. (Syllabus by the Court.)

DEFENDANT brings error from reversal of judgment dismissing petition. Reported 97 N. E. 835.

STATEMENT OF FACTS BY THE COURT.

The village of Ottawa brought suit in the Court of Common Pleas of Putnam county against the Ohio Electric Railway Company to enforce the collection of a claim which the village had for lighting the tracks of the railway. The petition, after averring the incorporation of the parties, alleged that the defendant operated cars through said village on certain streets named; that the defendant had, prior to the commencement of the suit, succeeded to all the rights of a prior company owning said tracks; that on May 6, 1907, the council of the village passed an ordinance by the provisions of which it required the Lima & Toledo Traction Company, which was the predecessor in title to the defendant, to light its tracks within the limits of said village with forty candle power incandescent electric lights located as named in the ordinance; that a copy of the ordinance was served on the Lima & Toledo Traction Company; that upon failure of the company to light its tracks as

Municipal Regulation of Street Railway Companies. — As to the power of municipalities to regulate the operation of street railways, see 2 St. Ry. Rep. 460; 3 St. Ry. Rep. 810; 5 St. Ry. Rep. 156, 229; 6 St. Ry. Rep. 142, 290, 605; 7 St. Ry. Rep. 150, 642.

required by said ordinance the village furnished the same, and demand was made of the defendant for the cost of said lights, which was refused. To this petition defendant filed a general demurrer, which was sustained by the Common Pleas Court, and the petition dismissed. This judgment was reversed by the Circuit Court, and this proceeding is brought, seeking to reverse the judgment of the Circuit Court and affirm that of the Common Pleas.

J. W. Smith and Cable & Parmenter, for plaintiff in error.

Bailey & Leasure, for defendant in error.

Opinion by JOHNSON, J.:

The demurrer to the petition raised the question whether a municipal corporation has the power to compel an interurban railroad company, operating its cars by electricity, to light its railway or any portion thereof within the limits of the municipality, and there is no other question in this case.

Defendant in error contends that the ordinance requiring the lighting, which is referred to in the petition, was authorized by section 1536—176, Revised Statutes 1908, while plaintiff in error insists that the section applies only to steam railroads, and not to street or interurban railroads. The section referred to provides that, when deemed necessary by the council, it shall pass an ordinance requiring the individual or company owning or operating a bridge or railway within its limits to light such bridge or railway within a specified time. Section 1536—179, Revised Statutes, provides that on failure of the owner or operator to comply with the ordinance within the time fixed the municipality may light the bridge or railway at the expense of the owner or operator. The Legislature had enacted the original statute, from which section 1536—176 was taken, long before the existence of interurban or electric railroads. A consideration of the course of legislation on the subject, which has been gathered and set forth in the briefs of counsel, discloses that the General Assembly has not regarded interurban railroads as being included in the term "railroad," but that interurban railroads have been classed by the Legislature with street railroads.

This court has recognized and enforced that distinction and classification in a number of cases, and has held that statutes as to railroads do not apply to street railroads, unless clearly provided

by the statute itself. *Massillon Bridge Co. v. Cambria Iron Co.*, 59 Ohio St. 179, 52 N. E. 192; *State v. Traction Companies*, 64 Ohio St. 272, 60 N. E. 291; *Cincinnati, Lawrenceburg & Aurora Elec. St. Ry. Co. v. Lohe, Adm'r*, 68 Ohio St. 101, 67 N. E. 161, 67 L. R. A. 637; *Commissioners v. Traction Co.*, 75 Ohio St. 548, 80 N. E. 176. The construction and operation of interurban railroads are authorized by Act of May 17, 1894 (91 O. L. 285), being sections 3443—8 to 3443—13, Revised Statutes. Section 3443—13 provides:

“Such companies shall be subject to the same regulations now provided for street railroads, in so far as the same are applicable, and shall have all the powers in so far as they are applicable, that *other* street railroad companies have.”

The subsequent acts of the Legislature passed from time to time, since the enactment of the above statute, in reference to many different matters touching the subject, and in which the distinction pointed out has been preserved, sufficiently indicates its satisfaction with that distinction and classification.

Bridge Co. v. Cambria Iron Co., 59 Ohio St. 179, 52 N. E. 192, involved the construction of sections 3207 and 3208, Revised Statutes, relating to the building of railroads and liens for labor and material employed in such building. It was claimed that the word “railroad” included street railroads, and that the liens of laborers and materialmen were a first lien on a street and interurban railroad under the latter section. But it was held that the word “railroad” does not include street railroads, and the court state that interurban street railroads are not regarded by the Legislature as being included within the word “railroad.”

State v. Traction Companies, 64 Ohio St. 272, 60 N. E. 291, was a contest as to the right of an interurban railway company and a company operating a road on the streets of a city to enter into a traffic arrangement for the carriage of merchandise for hire on the street. The court in the opinion remark:

“It is well known that it was in response to a general demand for increased traffic facilities between cities and regions surrounding them that the Act of May 17, 1894, which is now included in sections 3443—8 to 3443—13, Revised Statutes, was enacted. In that act railways of this character, wherever located, are called street railways.”

Electric Street Ry. Co. v. Lohe, Adm'r, 68 Ohio St. 101, 67 N. E. 161, 67 L. R. A. 637, was an action for negligence of the com-

pany, by which a man standing on the platform of a moving car was killed. The court observed that the law of negligence, or rather of contributory negligence, of one riding on a platform of a street railroad car is not the same as of one riding on the platform of a steam railroad car, and then remark that interurban railroads are classed by the General Assembly as street railroads. The first proposition of law in the syllabus is:

"An interurban electric railroad is classed as a street railroad by the statutes of this State."

The subject was viewed from still another angle in *Commissioners v. Traction Co.*, 75 Ohio St. 548, 80 N. E. 176. There the question arose on the interpretation of the Act of April 25, 1904 (97 Ohio Laws, p. 546), "to provide how railroad and highway crossings may be constructed." It was contended by the commissioners that the word "railroad" in the statute included an interurban railroad. The court held otherwise, and pointed out that the various acts of the Legislature on the subject of railroads and street railroads show that in the opinion and intention of the Legislature the former term does not include roads of the latter description.

Counsel for defendant in error relies on the case of *State v. Cleveland*, 83 Ohio St. 61, 93 N. E. 467, 21 Ann. Cas. 1284, and the Circuit Court seems to have adopted the view of defendant in error as to the controlling effect of that case on the question made here. Defendant, Cleveland, was indicted for throwing a stone at a railroad car, and in a second count for throwing a stone at a street railway car. The proof showed that the car was in fact an interurban car. The statute under which the indictment was found, was originally passed January 30, 1879 (76 Ohio Laws, p. 11), and provided that "whoever throws any stone, * * * at any railroad car," etc. In 1884 (Act April 10, 1884 [81 Ohio Laws, p. 125]) the statute was amended, so as to include steam vessels or water craft, and, by Act March 12, 1887 (84 Ohio Laws, p. 81), also added, "at any cable railway car or street railway car." This court in the syllabus declare:

"A statute may include by inference a case not originally contemplated, when it deals with a genus within which a new species is brought. Thus a statute making it unlawful to wilfully throw a stone at a railroad car includes an interurban or traction railway, although such cars were not known or in use at the time the statute was enacted."

In the opinion, it is pointed out that the maxim, "*Expressio unius exclusio alterius*," is to be applied only as an aid in arriving at intention, and not to defeat the *apparent* intention; that the statute as originally enacted was broad enough to include any kind of railroad car; and that the subsequent enumeration of cable cars and street railway cars was not the addition of new things, but was intended to remove any question as to such cars being within the terms of the statute.

It is to be noted that the thing which the statute involved in that case dealt with was the *car* itself. The railroad car was regarded and interpreted in its ordinary and generic sense; that is, a car which is propelled by some motive power and runs on rails, and which, therefore, would include any species of such cars which might afterward be invented and used. The case referred to is a very recent one; but there is not disclosed in it any disposition to disregard the distinctions which the Legislature has constantly made between the different classes of railroads, and which this court has repeatedly noted and enforced, relating to the organization, taxation and other rights and duties of companies in the different classes. There is some discussion in the briefs of counsel as to the nature of the distinctions between different classes of railways, the manner of their construction and operation, and the varying range of their service to the public. Such considerations are of value here only so far as they may assist in determining the classification which the Legislature has actually made.

In this connection, it is proper to note that if a municipal corporation can, by virtue of the section under examination here, compel an interurban railroad to light its tracks within the limits of the municipality, there would appear to be no reason why it could not also compel a street railway to do so; for, as we have shown, interurban and street railways are classed together. It is, of course, well known that electric cars, both street and interurban, are equipped with headlights which light the street in advance of the cars, and thus give notice of their approach and passage along the street. Under such a condition, the utility or advantage of additional lighting is not apparent. In many cities such railways traverse numbers of different streets, and the power to shift the burden of lighting them from the city to the company can only be obtained by legislative enactment.

The legislative power of the State is vested in the General Assembly, and a municipal corporation has only such legislative

power as is expressly granted or clearly implied. *Bloom v. Xenia*, 32 Ohio St. 461; *Ravenna v. Penna. Co.*, 45 Ohio St. 118, 12 N. E. 445; *Townsend v. Circleville*, 78 Ohio St. 133, 84 N. E. 792, 16 L. R. A. (N. S.) 914.

A full consideration of the history of section 1536—176, Revised Statutes, and of its language, and of the consistent course of legislation on the general subject involved in the inquiry, leads us to hold that the Legislature has not granted to cities and villages the power to compel interurban and street railway companies to light the streets of such villages and cities occupied by their tracks.

For these reasons, we conclude that the Circuit Court erred in reversing the judgment of the Court of Common Pleas, and the judgment of the Circuit Court will be reversed, and that of the Common Pleas Court will be affirmed.

Judgment reversed.

DAVIS, C. J., and SPEAR, SHAUCK, PRICE and DONAHUE, JJ., concur.

Smeltzer v. Metropolitan St. Ry. Co.

(Missouri—Kansas City Court of Appeals.)

1. COLLISION WITH VEHICLE CROSSING TRACK; CONTRIBUTORY NEGLIGENCE. —

A driver of a vehicle who, when about seventy-five feet from a track, sees a car 150 feet away, approaching at a speed of twelve or fifteen miles an hour, is guilty of contributory negligence in attempting to cross the track, instead of waiting for the car to pass.

2. SAME; NEGLIGENCE OF MOTORMAN; HUMANITARIAN DOCTRINE. — Where the motorman of a car saw or could have seen a person drive on the track when the car was seventy-five feet away, and where he could have stopped his car within a distance of thirty-five or forty-five feet, he is guilty of negligence in colliding with the vehicle, and the driver may recover under the humanitarian doctrine for injuries sustained.

DEFENDANT appeals from judgment for plaintiff. Reported 148 S. W. 192.

John H. Lucas and *Piatt & Marks*, of Kansas City, for appellant.

Oldham & James, of Kansas City, for respondent.

Collision with Vehicle. — As to the liability of a street railway company for a collision with a vehicle, see *Nellis on Street Railways* (2d Ed.), §§ 400-402, 414-418.

Opinion by ELLISON, J.:

Plaintiff's action was instituted to recover damages alleged to have resulted from one of defendant's street cars colliding with his wagon and throwing him to the street. The judgment was for him in the trial court. The action is based on the humanitarian rule. The controlling facts are few and easily understood. Plaintiff, at 9 o'clock P. M., was driving a milk wagon, with an inclosed top, south, on the west side of Troost avenue north of Thirty-third street, in Kansas City. When he reached a point about seventy-five feet north of Thirty-third street, intending to cross over defendant's tracks to the east side of the street, he put his head out of the open door of his wagon and looked back north for a car. He saw one, 150 feet away, approaching at a speed of twelve or fifteen miles an hour. Notwithstanding this, he started east across the street, "angling a little." His horse and the greater part of the wagon had cleared the west track, when the car struck the rear part, and inflicted the injury of which he complains. When plaintiff's horse got upon the west track, the car was seventy-five feet away; necessarily it was in plain view of the motorman, if he was looking ahead. There was evidence that the car could have been stopped within a distance of thirty-five or forty-five feet.

Plaintiff was guilty of contributory negligence in attempting to cross the track, instead of waiting for the car to pass by.

But his negligence and the imminence of his peril were apparent to the motorman when he was such a distance away as to have had ample time to have stopped the car by the exercise of ordinary care. That is, as we have just said, the motorman saw the peril of the situation, as the evidence tended to prove, when he was seventy-five feet away and when he could have stopped within thirty-five or forty-five feet. *Morgan v. Wabash Ry. Co.*, 159 Mo. 262, 60 S. W. 195; *White v. Railway Co.*, 202 Mo. 539, 563, 101 S. W. 14; *Ellis v. Met. St. Ry. Co.*, 7 St. Ry. Rep. 291, 234 Mo. 657, 138 S. W. 23. In the last case Judge Lamm, speaking for the Supreme Court, says the humanitarian rule

"is a doctrine of the law, which, in one of its phases, casts liability upon a negligent street railway company whenever its servants, operating its car on a public street, see, or by the exercise of ordinary care could see, a street traveler in danger from the going car, and thereafter fail to exercise ordinary care in the use of means at hand to avoid injuring him, when such ordinary care, having regard to the safety of passengers, could have saved the traveler."

Continuing, the judge states that:

"While negligence always has misfortune for a companion, yet such traveler does not alone bear the burden in the law of that misfortune when he inadvertently goes into a place of danger from a street car so far ahead of it that those who control it may, under the circumstances and conditions given in the rule, save his limb or life. The joint right in the carrier under its easement and franchise, and in the traveler under the easement in the public, to use a public street, coupled with correlative and present duties of all those who use the street to each other, result in the above sensible and settled working theory for the administration of justice between the street traveler and the carrier."

Remark is made in that case on the seeming conflict in the authorities in this State. From citations made to us by defendant, we, too, can see the embarrassment in undertaking to reconcile all the cases. But the above announcement clearly states the rule and its justness.

There was an objection made to plaintiff's being allowed to show that loss of sexual power resulted to plaintiff. The point is not briefed, nor is it referred to in the summary of "points and argument." It is sufficient to say that we think the allegations of the petition justified admitting the evidence.

What we have said disposes of complaint as to instructions refused for defendant. We think amendments made to some of them, which were refused as offered, not fairly subject to criticism.

It is next said that there was no evidence that the car could have been stopped, or the speed slackened sufficiently to have avoided striking plaintiff. We, however, find, as we have already stated, that there was.

An examination of the record, in connection with defendant's argument and brief, does not show that we should interfere, and hence we affirm the judgment. All concur.

Love v. Detroit, J. & C. R. Co.

(Michigan — Supreme Court.)

1. **SURVIVAL ACT CONSTRUED.** — A right of action under the Survival Act (Compiled Laws, §§ 10, 117) vests at once in the injured person upon the infliction of the injury, and upon his subsequent death becomes an asset of his estate to be collected and distributed in accordance with the administration statutes.
2. **ACTION BY ADMINISTRATOR; DAMAGES.** — An administrator bringing an action for personal injuries is entitled to recover the same damages that the deceased could have recovered had he lived to bring the suit himself.
3. **CHILDREN; CONTRIBUTORY NEGLIGENCE.** — A child between five and six years of age cannot be charged with contributory negligence.
4. **CONTRIBUTORY NEGLIGENCE; IMPUTED NEGLIGENCE.** — The contributory negligence of the mother of a child between five and six years of age cannot affect the right to recover for personal injuries to the child.
5. **SAME.** — The contributory negligence of a mother cannot be imputed to a father so as to bar an action by him as administrator for the death of his child.
6. **ACTION FOR DEATH OF CHILD; EVIDENCE.** — In an action by a father, as administrator, to recover for the death of his child, evidence by the father as to whether his grandparents were living, and by the mother as to the age of her father and other ancestors, is competent.

Evidence by the father as to the amount of his salary and financial ability to educate his child was competent.

The fact that a child's death has occurred before he has become a wage-earner does not foreclose inquiry as to the probable value of his services for the years after his death.

Evidence of an insurance expert as to the child's expectancy of life was competent.
7. **SAME; INSTRUCTIONS.** — In an action by a father, as administrator, for the death of his child, alleged to have been caused by the negligence of the defendant in running over the child, instructions examined and held proper.

Negligence of Parent Imputed to Child. — For a discussion whether the negligence of a parent, guardian or other custodian will be imputed to a child injured by a street railway car, see *Nellis on Street Railways* (2d Ed.), § 464.

Judicial Notice of Equipment of Street Cars. — In *Chamberlayne's "Modern Law of Evidence,"* § 836, it is said: "A court will not require that any one should prove to it the general construction of a street horse car. In like manner it will not be demanded that the purposes for which customary equipment is intended should be proved. Thus, a court will take notice of the uses for which an ordinary street car fender was designed. In general, the dereliction of street railway companies in failing to provide adequate accommodations for their passengers is so generally known that the courts will take notice of it."

8. **JUDICIAL NOTICE; FENDERS.** — The court will take judicial notice of the fact that it is the custom of electric railway companies operating their cars in the public streets to equip them with fenders or some similar device.
9. **DAMAGES; EVIDENCE.** — In an action by a father, as administrator, to recover for the death of his child, evidence examined and *held* sufficient to sustain a verdict of \$2,000 for pain and suffering.

DEFENDANT brings error from a judgment for the plaintiff. Reported 135 N. W. 963.

M. J. Cavanaugh and *George J. Burke*, of Ann Arbor, for appellant.

T. A. Bogle and *H. L. Wilgus*, of Ann Arbor, for appellee.

Opinion by **BLAIR, J.:**

This action was brought in the Circuit Court for the county of Washtenaw by Clyde Elton Love, as administrator of the estate of Frank Emerick Love, deceased, for the alleged negligent killing of said deceased by defendant railroad company. Deceased, at the time of his death, was five years and five months of age. The administrator, plaintiff in this suit, and his wife are the father and mother, respectively, of said deceased and his sole and only heirs-at-law and distributees. Deceased came to his death on the 14th day of May, 1909, while riding on a tricycle in an attempt to cross the tracks of the city line, so called, of the said defendant railroad company, in the city of Ann Arbor, at the intersection of Monroe and Twelfth streets. The accident occurred at 4 o'clock on the afternoon of said day, or shortly thereafter. The deceased was taken to the Homeopathic Hospital in the city of Ann Arbor, where he remained alive until about midnight of the same day, or about eight hours after the accident. The deceased had been in company with his mother on a visit. The mother allowed or permitted the boy to go toward and across the railroad tracks, with the location of which she was entirely familiar, and where cars passed every few minutes, and to precede her by two blocks or more, and was on the opposite side of the street car track from him at the time of the accident. The negligence claimed by the plaintiff as a basis for the cause of action was: (a) That the car was running at an excessive rate of speed contrary to the ordinance; (b) neglect to provide proper safeguards in the way of a fender; (c) inexperienced and incapable servants. This action was based on the Sur-

vival Act (section 10,117, Compiled Laws 1897). The jury, after the charge of the court, brought in a verdict in favor of the plaintiff for

"the sum of \$2,000 for the suffering of Frank Emerick Love from 4 o'clock P. M. until 12 o'clock, and \$2,500, or his expectancy in life for thirty-seven years, being a total of \$4,500."

Briefly, it is the claim of the defendant in this cause that the verdict in said cause should be reversed because: (1) The court should have directed a verdict for the defendant in accordance with the motion to direct a verdict; (2) the court erred in admitting testimony as appears by assignments of error 1, 2, 3, 4, 5, 6, 7 and 8; (3) because the court erred in refusing to give defendant's requests to charge, assignments of error 10 to 18, inclusive; (4) because the court erred in his charge to the jury as set forth in assignments of error 19 to 28, inclusive; (5) because the court erred in refusing to grant defendant's motion for a new trial; (6) because the court failed to assign any reasons for his refusal to grant a new trial.

1. The motion for a directed verdict presented the question whether, where, as in this case, the parents are the only heirs-at-law and distributees of the child's estate and as such entitled to the whole amount recovered, the contributory negligence of the mother would bar recovery by the father as administrator. The circuit judge held that it would not, and we have now to consider the correctness of his determination.

The decisions of this court have established that:

The Survival Act (section 10,117, Compiled Laws) applies to rights or causes of action as well as to actions. *Rogers v. Windoes*, 48 Mich. 628, 12 N. W. 882; *Racho v. City of Detroit*, 90 Mich. 92, 51 N. W. 360; *Roberts v. City of Detroit*, 102 Mich. 64, 60 N. W. 450, 27 L. R. A. 572; *Sweetland v. Chicago, etc., Ry. Co.*, 117 Mich. 329, 75 N. W. 1066, 43 L. R. A. 568.

A right of action is as much property as is a corporeal possession, and under the Survival Act vests at once in the injured person upon the inflicting of the negligent injury, and upon his subsequent death becomes an asset of his estate to be collected and distributed in accordance with the administration statutes. *Berger v. Jacobs*, 21 Mich. 215; *Power v. Harlow*, 57 Mich. 107, 111, 23 N. W. 606; *In re Joslyn's Estate*, 117 Mich. 442, 75 N. W. 930; *Carbary v. D. U. R.*, 157 Mich. 683, 122 N. W. 367; *Olivier v.*

St. Ry. Co., 134 Mich. 367, 96 N. W. 434, 104 Am. St. Rep. 607, 3 Ann. Cas. 53.

"A right of action for personal injuries not resulting in the death of the injured person survives his death (3 Compiled Laws, § 10117), and a suit for his damages begun by him may be continued by his personal representative after his death, *with the same effect, according to the same rules, and to recover the same damages*, as if he were living and prosecuting his action in person. Neither the Death Act, so-called (3 Compiled Laws, § 10427), nor Act No. 89, Pub. Acts 1905, affect such a right of action or have any application to the manner in which it shall be pursued." *Rouse v. M. U. R.*, 164 Mich. 475, 129 N. W. 719.

An administrator bringing the action in the first instance, as in the present case, is entitled to recover the same damages that the deceased could have recovered had he lived to bring the suit to a successful issue. *Olivier v. St. Ry. Co.*, 3 St. Ry. Rep. 452, 138 Mich. 242, 101 N. W. 530.

A child of the tender years of plaintiff's intestate cannot be charged with contributory negligence, and the negligence of his parents cannot affect his recovery. *Shippy v. Au Sable*, 85 Mich. 280, 48 N. W. 584; *Boehm v. City of Detroit*, 141 Mich. 277, 104 N. W. 626; *Johnson v. Bay City*, 164 Mich. 251, 129 N. W. 29.

"A right of action is as much property as is a corporeal possession, and in case of a minor is protected by the law in the same way and under the same securities. The mother could not release it even for full consideration and by the most formal instrument; much less, therefore, could she, by mere word of mouth when not under oath, or otherwise chargeable with responsibility, destroy his right of action by her admissions." *Power v. Harlow*, 57 Mich. 107, 111, 23 N. W. 606.

It appears to us to be a logical and necessary inference from the above principles that the contributory negligence of the mother, if proved, which we are far from holding in this case, would not affect the right to recover. *Warren v. Manchester St. Ry.*, 70 N. H. 352, 47 Atl. 735; *Wymore v. Mahaska Co.*, 78 Iowa 396, 43 N. W. 264, 6 L. R. A. 545, 16 Am. St. Rep. 449; *Bradshaw v. Frazier*, 113 Iowa 579, 85 N. W. 752, 55 L. R. A. 258, 86 Am. St. Rep. 394; *Westerfield v. Levis Bros.*, 43 La. Ann. 64, 9 South. 52; *Norfolk, etc., Ry. Co. v. Groseclose's Adm'r*, 88 Va. 267, 13 S. E. 454, 29 Am. St. Rep. 718; *Wilmot v. McPadden*, 78 Conn. 276, 61 Atl. 1069; *Southern Ry. v. Shipp*, 169 Ala. 327, 53 South. 150; *Ploof v. Traction Co.*, 70 Vt. 509, 41 Atl. 1017, 43 L. R. A. 108; *Nashville Lumber Co. v. Busbee*, (Ark.) 139 S. W. 301.

The case of *Feldman v. D. U. R.*, 162 Mich. 486, 127 N. W. 687, was under the Death Act, so called (sections 10,427, 10,428, 3 Compiled Laws), where

"the jury may give such damages as they shall deem fair and just with reference to the pecuniary injury resulting from such death, to those persons who may be entitled to such damages when recovered."

It was held that negligence of the parents would bar their recovery. That case is clearly distinguishable from the present case, in that there the declaration must aver and the proofs establish a pecuniary injury or loss to the persons specified in the statute, constituting a separate and distinct cause of action from that counted on in the instant case. *Hurst v. Det. City Ry. Co.*, 84 Mich. 539, 48 N. W. 44; *Ploof v. Traction Co.*, 70 Vt. 509, 41 Atl. 1017, 43 L. R. A. 108; *Tucker v. Draper*, 62 Neb. 66, 86 N. W. 917, 54 L. R. A. 321.

It is further to be observed that the plaintiff was guilty of no negligence whatever contributing to the accident, and, in our opinion, the negligence of one parent is not imputable to the other and therefore furnishes no bar to his recovery. *Atlanta, etc., Air Line Co. v. Gravitt*, 93 Ga. 369, 20 S. E. 550, 26 L. R. A. 553, 44 Am. St. Rep. 145; *Macdonald v. O'Reilly*, 45 Oreg. 589, 78 Pac. 753; *Donk Bros. v. Leavitt*, 109 Ill. App. 385; *Wolf v. Railroad Co.*, 55 Ohio St. 517, 45 N. E. 708, 36 L. R. A. 812; *Cleveland, etc., R. R. Co. v. Workman*, 66 Ohio St. 509, 64 N. E. 582, 90 Am. St. Rep. 602; *Con. Trac. Co. v. Hone*, 59 N. J. Law 275, 35 Atl. 899; *Lewin v. Railway Co.*, 52 App. Div. 69, 65 N. Y. Supp. 49.

2. Assignments 1 and 2 are not based upon exceptions. Assignments 3 and 8 are based upon exceptions to rulings of the court permitting an answer to the following question by the father: State whether or not your grandparents are living, and in permitting the mother to testify as to the age of her father and other ancestors. Such testimony was competent. *Sterling v. Union Carbide Co.*, 142 Mich. 284, 105 N. W. 755.

The fourth, fifth, sixth and seventh are grouped and considered together in appellant's brief. The fourth assigns error in permitting the father to testify to the amount of his salary. The fifth, upon denial of appellant's motion to strike out the testimony of plaintiff as to his salary and his financial ability and prospects of financial ability to educate his child. The sixth, upon per-

mitting testimony as to the wages of common laborers. The seventh, upon permitting testimony as to the wages of carpenters.

From the nature of the case, the amount of the damages cannot be estimated with certainty either as to the element of pain and suffering or the element of future earnings after the age of twenty-one; but this does not, as we have repeatedly held, deprive the injured person of all damages. *Hart v. Village of New Haven*, and cases cited, 130 Mich. 181, 89 N. W. 677.

The measure of damages is well settled in cases for negligent injuries under the Survival Act. *Olivier v. St. Ry.*, 3 St. Ry. Rep. 452, 138 Mich. 242, 101 N. W. 530; *Davis v. Railroad Co.*, 147 Mich. 479, 111 N. W. 76; *Rouse v. M. U. R.*, 164 Mich. 475, 129 N. W. 719.

The fact that the child's death has occurred before he has become a wage-earner does not foreclose inquiry as to the probable value of his services for the years ensuing his death. *Black v. Railroad Co.*, 146 Mich. 568, 109 N. W. 1052; *Braasch v. Stove Co.*, 153 Mich. 652, 118 N. W. 366, 20 L. R. A. (N. S.) 500.

To enable the jury to determine the probable earning capacity of the child for the period of his probable life after arriving at the age of twenty-one, a wide latitude must necessarily be allowed in the admission of testimony as to the child's status and future prospects and the vocations and their remuneration which might reasonably be expected to be open to him. We are, therefore, of the opinion that the rulings complained of were not erroneous. *Snyder v. Railway Co.*, 131 Mich. 418, 91 N. W. 643; *Jeffries v. Air Line Ry.*, 129 N. C. 236, 39 S. E. 836; *Walters v. Railway Co.*, 41 Iowa 71; *Fishburn v. Railway Co.*, 127 Iowa 483, 103 N. W. 481.

Counsel for appellant also argue in their brief that the court erred in admitting the testimony of an insurance expert as to the child's expectancy of life. We are unable to find any assignment of error presenting this point. We are all of the opinion, however, that such testimony was competent. *Walters v. Railway Co.*, 41 Iowa 71.

3. Counsel argue in their brief that

"the fourth, fifth, sixth and seventh requests to charge were entirely reasonable. These requests contained a fair statement of defendant's theory of the case, and the court's refusal to submit them to the jury was prejudicial to the rights of the defendant."

The motorman testified that when about 125 feet from the west crosswalk on Twelfth street he got a signal to stop on the east side of the street; that at the same time he saw the child come out on Twelfth street and afterwards stop about fifteen feet from the track; that as soon as he got the signal he shut off the current, applied the brakes, and began to slow down; that when he got within about sixty feet of the west crosswalk, seeing the child stop, he turned on the power again to carry him across Twelfth street for his signaled stop, running at about four miles an hour; that when he got within about fifteen feet of the crosswalk the child suddenly started across, and thereupon he did everything in his power to stop the car, but it was then impossible to do so. The four requests referred to were based upon this testimony and were not given unless, as claimed by plaintiff, they were covered by the following portion of the charge:

"If you find from the evidence that the motorman in charge of defendant's car saw the plaintiff's intestate in time to have avoided the accident by reversing the power, and did not do so, and that by reason thereof the accident occurred, this constituted negligence, and your verdict must be for the plaintiff. Unless you find from the evidence that the child stopped when he saw the car approaching, and that the motorman in the exercise of due care and prudence under all the circumstances of the case had good reason to believe, and did believe, that the child did not intend to cross the track until after the car had passed, if you find from the evidence that the motorman was justified in believing that the child did not intend to cross the track, and that the car was not running at more than eight miles an hour, and the motorman, when he saw that the child did intend to cross the track, reversed the car and did all in his power to avert the accident, then the defendant would not be liable in this case, unless you find from the evidence that the defendant was guilty of other acts of negligence which caused the accident. If you find from the evidence that this accident was unavoidable and not due to any fault or negligence on the part of the defendant, then the verdict should be for the defendant."

We think the portion of the charge sufficiently stated defendant's theory of the case, provided such statement was not nullified by the qualification

"unless you find from the evidence that the defendant was guilty of other acts of negligence which caused the accident."

This question we consider under the next head.

4. We consider, in connection with the question last above referred to, the assignment of error upon the following portion of the charge:

"It is the duty of the defendant in equipping its cars to provide reasonable and proper safeguards in general use in order to prevent or minimize injury, in case of accident. In this connection you may consider the effect of the absence of a fender upon the car which did the damage, upon the duty of the motorman to use more care in controlling the car without such device."

Among other duties of defendant averred in the declaration is the following:

"* * * And it became and was the duty of said defendant so to equip its said cars with fenders on the front end thereof that in the event of striking any such child upon said crossing said child would be picked up by and would fall upon any such fender, and thus avoid the serious injury of any such child, or would thereby have been warded off and away from said track without serious injury."

The testimony discloses that there was no fender on the car at the time of the accident. This court will take judicial notice of the fact that it is the custom of electric railway companies operating their cars in the public streets to equip them with fenders or some similar device, and that their object is the protection of the public engaged in ordinary business or travel upon the streets, whence arises a duty on the part of defendant as averred in the declaration and charged by the court. *Spiking v. Consol. Ry. Co.*, 6 St. Ry. Rep. 320, 33 Utah 313, 93 Pac. 838; *Noe v. Rapid Ry. Co.*, 1 St. Ry. Rep. 339, 133 Mich. 152, 94 N. W. 743; *Ensley v. D. U. R.*, 1 St. Ry. Rep. 380, 134 Mich. 195, 96 N. W. 34; *Mayer v. Railway*, 4 St. Ry. Rep. 491, 142 Mich. 459, 105 N. W. 888; *Mayer v. Railway*, 152 Mich. 276, 116 N. W. 429. The defendant's requests covered by this portion of the charge required a verdict regardless of its negligence in failing to equip the car with a fender, although the jury might have found, accepting the motorman's testimony as true, that at the slow rate of speed testified to by him the presence of a fender would have prevented or very much lessened the injuries. We find no error in this part of the charge.

Error is also assigned upon the following portion of the charge:

"At the time the accident occurred the defendant was operating heavy, rapidly moving cars propelled by electricity, dangerous to persons and property in the streets where men, women and children were and had a right to be, and capable of causing serious injury and death unless properly controlled. It was therefore the duty of the defendant to exercise in the control and management of its cars at this time and place a degree of care commensurate with the peril involved."

We do not think this portion of the charge is subject to the criticism made by counsel for defendant, that it gave the jury to understand that in the opinion of the court the particular car which struck the child was at that time running rapidly.

5. Our examination of the record has fully satisfied us that the objection that the verdict is against the weight of the evidence is without foundation. Neither do we think that we would be justified in holding that the verdict was excessive as to the amount allowed for pain and suffering. The family physician testified:

"The right leg was virtually severed above the knee, the left leg was badly bruised and the pelvis and hips on both sides were badly bruised. I found a young medical student had placed a tourniquet upon the limb above the point of the injury close to the body to control the hemorrhage. * * * I had known this boy ever since he was born. He was a vigorous, healthy boy, and had been during his whole life. The boy recognized me before I did him in his dirty, mangled condition. In connection with his crying out in pain, he said to me, 'Dr. Kinyon, can't you do something for me?' That was the first I knew anybody knew me. He was groaning and complaining of pain. Crying out with pain."

The father testified:

"My boy died at four minutes before midnight on May 14, 1909, and his age was five years and five months. Q. State whether or not you were present at the time he died. A. I was. Q. State how long before he died you had been with him, immediately before. A. Since about half-past four. Q. State whether or not he suffered during that period of time. A. He did. Q. State what indication of suffering he gave. A. He moaned and cried out. A little later, after he had returned from the operating room, he put his hand down towards his leg, and cried out very strongly, 'Let go! Let go!' and continued doing that for some time. Q. State whether or not you had any conversation with him or anything of that sort. A. Yes; I asked him if he knew us and perhaps two or three or four other questions, and he answered them by nodding his head. Q. State whether or not he was conscious after the operation and before his death. A. If I understand exactly what constitutes consciousness he certainly was."

Whether a verdict is excessive or not in a case like this presents a question of fact and not of law. There is no definite standard for measuring in dollars and cents the extent of pain and suffering and mental anguish, and although the statute casts upon this court the duty of reviewing the estimate of the jury, we are not inclined to substitute our estimate for that of the jury except in cases where the damages are so clearly excessive as to justify the conclusion that they were the result of partiality or prejudice. *Johnson v. City of Bay City*, 164 Mich. 251, 129 N. W. 29.

6. The point presents no question for review. *Grand Rapids Bd. of Education v. Brown*, 159 Mich. 148, 123 N. W. 562.
The judgment is affirmed.

Di Benedetto v. Milwaukee Electric Ry. & Light Co.

(Wisconsin — Supreme Court.)

EJECTION OF PASSENGER BY CONDUCTOR; CONSISTENCY OF FINDINGS; DAMAGES, PRIMITIVE, COMPENSATORY; MALICE. — Plaintiff seeks to recover compensatory and punitive damages by reason of having been violently and maliciously ejected by the conductor from a street car belonging to the defendant.

Held, that negative answers of the jury to the following questions, "Was the conduct of the plaintiff such as to justify the conductor in ejecting him from the car?" "Was the plaintiff ejected from the car, under circumstances of aggravation or cruelty, with vindictiveness or malice?" were not inconsistent;

That the fact that under the evidence the jury found that plaintiff was wrongfully ejected from the car by the conductor, did not necessitate a finding that the conductor acted with such cruelty, vindictiveness and malice as to render defendant liable for punitive damages;

That the jury were justified in finding that the plaintiff's ejection from the car was free from such aggravated acts as amounted to cruelty, and that the conductor did not act maliciously in the matter.

Vindictiveness and malice must expressly appear, and are not to be presumed from the fact that the plaintiff was wrongfully ejected from the car.

The allowance of punitive damages in such cases is never a matter of right.

DEFENDANT appeals from an order granting a new trial. Reported 136 N. W. 282.

STATEMENT OF FACTS BY THE COURT.

The plaintiff seeks to recover compensatory and punitive damages by reason of having been violently and maliciously ejected by the conductor from a street car belonging to the defendant. The answer is a general denial.

Exemplary Damages for Ejection of Passenger. — For a discussion of the liability of a street railway company for exemplary damages for an assault or ejection of a passenger from a street car, see the note to *White v. Covington, etc., Ry. Co.*, p. 362.

The testimony of the plaintiff, in which he was corroborated, was that the car he wished to take did not stop at the corner, and he was compelled to walk a number of steps to board it. That the conductor said to him: "Get on, Ginney. Why don't you get the car on the corner?" That he replied that the car was not on the corner. That when the conductor asked him for his fare he asked the conductor to wait a minute, because he had his overalls and heavy coat on, and the conductor said, "You God damn Ginney, go on; I can't wait for you." That he gave the conductor a quarter and received back five tickets, and then said to the conductor, "So your father could not learn you to talk a little better, a man like you." That the conductor then said: "Shut up, you Ginney; I will throw you out of the car." That the conductor grabbed him from the back and pushed him out. That he held onto the car with his hand, and that the conductor fell off with him and on top of him. That the conductor went to the front of the car, got the switch hook, and came back with it raised in a threatening manner. That the conductor refused to allow him to get back on the car, and that the conductor at first refused to meet his demand for a return of his ticket, on the ground that he had punched it, but that when another conductor advised him to give back a ticket the conductor did so. The plaintiff also testified as to his bodily injuries, the amount of his doctor and medicine bills, his weekly earnings, and the time he was out of work because of his injuries.

The conductor testified that the plaintiff gave him less than a half ticket for his fare; that he demanded another ticket or a nickel, and reached for the bell cord to stop the car to put the plaintiff off; that the plaintiff drew a knife from his pocket and raised it to strike him; that he grabbed the plaintiff's wrist, and they got off of the car together; that the plaintiff chased him toward the front of the car, where the motorman handed him the switch hook; that he did not strike the plaintiff, but told him he could not come back on the car; and that he gave the plaintiff a ticket, when advised by another conductor so to do. He also testified that he did not report the trouble at the company's office. Other witnesses for the defendant testified that the plaintiff had something eight or nine inches long in his hand, but that they could not distinguish what it was; that the conductor appeared frightened; and that the conductor held the switch hook aloft ready to strike the plaintiff on returning from the front of the

car, and desisted when a passenger called to him not to strike the plaintiff.

The jury returned the following special verdict:

"Question 1. Did the conductor of the defendant company eject the plaintiff from a car on January 31, 1911, on East Water street, in the city of Milwaukee? Answer: Yes.

"Question 2. If you answer the first question 'Yes,' then answer this question: Was the conduct of the plaintiff such as to justify the conductor in ejecting him from the car? Answer: No.

"Question 3. If you answer question 2 'No,' you need not answer question 3. If you answer question 3 'Yes,' then answer this question: Did the conductor use any more force than was reasonably necessary to use in ejecting the plaintiff? Answer: * * *

"Question 4. If you answer question 2 'No,' then answer the following question: Was the plaintiff ejected from the car, under circumstances of aggravation or cruelty, with vindictiveness or malice? Answer: No.

"Question 5. If you answer question 4 'Yes,' then answer this question: Did the defendant ratify the act of the conductor? Answer: * * *

"Question 6. If you answer question 1 'Yes,' then answer this: Was the conductor, at the time he ejected the plaintiff from the car, in the performance of his duties as a conductor for the defendant company? Answer: Yes.

"Question 7. If the court should be of the opinion that the plaintiff is entitled to recover damages, in what sum do you assess such damages? Answer: Compensatory, \$69.25; punitive, \$500."

The plaintiff moved the court to change the answer to question 4, to answer question 5 "Yes," and, in the event that this motion should be denied, for a new trial. The defendant moved for judgment on the verdict. The court granted a new trial, on the ground that the answers to questions 2 and 4 could not be reconciled, and, if it were assumed that the account of the plaintiff was true, the fourth question should have been answered in the affirmative. The court held that the answers to questions 2 and 4 were irreconcilable, since the jury found that the plaintiff's testimony as to the conductor's conduct in ejecting the plaintiff was true. It followed that such evidence showed facts necessarily establishing that the conductor acted cruelly and with malice; and hence that this evidence required an affirmative answer to question 4. For this reason the court held that justice would be promoted by granting a new trial. Upon the appeal from the civil court to the Circuit Court, the order granting a new trial was affirmed. This is an appeal from the order of the Circuit Court affirming the order of the civil court.

Van Dyke, Rosecrantz, Shaw & Van Dyke, for appellant.

O'Connor, Schmitz, Wild & Cross, for respondent.

Opinion by SIEBECKER, J.:

The defendant contends that the Circuit Court erred in affirming the order of the civil court granting a new trial. It is claimed that the civil court erroneously granted the new trial upon alleged inconsistencies in the jury's answers to questions 2 and 4. It is manifest that the new trial was not granted by the trial court in its discretion or because the court entertained an opinion that justice had not been done in compensating the plaintiff for the injuries he had sustained. The verdict found separately the items of compensatory and punitive damages, so that the court might award judgment on either or both amounts, according to plaintiff's rights as established by the facts found by the jury in their special verdict. The defendant asked that judgment be awarded the plaintiff upon the verdict for the amount of the compensatory damages and costs of the action. The plaintiff objected to such judgment, and made a motion in the alternative, requesting that the court change the answer of the jury to question 4 from "No" to "Yes," and, in the event of a denial of such request, that the court grant a new trial. The court refused to change the jury's answer to this question as requested, but granted a new trial upon the ground stated. It is obvious from the court's ruling and the grounds assigned therefor that he concluded that, if the jury, under the evidence in the case, found that the plaintiff was wrongfully ejected from the car by the conductor, they must find that the conductor acted with such cruelty, vindictiveness and malice as to render defendant liable for punitive damages. We are persuaded that the trial court and the Circuit Court on appeal erred in this respect. The evidence in many respects is in sharp conflict. The jury evidently believed that the conductor provoked the altercation with the plaintiff by using abusive language toward him when seeking to collect the car fare, and that the plaintiff's conduct did not call for his ejection from the car. This does not necessarily imply, however, that all the plaintiff testified to as to the manner of his ejection must be taken as true. The evidence on this phase of the affair is in sharp conflict. It was witnessed by persons on the car, who testified in the case; and from the whole evidence the jury had good grounds to conclude that the conductor acted wrong-

fully in the matter, but that there were no such aggravated acts as the plaintiff testified to, and that the conductor's acts were free from cruelty, and evinced no vindictiveness or malice.

The jury were not compelled to believe, in their entirety, the statements of either of the participants. *Hopkins v. C., M. & St. P. R. Co.*, 128 Wis. 403, 107 N. W. 330. The facts and circumstances adduced in the evidence tend to support the conclusion that both parties became actively involved in the affray before it concluded, and that both of the participants became aggressive combatants before it ended. In the light of such a situation, the jury were justified in finding that the plaintiff's ejection from the car was free from such aggravated acts as amounted to cruelty, and that the conductor did not act maliciously in the matter.

The facts of vindictiveness and malice must expressly appear, and are not to be presumed from the fact that the plaintiff was wrongfully ejected from the car. Their existence is one of inference for the jury from the whole case, and not for the court, as matter of law, under the facts and circumstances adduced in evidence.

The allowance of punitive damages in such cases is never a matter of right. As stated in *Topolewski v. Plankinton Packing Co.*, 143 Wis. 52, opinion 71, 126 N. W. 554, 561:

"In all cases the court should decide whether, in any reasonable view of the evidence, punitive damages would be proper, and, if so, to then instruct the jury what elements of fact are requisite to justify such damages, and make it plain that whether to allow them or not is left to their sound discretion."

We are led to the conclusion that the jury were well justified, under the evidence, in answering question 4 in the negative; that, in the light of the facts and circumstances of the case, such answer in no way conflicts with an affirmative answer to question 2; and that the trial court erred in holding that there was such conflict in the verdict as required a new trial. The Circuit Court on appeal should have corrected such error, and have awarded plaintiff judgment for the amount of the compensatory damages allowed by the jury, with costs.

The order appealed from is reversed and the cause remanded, with directions to award judgment as indicated in this opinion.

Underwood v. Oskaloosa Traction & Light Co.

(Iowa — Supreme Court.)

1. **COLLISION OF AUTOMOBILE WITH STREET CAR; CONTRIBUTORY NEGLIGENCE OF DRIVER.** — If a driver of an automobile could not have failed to see an approaching street car if he had looked to the front instead of to the rear, and his car was under control, and he was confronted with no emergency which caused him to run into a street car, he must be deemed guilty of contributory negligence.
2. **LAST CLEAR CHANCE.** — Since the driver of the automobile was in no apparent peril up to a mere moment before the actual collision, and it was not claimed that the motorman knew that the driver was not looking to the front, the plaintiff was not entitled to recovery under the "last clear chance" doctrine.

DEFENDANT appeals from verdict for plaintiff. Reported 137 N. W. 933.

John F. & Wm. R. Lacey, of Oskaloosa, for appellant.

McCoy & McCoy and *S. V. Reynolds*, all of Oskaloosa, for appellee.

Opinion by EVANS, J.:

The accident in question occurred on September 6, 1910, at 4 P. M., on one of the principal business streets of Oskaloosa, known as High avenue. This avenue extends east and west, and street cars are operated upon it. The plaintiff in his automobile approached the avenue at right angles over C street. High avenue is eighty feet wide, and the street car track is laid upon its center line. C street is sixty-six feet wide. The structures on C street prevented a view east or west on High avenue, except upon near approach to its crossing. Arriving at the C street crossing on the north line of High avenue, there was nothing at the time of the accident to obstruct a clear view of High avenue either east or west. The street car in question was coming from the west. The collision resulted from the failure of the plaintiff to observe the street car. He so failed because his attention was directed in another direction, and he was looking backward, instead of forward. The

Collision with Automobile. — As to the liability of a street railway company for collisions with vehicles in the street, see *Nellis on Street Railways* (2d Ed.), §§ 400-402, 414-417. See also *Huddy on Automobiles* (3d Ed.), § 102.

petition charged various specifications of negligence on the part of the defendant, viz., that the car was operated at a reckless rate of speed; that no gong or bell was sounded; that the motorman was old and incompetent; that the car and its equipments were old and out of repair; that the motorman was negligent in failing to stop the car after discovering the peril of plaintiff, and in failing to discover such peril in time to stop the car. The trial court withdrew the specifications in relation to the competency of the motorman and the condition of the car. The other specifications were submitted to the jury.

It is the contention of appellant that the evidence did not warrant a submission of the case to the jury at all, and that a verdict should have been directed for the defendant. We give our first attention to this question. The plaintiff testified as follows:

"I was running south on C street when I came to within about sixty feet of the north line of West High avenue. I saw a man on the crossing going east. When I first noticed him he was directly in front of me. I called out to him to call his attention so he could see I was coming. Instead of quickening his speed he rather slowed up. I went past him, and as I passed I turned and looked over my left shoulder, but he still kept moving on, but seemed to be muttering something. As I drove by him I had slowed up considerably, so that he would have time to get out of my way. His peculiar actions drew my attention to him, and when I turned my eyes in front I was right on the street car line, and the street car was very close to me. I did not have time to quicken my speed, and it was too late to shut down. I had heard no gong or bell sounding. If I had heard a bell I would have turned to the east or west, or stopped my car. I could have turned either east or west. I could have stopped easier than anything else, as I was running slow. I was running about ten miles an hour. I had been looking towards High avenue until this man attracted my attention. When I first saw the street car it was right close to me, and my front wheels were close to if not on the street car line. The street car was virtually on me when I first saw it. I had a clear track in going into High street. I was going south on C street, which crosses High. When I first saw the fellow in my way he was fifty or sixty feet from me. He was coming east down the High street sidewalk. He was going east on High street. He was in the crossing when I first noticed him, and I was then running about ten miles an hour. He turned and commenced to talk. I could see from the way his mouth worked and his peculiar actions that he was not pleased. I understood from his muttering that he was not pleased with my actions. When he started in front of me I slowed up and gave the alarm. I supposed he would quicken his speed, but he slowed up, and I slowed up and probably down to eight miles an hour. If it had not been for the trouble with this man I would have seen the car, but he was making a disturbance and attracted my attention. He followed me down after the accident. I rather think he was drunk. He caused me to slow up. His action caused me to look

at him, rather than to see whether the street was clear or not. If I had seen the car I probably would have stopped, or I could have turned either east or west and missed it. This drunken man attracted my attention until it was too late for me to turn. When I got through with him the car was right on me."

Plaintiff's witness Parks testified on cross-examination as follows:

"There was nothing to obstruct the view of anybody in the auto from seeing or anybody from seeing the auto; nothing to obstruct the view of the street car; nothing to prevent Underwood from turning to east or west in the street if he had been looking. He may have been looking at this man. They came together quick, and it was all done. Underwood could have turned either to the right or left. I do not remember hearing the gong sounded. There was nothing to attract my attention either to the street car or the auto. I saw the car going east and the auto going south. The auto did not turn either right or left, but ran straight at the car. I think the car hit it. Both of the heads came together. The southwest corner of Underwood's machine struck the northeast corner of the car. The fender was knocked to one side."

Plaintiff's witness Dobbys testified as follows:

"I think the car was running seven or eight miles an hour. Underwood was coming at a fair gait. The street car was running faster than Underwood. The motorman did nothing that I noticed to slacken the speed of the car. There was no obstruction west of C street to obstruct the view from the platform of the car."

Other witnesses testified for the plaintiff in substantial consistency with the foregoing. There was no evidence of any reckless or undue rate of speed on the part of the street car, nor evidence of any other negligence, except the alleged failure to sound the gong or bell.

It is undisputed that the plaintiff could not have failed to see the approaching street car if he kept his face to the front instead of to the rear. His car was under control. He had a space of forty feet after entering High street to turn either to the east or west. There was no excuse for his looking over his left shoulder except the merest curiosity. He was confronted with no emergency, real or apparent, which caused him to do an act so reckless. The case presented is one of simple and conclusive negligence on the part of the plaintiff.

The appellee contends that he was entitled to recover on the theory of "last clear chance." This theory was submitted to the jury by the instructions of the court, and a recovery permitted

thereunder. There is no claim of evidence that the motorman actually discovered the peril of the plaintiff, but it is contended that he was in a position wherein he ought to have discovered it. The question was submitted to the jury in this form. The plaintiff was in control of his automobile. It is conceded that he could have turned to east or west or could have stopped. He was in no apparent peril up to a mere moment before the actual collision. It is not claimed that the motorman knew that plaintiff's attention was directed away from his duty. The trial court properly instructed, in substance, that the motorman had a right to presume that the plaintiff would turn east or west or stop until the contrary was apparent. Nothing to the contrary was apparent until the automobile was within ten or fifteen feet of the track, when the collision was confessedly unavoidable. There was no basis in the evidence for the application of the "last clear chance" theory. The incongruity of its attempted application is illustrated by another feature of the case. The street car was also damaged in the collision, and a counterclaim was filed to recover such damages from the plaintiff. Now, if the defendant could be made liable to the plaintiff notwithstanding plaintiff's negligence on the theory that the defendant's motorman, by exercise of reasonable diligence, ought to have discovered the plaintiff's negligence and peril, as set forth in the instructions to the jury, then, upon the same reasoning, appellant contends that the plaintiff should be held liable to the defendant for its damages because by the exercise of ordinary diligence he also could have discovered the defendant's peril. The logic is quite compelling, and would result in holding each party liable to the other for the respective damages sustained. It is sufficient to say that the plaintiff was not entitled to recovery on the "last clear chance" theory, and that a verdict for the defendant ought to have been directed on the ground that the negligence of the plaintiff clearly contributed to, if it did not exclusively cause, his injury.*

* Portion of opinion not material to street railway law omitted.

Gaedis v. Metropolitan St. Ry. Co.

(Missouri — Kansas City Court of Appeals.)

1. **COLLISION WITH CHILD; EVIDENCE; NEGLIGENCE OF MOTORMAN.** — Action to recover for injuries to a child from being struck by a street car. Evidence held to present a clear case of negligence on the part of the motorman.
2. **PLEADING; PETITION; INCONSISTENT ALLEGATIONS.** — In an action for injuries to a child struck by a street car allegations that the motorman was running the car at a dangerous rate of speed, that he did not sound the bell, and that he saw or should have seen the peril of the boy in time to have stopped the car had he been in the exercise of reasonable care, are not inconsistent.

All of these facts could be coexistent, and therefore proof of one would not even tend to disprove the other.

There is no inconsistency between the allegations that the injury was caused by moving the car at excessive speed and that the defendant failed to stop the car in time to avoid the collision after the danger was apparent.

DEFENDANT appeals from judgment for plaintiff. Reported 143 S. W. 565.

John H. Lucas and *H. H. McCluer*, for appellant.

H. J. Latshaw, for respondent.

Opinion by JOHNSON, J.:

This suit is prosecuted by August Gaedis, as next friend of his infant son, Frank Gaedis, to recover damages for personal injuries sustained by Frank in being struck by an electric street car operated by defendant on one of its lines of street railway in Kansas City, Kan. A trial in the Circuit Court resulted in a verdict and judgment for plaintiff in the sum of \$2,000, and, after unsuccessfully moving for a new trial and in arrest of judgment, defendant brought the case here by appeal.

The injury occurred in the afternoon of September 18, 1908, on North Fifth street in Kansas City, Kan., near the intersection of Elizabeth avenue. This street runs north and south, and going north from Elizabeth avenue is on a slight upward grade for several blocks. Defendant operates a double-track electric railway on Fifth street, and a south-bound electric street car of the single-

Pleading Negligence in Injuring Child. — As to pleading negligence of the street railway company in an action for an injury to a child, see *Nellis on Street Railways* (2d Ed.), § 473.

truck type inflicted the injury in question. August Gaedis conducted a grocery store on the west side of Fifth street and with his family resided over the store. He had two children, Annie, who was between six and seven years old, and Frank, four years and ten months of age. The evidence of plaintiff tends to show that, a short time before the injury, these children went into the street and engaged in play on the west track on which south-bound cars were run. They played with sand dropped by passing cars and were on or near the east rail. While thus engaged, a car came from the north at a speed of eight or ten miles per hour, and ran by without slackening speed or sounding the bell. Both children failed to notice the car until it came very near. The little girl succeeded in jumping out of the way and escaped; but the boy was less fortunate, and was struck by the end of the fender as he was trying to escape and was thrown down. One of his hands was run over and so crushed that it became necessary to amputate all the fingers except one. The car ran a block before it was stopped.

The evidence of defendant tends to show that the children were not playing on the track; but, while the car was advancing at a speed not to exceed five miles per hour, they first attempted to cross the track in front of the car, and, being warned away, they stood on the east side of the track apparently in the clear while the car ran by. No one on the car knew that the child had been struck until the car stopped a block away, when, looking back, they discovered that something had happened. An expert witness introduced by plaintiff testified that the car could have been stopped in thirty or forty feet if it had been running eight miles per hour, and in fifty or fifty-five feet if its speed had been ten miles. During the approach of the car the children were in the view of the motorman a distance of three or four blocks.

The evidence of plaintiff presents a clear case of negligence on the part of the motorman. The plaintiff was so young he could not have been guilty of contributory negligence, and the presence of him and his sister on the track, or in proximity to it, unattended by an older person, in itself, was a danger signal that should have put the motorman on his guard. Seeing them there absorbed in play, he should have reduced speed and brought the car under complete control, so that if necessary it could be stopped before reaching the place where they were playing.

Defendant does not contend that the facts disclosed by the plaintiff's evidence do not show that negligence of the motorman was

the proximate cause of the injury, but does contend that its demurrer to the evidence should have been sustained because of vital defects in the petition. The specifications of negligence in the petition were as follows:

"First. The servants and agents then and there in charge of said car carelessly and negligently failed and neglected to have said car under control at the time it struck plaintiff, and as it approached plaintiff at said time and place. Second. The servants and agents then and there in charge of said car carelessly and negligently ran said car at a dangerous rate of speed under all the circumstances, at the time and place said car struck plaintiff and as it approached plaintiff, as above set forth. Third. The servants and agents of defendant then and there in charge of said car carelessly and negligently failed and neglected to ring the gong of said car, or to otherwise warn plaintiff of the approach of said car, at said time and place, although said servants and agents of defendant knew, or by the exercise of ordinary care and caution could have known, that plaintiff was in a perilous, or approaching a position of peril, or attempting to get out of a position of peril, within reasonable time to thereafter have rung said gong or bell of said car, or to have otherwise warned plaintiff of the approach of said car, and to have thereby avoided striking and injuring plaintiff. Fourth. Said servants and agents of defendant then and there in charge of said car saw plaintiff, or by the exercise of ordinary care and caution could have seen plaintiff, in his perilous position upon or near said track, or approaching his perilous position upon or near said track, or attempting to get out of his perilous position upon or near said track, within reasonable time to thereafter have stopped said car, or slackened the speed thereof, without injury to the people upon said car, and thereby to have prevented striking and injuring plaintiff, as above set forth; but said servants and agents of defendant carelessly and negligently failed and neglected to do so."

The negligence pleaded in the fourth paragraph was the only act of negligence submitted to the jury in the instructions given at the request of plaintiff. The principal one of these instructions was as follows:

"The court instructs the jury that if you find and believe from the evidence in this case that plaintiff, Frank Gaedis, is a minor of about seven years of age, and that August Gaedis is legally acting as next friend of said Frank Gaedis for the prosecution of this suit, and if you further find and believe from the evidence that on September 18, 1908, North Fifth street was a public street and thoroughfare in Kansas City, Kan., and that upon said September 18, 1908, at about 2 o'clock P. M. thereof, Frank Gaedis was playing with his sister upon the west street railway track on said North Fifth street, near and a short distance north of Elizabeth street, and that while so playing one of defendant's south-bound electric cars ran against plaintiff and over his left hand, thereby so injuring and mashing said left hand that three fingers thereof had to be and were on account thereof and as a direct result thereof

amputated, and if you further find and believe from the evidence that the motorman in charge of said car saw plaintiff, or by the exercise of ordinary care and caution he could have seen plaintiff, upon said track, and apparently unconscious of the approach of said car, and in a position upon said track of imminent peril of being struck by said car, within reasonable time to have thereafter stopped said car without injury to the people upon said car before striking plaintiff and injuring him, and failed to do so, then your verdict must be for plaintiff and against defendant."

Necessarily the verdict was based on the sole ground that the motorman failed to exercise reasonable care to discover the perilous situation of plaintiff and to avoid injuring him by stopping the car, since the issues of negligence in running the car at a dangerous speed and in not ringing the bell were not submitted to the jury.

Counsel for defendant argue that the different acts of negligence alleged are so repugnant that the petition is self-destructive and must be regarded as pleading no cause of action. The rule is well settled that, where the pleaded acts of negligence are so inconsistent that the proof of one would disprove the existence of the others, the petition on its face is *felo de se* and will not support a judgment. *Raming v. Railway*, 157 Mo. 477, 57 S. W. 268; *Gabriel v. Railway*, 130 Mo. App. 651, 109 S. W. 1042. With this rule in mind, we proceed to an analysis of the petition to ascertain if it contain self-destructive averments.

At the outset it would be well to speak of the rules of construction that should guide us in the interpretation of the language of the petition. Section 1831, Rev. Stat. 1909, provides that:

"In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed, with a view to substantial justice between the parties."

Speaking of this statute, the Supreme Court say, in *Sharp v. Railroad*, 213 Mo., loc. cit. 525, 111 S. W. 1156:

"That section of the statute does not change the fundamentals of good pleading where justice demands their strict enforcement. It does not dispense with the necessity of stating directly, or inferentially, the facts on which the pleader depends to secure the objects of his pleading. It does not throw on an adversary the hazard of correctly interpreting the meanings of a pleading containing doubtful allegations, on one or the other of which such adversary might fairly act. But it does mean that allegations should be liberally construed with a view to substantial justice. It does mean that superrefinement in gloss, a penchant or bias to superfine analysis, the mere arriving at possible and strained constructions, are out of place in getting at the meaning of an

allegation in a petition. That language employed in pleadings should be construed with reference to time and place of utterance, should be taken in its plain, ordinary hearthstone meaning, and such interpretation given as fairly appears within the intendment of the pleader. That is, the intendment most favorable to him shall be allowed — at least, absent a demurrer and present a verdict in his favor, as here. See authorities collated by the learned annotators of Mo. Ann. Stat. 1906, p. 652."

The courts of this State do not favor the practice of defendants, still much indulged, of answering to the merits without challenging the sufficiency of the petition, of accepting the hazard of a trial on the theory that the petition is sufficient, and then, when the battle is lost, of harking back to the once abandoned ground that the petition does not plead a cause of action. In the present case the petition was not attacked by demurrer or motion. Defendant answered tendering the issue to each and all of the asserted acts of negligence. In such state of case, it is our duty to give the petition the most liberal construction, and, if it may be done without violence to reason, to reconcile and harmonize the several allegations of negligence.

The application of these canons of construction demonstrate the fallacy of defendant's argument against the petition. There is no repugnancy between the charges that the motorman was running the car at a dangerous rate of speed, did not sound the bell, and that he saw or should have seen the peril of the boy in time to have stopped the car had he been in the exercise of reasonable care. All of these facts could be coexistent, and therefore proof of one would not even tend to disprove the other. It was possible for the car to have been run down the slope at thirty miles per hour — a highly dangerous speed — and for the motorman, who had a clear view of the children for a thousand feet or more, to have discovered their peril in time to have avoided injuring the plaintiff by stopping the car. The case of *Grout v. Railway*, 6 St. Ry. Rep. 827, 125 Mo. App. 552, 102 S. W. 1026, does not aid the position of counsel for defendant. We held in that case that the humanitarian duty of the motorman of a street car relates only to the peculiar circumstances of the given situation, and therefore that the allegation in the petition that the motorman, had the car been running at a proper speed, would have had a reasonable opportunity to discover the peril and avoid the injury, was not a good plea of negligence under the last-chance rule. But in the petition before us the fourth specification of negligence did not assume

to deal with a theoretical, but with an actual, situation, and based a right of recovery on the ground that, under the existent facts and circumstances, the motorman would have discovered the danger to plaintiff and would have prevented the injury by stopping, had he exercised ordinary care. In *Haley v. Railroad*, 197 Mo. 25, 93 S. W. 1123, 114 Am. St. Rep. 743, the Supreme Court say:

"The petition charged that the defendant was negligent in the matter of speed, and it also charged that the defendant negligently failed to stop the train in time to avoid the collision after the danger was apparent. These two charges are not necessarily inconsistent, because they might both be true; that is, the train might have been moving at a rate of speed that under the circumstances was negligent, and yet it might be that the engineer could have stopped it in time to have avoided the accident by the use of ordinary care. But the defendant would not be liable, under what we call the humanitarian doctrine, if the speed of the train was such as to render it impossible for the engineer by the exercise of ordinary care to have stopped it in time, although the speed may have been negligent. Therefore, whilst it is negligence to run a train into a place where danger of collision is to be expected, at such a rate of speed that it could not be quickly stopped on appearance of danger, still it cannot be said that the defendant is liable for failing to stop the train after discovering the peril, if in fact the speed was such that the engineer could not stop it."

The last part of this quotation recognizes the rule we declared and applied in the Grout Case, and the first part clearly supports the view we are discussing, that there is no inconsistency between the allegations that the injury was caused by moving the car at excessive speed, and that the defendant failed to stop the car in time to avoid the collision after the danger was apparent. To the same effect are the opinions in the following cases: *Heinzle v. Railway*, 213 Mo. 102, loc. cit. 118, 111 S. W. 536; *Nipper v. Railway*, 145 Mo. App. 224, 129 S. W. 439; *McQuade v. Railway*, 200 Mo., loc. cit. 155, 98 S. W. 552; *Thompson v. Livery Co.*, 214 Mo. 487, 113 S. W. 1128; *Blyston-Spencer v. Railroad*, 152 Mo. App. 118, 132 S. W. 1175; *Childress v. Railroad*, 141 Mo. App., loc. cit. 685, 126 S. W. 169.

Stress is laid by defendant on the effect to be given the averment in the first specification that defendant negligently "failed to have said car under control." The context demonstrates that the pleader did not intend to charge that the car could not have been controlled by the motorman — was running wild — but that it was being run at a dangerous rate of speed under the circumstances of the situation. The petition is sufficient to support the

judgment, and the court did not err in overruling defendant's request for a peremptory instruction. In what has been said we have answered the principal objections to the instructions given at the request of plaintiff. The other objections are not well taken. The judgment is affirmed. All concur.

Caughell v. Indianapolis Traction & Terminal Co.

(Indiana — Appellate Court.)

INJURY TO PASSENGER ALIGHTING FROM CAR; CARE REQUIRED OF EMPLOYEES; DUTY OF CONDUCTOR. — Employees of street railways must use the highest degree of care to see and know that no passenger is alighting from a car before putting it in motion, but are not required absolutely to see and know.

The duty of the conductor of a street car who stops his car for passengers to alight is twofold. He must wait a reasonable length of time for the passenger to alight, and then he must exercise the highest degree of care consistent with the proper transaction of the business to see and know that no passenger is in the act of alighting before putting the car in motion.

In an action by a passenger to recover for personal injuries sustained while alighting from one of defendant's cars, an instruction based on the assumption that, when the conductor had waited a reasonable length of time, the defendant was not liable unless the conductor actually saw plaintiff attempting to alight when he started the car, whether or not he was exercising the proper degree of care to see and know that no one was alighting at that time, was improper. The jury should have been instructed on the duty of the conductor to exercise the highest degree of care to see and know that no one was in the act of alighting before starting the car.

PLAINTIFF appeals from a judgment for defendant. Reported 97 N. E. 1028.

F. F. James, James & Martin and *D. J. Hefron*, for appellant.

F. Winter and *W. H. Latta*, for appellee.

Opinion by IBACH, P. J.:

Appellant sued appellee for personal injuries alleged to have been caused by appellee's conductor negligently starting a street

Injury to Passenger While Alighting from Car. — As to the liability of a street railway company for injuries received by a passenger while alighting from its car, see the note to *Champayne v. La Crosse City Ry. Co.*, 2 St. Ry. Rep. 988.

car on which she was a passenger while she was in the act of alighting therefrom, thus throwing her to the street and severely injuring her. Trial by jury resulted in a verdict for appellee. Appellant's evidence tended to support the theory of her complaint; that of appellee tended to show that she had jumped off after the car was started.

The only errors argued are that the court erred in refusing to give to the jury instruction 1 at appellant's request, and in giving instructions 7 and 9 upon its own motion.

Instruction 1 is:

"The court instructs the jury that the law requires the employees of street railways to do more than to stop reasonably long enough for passengers to safely alight from cars. They are bound and required to ascertain and know that no passenger is in the act of alighting from the car before putting it in motion again. If the employee fails in that respect, then such failure is imputed to his employer, and is actionable negligence on the part of the employer, and it is no excuse for the employee or his employer to show that the car on the particular occasion was operated in the usual manner."

This instruction would be justified on the authority of *Anderson v. Citizens' St. R. Co.*, 12 Ind. App. 194, 38 N. E. 1109; *Crumph v. Davis*, 33 Ind. App. 88, 70 N. E. 886, and *Union Traction Co. v. Siceloff*, 3 St. Ry. Rep. 230, 34 Ind. App. 511, 72 N. E. 266. But in the case of *Louisville, etc., Traction Co. v. Korbe*, 93 N. E. 5, 94 N. E. 768, the Supreme Court of this State disapproved such an instruction, upon the ground that employees of street railways must use the highest degree of care to see and know that no passenger is alighting from a car before putting it in motion, but are not required absolutely to see and know. The Appellate Court cases above cited have been superseded by this decision. No error was committed by the trial court in refusing to give instruction 1.

By his instruction 7, the court told the jury that if plaintiff, a passenger on appellee's car, who had paid her fare, had given signals to stop said car at Twenty-third street, and the car was stopped for the purpose of allowing her to alight at said place, then,

"under the law, it was the duty of the conductor and the motorman of said car to allow the plaintiff sufficient time to safely alight upon the street at said crossing, and if you find that while said car was standing still and the plaintiff was in the act of leaving said car, and in plain view of the conductor of the defendant, in control of said car, the said conductor gave the starting signal,"

and the car was started, and by reason of the starting of the car plaintiff was thrown to the street and injured, and defendant was guilty of negligence in starting the car, and plaintiff's negligence did not contribute thereto, then the starting of the car would be the proximate cause of her injury, and the verdict should be for the plaintiff. This was the only instruction given embracing the theory of plaintiff's action, and it did not adequately state the duty of appellee's conductor toward appellant. The duty of the conductor of a street car who stops his car for passengers to alight is twofold. He must wait a reasonable length of time for the passenger to alight, and then he must exercise the highest degree of care consistent with the proper transaction of the business to see and know that no passenger is in the act of alighting before putting the car in motion. *Louisville, etc., Traction Co. v. Korbe, supra*, and cases cited; *Indiana Union Traction Co. v. Keiter*, (Sup.) 92 N. E. 982; *Citizens' St. R. Co. v. Hoffbauer*, 23 Ind. App. 615, 627, 56 N. E. 54. In the present case the conductor's duty to use the highest degree of care towards plaintiff, a passenger, was not completed when he had waited what he regarded a sufficient time assumption that, when a conductor had waited a reasonable length of time for plaintiff to alight, appellee would be liable for plaintiff's injury caused by starting the car, not only if she was in the act of alighting in plain view of the conductor, but also if she was in the act of alighting, and the conductor, in the use of the highest degree of care, could have seen her. Instruction 7 is based on the assumption that, when a conductor had waited a reasonable length of time, appellee was not liable unless the conductor actually saw plaintiff attempting to alight when he started the car, whether or not he was exercising the proper degree of care to see and know that no one was alighting at that time. Appellant's contention was that the conductor could have seen her attempting to alight from the car at the time he started it if he had been in the exercise of due care, and not that he actually saw her. The issue ignored by instruction 7, as to whether the conductor was in the exercise of due care to see that no passengers were attempting to alight when he started the car, is the one issue most material to plaintiff's case, and the jury should have been instructed thereon. Appellee claims that instruction 7 is not a positive misstatement of the law, but does state facts upon which appellant could have recovered, and that, if it did not go far enough in one direction to conform to the

views of counsel for appellant, they should have presented a correct instruction which did.

This is a well-recognized rule, founded on the doctrine of waiver, and we do not wish to be understood as relaxing that rule, but here we find a case marked with peculiar circumstances. Counsel for appellant presented upon this issue instruction 1 at that time fully supported by authority, though superseded since the trial. Since the court refused this instruction which expressed the law, as it had been declared by this court up to the time of the trial of this case, counsel should be excused from tendering other instructions upon the same branch of the case, and should not be held to have waived the right to instruction upon the omitted branch of the case.

Instruction 7 gave undue prominence to the questions whether the conductor waited what he regarded a sufficient time for passengers to alight before starting the car, and whether he actually saw appellant attempting to alight when he started it. Both of these issues were less material in the present case than the question whether he was exercising the highest degree of care to see and know that no one was in the act of alighting before starting the car. There is no evidence that he actually saw her attempting to alight, but there is testimony to the effect that she was attempting to alight at the time the car was started, and that the conductor in the use of due care could have seen her. In the absence of an instruction upon this issue, instruction 7, which singled out other issues, about which there was no dispute, and directed the attention of the jury specially to them, without mention of the one most material to the case, must be held to have misled the jury, for they may well have believed that the facts therein stated were the only ones upon which appellant could recover.

We have read the evidence, and while we cannot say that there is no evidence which would tend to support a verdict for defendant had the jury been properly instructed, yet, taking into consideration all the instructions given to the jury, and all the evidence in the case, we feel that substantial justice was not done, and that the interests of justice will be best subserved by granting a new trial.

Judgment reversed, and cause remanded for new trial.

Bodin v. Duluth St. Ry. Co.

(Minnesota — Supreme Court.)

INJURY TO PEDESTRIAN CROSSING STREET; ORDINARY CARE; QUESTION FOR JURY; EVIDENCE; EXCESSIVE SPEED; FAILURE TO GIVE WARNING; DAMAGES. — Where it appears that a pedestrian, about to cross street railway tracks at a regular street crossing, looked twice after he left the curb toward the approaching car, but the night was dark, the speed of the car was unusually high, the noise on the rails as then laid not great, the headlight on the car was smaller and dimmer than ordinarily used on the cars there operated, the street was being paved with paving stones, and debris scattered around, the rails being raised six or seven inches from the concrete base, then partly laid, requiring attention to avoid the obstructions, it becomes a question for the jury whether such pedestrian, after he so looked and saw the car, was justified, in the exercise of ordinary care, to conclude that he could cross the track in safety.

The finding that defendant ran the car at a negligently high speed and failed to give the usual warning of its approach is sustained by the evidence.

Where the only next of kin was decedent's mother, sixty-seven years old, and to whose support he had regularly contributed for the last three years, *held*, that \$2,000 damages for his death was not excessive.

(Syllabus by the Court.)

DEFENDANT appeals from a judgment for plaintiff. Reported 136 N. W. 302.

Thomas S. Wood, of Duluth, for appellant.

Andrew Nelson, of Duluth (*Geo. B. Sjoselius*, of Duluth, of counsel), for respondent.

Opinion by **HOLT, J.:**

The action is for injuries resulting in the death of plaintiff's intestate through the alleged negligence of the defendant. The trial resulted in a verdict of \$4,000. The defendant's motion for judgment notwithstanding the verdict was denied; also the alternative motion for a new trial, if plaintiff remitted \$2,000 from the verdict. Plaintiff remitted, and defendant appeals.

The defendant is a street railway company operating by electric power a line, among others, between Duluth and West Superior

Injury to Pedestrian. — For a discussion of the liability of a street railway for injuries received by a pedestrian struck by a street car, see *Nellis on Street Railways* (2d Ed.), §§ 404-406, 419-424.

upon a street called Garfield avenue. The north-bound track of the line is east of the center of the street, and the south-bound on the west thereof. At about 10:20 o'clock on the night of September 12, 1910, a car of the defendant running north collided with Carl Upstrom, plaintiff's intestate, inflicting injuries resulting in death the next day. The testimony tended to show that the night was dark and cloudy; one witness claiming it was somewhat foggy. The usual street light was not burning. The street was being paved with sandstone blocks, laid on a concrete base. The testimony is somewhat obscure as to whether the paving of Garfield avenue was completed further than to the east rail of the south-bound track. At any rate, all of the avenue east of the west rail of the north-bound track had only the base. The rails were six or seven inches higher than the concrete. The testimony also tended to show that there were sandstone blocks and debris between the tracks and rails. Where the accident occurred is a short cross street, called 600. The collision took place on the north crossing of this street. Upstrom and a companion, since deceased, immediately before the accident, came out of the boarding house, where they lived, at the northwest corner made by the intersection of the street 600 with Garfield avenue, and were observed by a witness, who stood on the sidewalk at the northeast corner. This witness testified that he heard Upstrom and his companion, when they were about three feet east of the west curb of the avenue, talk about whether the car then approaching from the south on the north-bound track was so far away that they could safely cross, and that they looked toward the car, one observing that there was ample time; Upstrom saying to his companion, Anderson, as he pointed to the coming car, "There is one of them coming away down there," and Anderson, responding, said: "We can make that one easy; it is so far away." They then walked right across, or, perhaps, a little slanting, since they started a few feet north of the north crossing. This witness also states that he observed that Upstrom, who was about three feet in the lead, again looked toward the car when about nine feet from the track, walking from the time he started at a steady, brisk gait. When Upstrom looked the first time, the car appeared to this witness to be a block and a half away, and when the second time about half a block. Upstrom was struck, this witness says, when he was stepping over the west rail. The deceased was thrown a few feet forward and away from the car, and the car was stopped, so that the rear vestibule was about

eighteen feet further north than the body; the car having traveled some sixty-eight feet after the collision. There was also testimony tending to show that the rails were new and dry, and that not much noise was made by the car in coming; that the headlight was not one of the ordinary ones used on cars traveling there, but one of smaller size and power; and, further, that the car was run at a speed of over twenty miles per hour without slacking up for crossings. The avenue was straight for about a mile towards the south, and all the way closely built; the buildings extending to the sidewalk.

We have set out the evidence tending most strongly to show that the deceased was not guilty of negligence, because, the jury having found that he was not, and this finding having been approved by the trial court, this court must consider the evidence in the most favorable aspect, so far as Upstrom's freedom from contributory negligence is concerned. While it is the settled law in this State that a person crossing a street railway at a street crossing is not required to use the same degree of care as one crossing the ordinary steam railway, still it is held that a person about to cross a street railway track must use his senses to discover if a car be in dangerous proximity. To fail to look, or to heedlessly proceed when the look disclosed the danger, is negligence which defeats recovery. Either is manifest negligence where no excuse appears for failure to look, or for not acting on the information imparted by the sense. In this case, the testimony disclosed that the deceased did look, and was aware of the approach of the car. It thus narrows down to this proposition: Would the ordinary prudent person in Upstrom's situation, by the information obtained by his senses of sight and hearing, have come to the conclusion that the crossing could not be made with safety? We may concede that if it had been daylight the inference would be irresistible that it would have been negligence to attempt the crossing under the circumstances. One can judge of the speed of an approaching object in daylight with some degree of exactness; but it is very difficult, if not impossible, so to do in the dark, when the only thing visible of the moving object is a headlight.

Defendant contends that this case is an exact counterpart of *Metz v. St. Paul City Ry. Co.*, 88 Minn. 48, 92 N. W. 502. But we note that Metz, on a clear, still night, only looked once when he stepped off the curb; there was no obstruction in the street; he could have had his eyes on the approaching car all the time. In

the instant case, the testimony tends to show that the deceased looked twice after he was three feet from the curb; that the street was torn up, so that some attention was necessary to see where he stepped; that the noise made by the car on the rails as then laid was not great; that the speed was greatly in excess of the usual; that the night was dark, the street poorly lighted, and the head-light smaller than the one ordinarily in use. All these considerations, we think, make it a question of fact for the jury to say if the conduct of the deceased, in attempting the crossing, was negligence. The deceased had the right to assume, until informed to the contrary by such observation as a prudent person could then have made, that the car was running at the ordinary speed, and under the ordinary rules, which require the motorman to have the car within control on passing over crossings where he may anticipate, not only that people are using the crossings, but that he may be required to stop for passengers. As stated in *Bremer v. St. Paul City Ry. Co.*, 6 St. Ry. Rep. 543, 107 Minn. 326, 120 N. W. 382, 21 L. R. A. (N. S.) 887:

"The pedestrian's duty is to be considered in connection with his justified presumption that the street car company, having no priority of way, will be careful, especially at a crossing."

And, again, in *O'Brien v. St. Paul City Ry. Co.*, 4 St. Ry. Rep. 853, 98 Minn. 205, 108 N. W. 805, it is said:

"It is settled law that it is the duty of a street car company to keep its cars under reasonable control, and to run them at a reasonable rate of speed, when they are near street crossings in crowded parts of a city; that it is not negligence in law to cross a street railway track in front of an approaching car which a person using the highway has seen, and which does not appear to him to be dangerously near, and which would not have been so in fact had it been running at its ordinary rate of speed and under proper control; and that such a person is not bound to anticipate that the motoneer would be negligent, reckless or wilful."

So to the same effect in *Albee v. Boston Elevated Ry.*, 209 Mass. 6, 95 N. E. 110; *Deitring v. St. Louis Transit Co.*, 3 St. Ry. Rep. 580, 109 Mo. App. 524, 85 S. W. 140; *Consolidated Traction Co. v. Glynn*, 59 N. J. Law 432, 37 Atl. 66; *Tesch v. Electric Railway Company*, 108 Wis. 593, 84 N. W. 823, 53 L. R. A. 618; *Saunders v. City Railroad Co.*, 99 Tenn. 130, 41 S. W. 1031.

The cases cited by appellant, to the effect that the motorman has a right to assume that a pedestrian, about to cross the track in

front of the approaching car, will exercise due care, state propositions of well-established law; also the cases holding that it is negligence to fail to use one's senses, or where it is clear that the information gained by the use of the senses was heedlessly disregarded. But such is not the case at bar, if the jury believed, as it had a right to do, the testimony most favorable to plaintiff's contention that Upstrom was using ordinary care in attempting to make the crossing.

No argument in appellant's brief is presented on the error assigned that defendant's negligence was not proven. It is sufficient to say that, both as to speed and absence of warning, the evidence amply sustains the finding of such negligence. The issues, both as to defendant's negligence and plaintiff's contributory negligence, were clearly and with great impartiality submitted to the jury; and, their findings thereon having been approved by the trial court, we find no legal cause to disturb them.

Error is assigned on the amount of damages as reduced, on the claim that they are excessive. The only argument presented is this:

"The damages were clearly excessive, even as reduced. Plaintiff's intestate had only contributed, all told, a sum less than \$100 to the support of his mother."

Plaintiff's intestate was 48 years old, industrious, strong, and healthy. His mother was 67 years old, with a life expectancy of over ten years. It was shown that each year for three years before his death he had sent her money, the last in July, 1910, \$40.35. His stepbrother testified to knowledge of these three remittances. Whether he had sent other moneys when such stepbrother was not present does not appear. In the following cases, *Thomas v. Chicago Great Western Ry. Co.*, 112 Minn. 360, 128 N. W. 297; *Holden v. Great Northern Ry. Co.*, 103 Minn. 98, 114 N. W. 365, and *Bremer v. Railway Co.*, 96 Minn. 469, 105 N. W. 494, amounts have been approved which indicate that we cannot now hold that \$2,000 is excessive in the present case.

The order appealed from is affirmed.

Lerner v. Public Service Ry. Co.

(New Jersey — Supreme Court.)

1. **TRESPASSER; NO DUTY TO OBSERVE REASONABLE CARE TOWARD.** — While, as against a trespasser, a malicious or intentional injury is actionable, a merely negligent act will not form the basis of recovery, because the duty to observe reasonable care is not owing to a trespasser.
2. **INJURY TO TRESPASSER ON CAR; WHETHER ACTIONABLE QUESTION FOR JURY.** — The question whether an injury to a trespasser (an able-bodied man), sustained by reason of his being forced from a slowly moving street car, nothing more appearing, was malicious or intentional, and therefore actionable, is for the jury.
(Syllabus by the Court.)

DEFENDANT appeals from judgment for plaintiff. Reported 84 Atl. 618.

Lefferts S. Hoffman and *Leonard J. Tynan*, both of Newark, for appellant.

Philip J. Schotland, of Newark, for appellee.

Opinion by TRENCHARD, J.:

The plaintiff below sued to recover for injuries sustained while attempting to enter a street car of the defendant company. The action was tried in the District Court with a jury, and the defendant appeals from the judgment entered upon the verdict for the plaintiff.

At the trial it appeared from the evidence produced by both sides that the plaintiff, an able-bodied man, attempted to board the car against the will of the conductor, but that he got no farther

Removal of Trespasser from Street Car. — In *Nellis on Street Railways* (2d Ed.), § 322, it is said: "A street railroad company owes a trespasser no duty of protection. Its servants have the right to remove him from the car, but in so doing they are required to subject him to no unnecessary hazard. They have no right to seize him and throw him from the car while it is in motion, or to so violently assault or frighten him as to cause him to fall from the car. In order to justify a recovery, however, the acts of the defendant's servants must have been improper, unnecessarily dangerous, the proximate cause of the injury, and done for the purpose of removing plaintiff from the car. A railway company owes to a trespasser the duty of using ordinary care in removing him from its cars, and not to wilfully or recklessly injure him after discovering him on the cars. If the employees use more force than is reasonably necessary, no matter whether they think they are not using excessive force, the company is liable for their acts."

than the step, from which position he fell to the ground and was injured by the fall. The proof upon the part of the plaintiff tended to show that the car had stopped to take on passengers, and that while the plaintiff was on the step, and was about to get on the platform, the conductor told him he could not get on, pushed him back, shut the gate in his face, rang the bell to go ahead, and "pushed the plaintiff with his fingers." On the part of the defendant the proof, on the contrary, tended to show that the car was crowded with passengers, and that the "car full" sign was displayed; that the car stopped, not to take on more passengers, but to discharge passengers; that, after the car started, and after the conductor had closed the gate, the plaintiff "put his foot upon the bottom step and hung on to the gate;" that the plaintiff was then told by the conductor that he "had better get off and that he could not get in;" and that the conductor did nothing further to interfere with the plaintiff.

While the testimony is conflicting upon the question of the speed of the car, nevertheless it was clearly open to the jury to find that, from the time the plaintiff attempted to board the car until he fell, it was moving slowly.

In his charge to the jury the judge said that "the plaintiff was a trespasser on the car," and therefore, in dealing with the question about to be considered, that must be regarded as the law of the case. The learned trial judge then further charged as follows:

"Whether or not the conductor did eject this man from the car while the car was in motion, whether he did something to force this man off this step and loosened his grasp on the gate so that the man fell off while the car was in motion, is for you to say. If he did, I charge you he is entitled to damages."

We are of opinion that the contention of the defendant that such instruction was erroneous, and requires a reversal of this judgment, must prevail.

While, as a trespasser, a malicious or intentional injury is actionable, a merely negligent act will not form the basis of recovery, because the duty to observe reasonable care is not owing to a trespasser. *Hoberg v. Collins, Lavery & Co.*, 80 N. J. Law 425, 78 Atl. 166, 31 L. R. A. (N. S.) 1064; *Powell v. Erie Railroad Co.*, 70 N. J. Law 290, 58 Atl. 930, 1 Ann. Cas. 774. In *Hoberg v. Collins, Lavery & Co.*, Mr. Justice Voorhees, in the course of his opinion, said:

"To force a man from a rapidly moving railway train, it is well known, is to subject him to a hazard almost certain to result in loss of life or severe bodily harm. Such an act, therefore, if conditions are known, is malicious and wrongful. To remove one from a railway car at rest is not an inherently dangerous act, nor one which commonly does, or is likely to, eventuate in harm, so that, if in fact an injury should result, it could be said to be wanton or wilful and intentional."

It logically follows that the question whether an injury to a trespasser (an able-bodied man), sustained by reason of his being forced from a slowly moving street car, nothing more appearing, was malicious or intentional, and therefore actionable, is for the jury. So the cases hold. *Southern Kansas R. Co. v. Sanford*, 45 Kan. 372, 25 Pac. 891, 11 L. R. A. 432; *Doggett v. Chicago, B. & Q. R. Co.*, 134 Iowa 690, 112 N. W. 171, 13 L. R. A. (N. S.) 364, 13 Ann. Cas. 588; *Toledo, St. L. & W. R. Co. v. Gordon*, 143 Fed. 95, 74 C. C. A. 289; *Johnson v. Chicago, St. P., M. & O. R. Co.*, 123 Iowa 224, 98 N. W. 642.

In *Krueger v. Chicago & A. R. Co.*, 84 Mo. App. 358, judgment in favor of the trespasser was reversed because the jury was charged that he could recover if he received the injury by reason of being forced to leave the train while it was in motion, this being held erroneous, since the motion might have been slow enough for the jury to say that it did not involve hazard.

No doubt a court question might be presented by undisputed proof of excessive or improper force (*Powell v. Erie Railroad Co.*, 70 N. J. Law 290, 58 Atl. 930, 1 Ann. Cas. 774), or by like proof that the act was done under conditions known to be almost certain to result in loss of life or severe bodily harm (*Hoberg v. Collins, Lavery & Co.*, 80 N. J. Law 425, 78 Atl. 166); but there was no such undisputed proof in the present case.

The result is that the judgment of the court below will be reversed and a venire *de novo* awarded.

Langdon v. Minneapolis St. Ry. Co.

(Minnesota — Supreme Court.)

1. **COLLISION WITH CARRIAGE OR CAB; NEGLIGENCE; EVIDENCE.** — In an action for damages for injuries received by plaintiffs as a result of a collision between one of defendant's street cars and plaintiffs' carriage or cab, the evidence is *held* sufficient to sustain a verdict of negligence against defendant.
2. **WILFUL NEGLIGENCE; QUESTION FOR JURY.** — There was evidence tending in a measure to support the charge of wilful negligence, and it is *held*, though the evidence in this respect left the question in some doubt, that there was no reversible error in its submission to the jury.
3. **EVIDENCE; DOCUMENTS PREPARED BY MOTORMAN; PRIVILEGED COMMUNICATIONS.** — The general objection that certain documents prepared by defendant's motorman, offered in evidence by plaintiffs, were immaterial and incompetent, and not impeaching, *held* not to raise the question whether the documents were privileged communications between defendant and its employee.

(Syllabus by the Court.)

PLAINTIFF appeals from an order denying defendant's alternative motion for judgment or a new trial. Reported 138 N. W. 790.

John F. Dahl and *W. O. Stout*, both of Minneapolis (*N. M. Thygeson*, of Minneapolis, of counsel), for appellant.

Butler & Mitchell, of St. Paul, for respondents.

Opinion by **BROWN, J.:**

These two actions, brought to recover damages for personal injuries alleged to have been caused by the negligence of defendant, were consolidated and tried together in the court below, resulting in verdicts for plaintiffs. Defendant appealed from an order denying its alternative motion for judgment or a new trial.

On November 20, 1908, at about 7 o'clock in the evening, plaintiffs, husband and wife, were proceeding from their residence in the city of Minneapolis, in a cab or closed carriage hired by the husband for the particular occasion, to the residence of a neighbor residing a short distance away, and while crossing Nicollet avenue, along and upon which defendant operates its line of street railway,

Collision with Vehicle. — As to the liability of a street railway company for injuries arising out of the collision with a vehicle, see *Nellis on Street Railways* (2d Ed.), §§ 400-402, 414-418.

at the intersection thereof with Franklin avenue, the cab was struck by a street car with such force and violence as to totally demolish the vehicle and inflict upon plaintiffs serious and permanent injuries. Plaintiffs charged in their complaints that the accident and resulting injury to them was caused solely from the negligent operation of the street car, in this: (1) That it was run at an excessive and unlawful rate of speed; (2) that no warning of the approach of the car was given by sounding the car bell or otherwise; (3) that the car was not under proper control as it approached the street crossing; and (4) that defendant was guilty of wilful negligence, in that the motorman in charge of the car failed to exercise reasonable care to avert the collision after discovering plaintiffs' peril. Defendant by its answer put in issue the charge of negligence on its part, and affirmatively alleged that the accident was occasioned by the negligence of plaintiffs and the driver of the cab, who, the answer further alleged, was their agent and servant. The trial below centered around the question of defendant's negligence in the respects alleged in the complaint, and the damages suffered by plaintiffs. There was no evidence of negligence on the part of plaintiffs, and the court instructed the jury that the negligence of the cab driver was not imputable to them; so that the defense of contributory negligence was eliminated from the case. The jury returned verdicts for both plaintiffs.

It is contended on this appeal, in support of the claim that the court below erred in denying defendant's motion for judgment notwithstanding the verdict, that the evidence wholly fails to make a case of negligence on the part of defendant in any of the respects alleged in the complaint. In support of the motion for a new trial it is contended: (1) That the court below erred in certain of its rulings on the admission and exclusion of evidence, and in its charge to the jury; and (2) misconduct on the part of plaintiffs' counsel.

1. We find no difficulty in concurring with the trial court that the evidence made the question of defendant's negligence one of fact for the consideration of the jury. The street car causing the injury to plaintiffs was being operated upon Nicollet avenue, over and across which are extended numerous streets and avenues much frequented and used by the public, though the evidence of the motorman was to the effect that there was little travel upon the side streets at that particular hour of the day. The car was pro-

ceeding south, and at the intersection with Franklin avenue, the place of the accident, and for some distance below, up a grade. The evidence tends to show that the car was being run at an excessive rate of speed; the witnesses differing in their estimates all the way from fifteen to thirty-three miles an hour. It also tends to show that the motorman in charge failed to sound the gong or bell of his car, or otherwise give warning of the approach of the car, as he neared the street crossing; that the same speed of the car was maintained up to the time of the collision; hence that the car was not under proper control. This evidence, if satisfactory to the jury, justified the conclusion of a negligent operation of the car, and that such negligence was the proximate cause of the injury to plaintiffs. *Shea v. Railway Co.*, 50 Minn. 395, 52 N. W. 902; *Holmgren v. Railway Co.*, 61 Minn. 85, 63 N. W. 270; *Smith v. Railway Co.*, 4 St. Ry. Rep. 535, 95 Minn. 254, 104 N. W. 16.

A further discussion of the evidence upon this subject would serve no useful purpose. There is nothing unusual in the facts presented, or which differentiates the case from the ordinary case of a collision at a street intersection between a street car and a passing vehicle. The evidence tended to show the excessive speed of the car, the failure to give the usual warnings of its approach, and the failure of the motorman to have proper control of the car, where control was necessary. The motorman was bound to anticipate the probable presence of pedestrians or vehicles at street crossings of the location and character of this one, and it was incumbent upon him to so manage his car that a collision with a vehicle, should one appear, could if possible be averted. It was also his duty to give the usual warnings of the approach of the car, and to limit the speed thereof to that prescribed by law as not dangerous or excessive. It is urged that the signals alleged to have been omitted by the motorman would have been unavailing, had they been given; that it was not negligence to fail to give such warning, for the approaching car could plainly have been seen by the driver of the cab long before he reached the car track. It is probable, had the action been by the driver of the cab to recover for his injuries, defendant's contention would be well founded; but the cab driver's conduct is not involved in the action. The court below charged the jury that his negligence could not be charged to plaintiffs, and of that instruction no complaint is made. Plaintiffs, within the closed carriage, had the right to assume that

defendant would discharge its full duty to the traveling public; that it would give timely warning of the approach of its cars at street intersections, operate its cars at a proper rate of speed, and keep them under reasonable control at points where pedestrians or vehicles might be expected to suddenly emerge from side streets. The negligence of the cab driver may be conceded, but that does not relieve the defendant from its negligence, under the law of the case as stated in the instructions of the court.

2. Defendant complains of the reception in evidence of Exhibits I and J. Exhibit I was a report of the accident made by the motorman to defendant the day following, and stated from the viewpoint of the motorman the facts and conditions surrounding the same. Exhibit J was a chart or plat made by the motorman showing the situation, the location of the car following the collision, the location of the cab and the bodies of the injured parties, and, as we understand it, the point at which the motorman first noticed the oncoming cab. It was brought out on the cross-examination of the motorman that these documents had been made by him or under his direction; and, upon request of counsel for plaintiffs, counsel for defendant produced them. They were made the basis of some further cross-examination, and were then offered in evidence. They were objected to by defendant as incompetent and immaterial, and not impeaching in character. We think the documents, as against the particular objection, were properly received in evidence. They were in substance and effect declarations of the witness made soon after the accident, and were in some respects at least at variance with the testimony given by him at the trial. Exhibit I, the report of the accident, contained no reference to the claim made by the witness on the trial that the horses attached to the cab were running away, or approaching the street on "the jump," and tended to contradict him in that respect. If the horses were in fact running away, it is fair to assume that witness would have referred to that fact in his written report to the company. We hold that the documents were, as against the particular objection, properly received in evidence. The further contention that they were inadmissible, because in the nature of a confidential communication, and therefore privileged (Booth, *Street Railways*, 399), was not included in the objection made on the trial, and cannot, therefore, be considered. The objection that the documents were "incompetent and immaterial, and not im-

peachment," did not call to the attention of the trial court the point now made that they were privileged. *Graves v. Bonness*, 97 Minn. 278, 107 N. W. 163.

3. The question whether the court erred in submitting to the jury the issue of wilful negligence presents the only other subject requiring special mention. Our examination of the record discloses no error of a character to justify a new trial, unless it be this particular instruction. We have given this feature of the case careful consideration, and as a result thereof hold, conceding the doubtfulness of plaintiffs' claim that they were entitled to a submission of the question to the jury, that no prejudice resulted therefrom. There was some evidence tending directly to show a failure on the part of the motorman to exercise reasonable care to avert the collision after discovering plaintiffs' peril. He discovered the carriage coming toward the car track on a run, a clear indication that the driver thereof did not intend to stop for the car to pass, if he noticed it coming, or could not do so because the horses were running away, as the motorman supposed, and it was, in view of the situation, incumbent upon the motorman immediately to take measures to avoid a collision, or in some manner draw the attention of the cab driver to the fact that the car was approaching. The precise distance between the cab and car when the motorman was first appraised of the situation was a question in some dispute on the evidence. But there was evidence that no effort to stop the car was made until the time of the collision. Passengers on the car testified that efforts to stop the car were made at the moment the collision occurred, and not before. The witnesses so testifying, particularly one of them, who through the car window noticed the approaching cab, were in position to judge with some degree of accuracy whether the efforts to stop the car and the collision were simultaneous. The force and effect of this evidence, considered in connection with the circumstances presented, and the testimony of the motorman on the subject, was for the jury to determine. It may be conceded that the evidence, taken as a whole, does not leave the question entirely free from doubt.

But since the negligence of defendant in other respects charged in the complaint was, as to plaintiffs, shown by ample and sufficient evidence, it seems beyond question that no prejudice resulted from the submission of the particular question. It is not at all probable that the jury considered that feature of the case; the evidence upon the other branches of negligence, as to plaintiffs, who

were not responsible for the conduct of the cab driver, being so clear and free from doubt. Had the evidence of negligence in the other respects been doubtful, an entirely different question would be presented. There was no fair doubt in that respect. The case of *Bloomquist v. Railway Co.*, 7 St. Ry. Rep. 496, 113 Minn. 12, 129 N. W. 130, is not in point. The trial court there refused to submit the question of wilful negligence, and the refusal was sustained. Wilful negligence was in that case the only basis upon which plaintiff therein could recover; the jury having found adversely to him upon all other questions. That is not the situation in the case at bar. We therefore hold that there was no error in the submission of the particular question to the jury. There was some evidence to support it, and, in any event, we are clear that it was not prejudicial.

4. We find no ground for reversal in the alleged misconduct of plaintiffs' counsel in his address to the jury. The attention of the trial court was not directly called to any prejudicial statements, no ruling invoked, nor exception noted, and the case comes within the rule applied in *State v. Frelinghuysen*, 43 Minn. 265, 45 N. W. 432; *Corrigan v. Elsinger*, 81 Minn. 42, 83 N. W. 492, and *Ludwig v. Spicer*, 99 Minn. 400, 109 N. W. 832.

This covers all the assignments calling for special mention, and results in the conclusion that no reversible errors were committed on the trial, and the order appealed from must be affirmed.

Order affirmed.

Valdosta St. Ry. Co. v. Fenn.

(Georgia — Court of Appeals.)

1. **CARE REQUIRED TOWARD PASSENGERS; TOWARD CHILDREN; NEGLIGENCE OF MOTORMAN IN LEAVING CAR SO THAT IT COULD BE EASILY STARTED.** — A street railway company may be held liable for an injury due to the failure of its motorman to exercise extraordinary care in protecting a passenger from injury; and a jury may be authorized to find that a motorman who left his car, which was operated by electricity, in such condition that the car could be easily started or set in motion by a passer-by, was guilty of culpable negligence as to passengers who were permitted to remain in the car, while awaiting the arrival of a connecting car of the same street car company on which they were to proceed to their destination.

Duties of Employees in Management of Car. — For a discussion of the duties of the employees of a street railway company in the management of a street car, see *Nellis on Street Railways* (2d Ed.), §§ 294-297.

A carrier is required to use such precautions as may be necessary to prevent any danger to his passengers which can be anticipated in the use of extraordinary diligence. In the exercise of extraordinary diligence, the carrier is required to anticipate that children of tender years will not act with the prudence of maturity, and are generally inclined to be inquisitive, meddlesome, and venturesome, and it is required to foresee that a very high degree of diligence may be necessary for the safety of those who may be injured by the thoughtlessness of children.

2. **CARE REQUIRED TOWARD PASSENGERS; WHO ARE PASSENGERS.**—The carrier is charged with the duty of using that extreme care and caution which every prudent and thoughtful person would use under similar circumstances. A passenger upon a street car, who has not reached his destination, and who, in order to reach his destination, must change from one car of the carrier to another car of the same carrier, and who is permitted to remain in the car while awaiting the arrival of the connecting car, is still a passenger.
3. **PROXIMATE CAUSE; MOTORMAN LEAVING CAR IN SUCH CONDITION THAT CHILD COULD START IT.**—The question of proximate cause depends upon the facts of each particular case, and in ascertaining in a particular case what was the proximate cause of the injury the conclusion reached depends upon whether the injury alleged was such a natural and probable consequence, under the circumstances of the case, as that it might and ought to have been foreseen by the wrongdoer as likely to ensue from his act.

The jury were authorized to find in this case that the act of the child was not a proximate cause, but that the motorman, in leaving his car in such condition that a child could set it in motion, was the prime and underlying essential and efficient cause of the injury; for "if the character of the intervening act claimed to break the connection between original wrongful act and the subsequent injury was such that its probable and natural consequences could reasonably have been anticipated, apprehended, or foreseen by the original wrongdoer, the casual connection is not broken, and the original wrongdoer is responsible for all of the consequences resulting from the intervening act." *Southern Railway Co. v. Webb*, 116 Ga. 152, 42 S. E. 395, 59 L. R. A. 109.

4. **EVIDENCE; NEW TRIAL REFUSED.**—The court did not err in overruling the defendant's demurrers, nor in refusing to award a nonsuit or direct a verdict. The evidence authorized the jury's finding, and there was no error in refusing a new trial.

(Syllabus by the Court.)

DEFENDANT brings error from judgment for plaintiff. Reported 75 S. E. 984.

E. K. Wilcox, of Valdosta, for plaintiff in error.

Toomer & Reynolds, of Jacksonville, Fla., and *Whitaker & Dukes*, of Valdosta, for defendant in error.

Opinion by **RUSSELL, J.**
Judgment affirmed.

Public Service Commission, Second District et al., v. Westchester Street Railroad Company.

(New York—Court of Appeals.)

FRANCHISE; EFFECT OF ADDITIONAL FRANCHISE GRANTED ON CONDITION OF REDUCED FARE; WHEN PURCHASER OF STREET RAILROAD AT FORECLOSURE SALE BOUND BY SUCH CONDITIONS; REMEDY FOR PURCHASER'S FAILURE TO COMPLY THEREWITH.—Where a village had granted a franchise to a trolley company under which it was entitled to charge a ten-cent fare and thereafter granted it an additional franchise on condition of a reduced fare over that portion of the road covered and affected by the first franchise, which additional franchise was accepted by the company, this constituted a valid contract and the old franchise was effectively modified or superseded by the new contract so far as the village authorities were interested therein.

Where such latter franchise was granted after the execution of a mortgage on the property of the trolley company, which mortgage by express terms covered property and franchises to be acquired after its execution, and the trustee under the mortgage elected to enforce such lien against such subsequently acquired property and franchises and secured a judgment directing the sale thereof, the mortgagee thereby affirmed the act of the mortgagor in obtaining the additional franchise and the terms on which it was secured. A purchaser of that part of the property granted under the first franchise and originally included in the mortgage, who is chargeable with notice of these facts, took it subject to the terms of the second franchise for a reduced fare although he did not buy the later acquired property.

The remedy of the village is not restricted to an action for the forfeiture of the franchise, nor can the court refuse to enforce the obligations imposed by the contract involved, because one of the parties had agreed to unprofitable terms, but an injunction and mandamus may be granted under the provisions of section 57 of the Public Service Commissions Law restraining the purchaser from violating the contract and compelling it to carry passengers at the reduced fare.

DEFENDANT appeals from an order granting an injunction and mandamus.
Reported 99 N. E. 536, 206 N. Y. 209.

STATEMENT OF FACTS.

On and after February 1, 1898, a corporation known as the Tarrytown, White Plains and Mamaroneck Railway Company

Condition Imposed in Franchise as to Rate of Fare.—For a discussion of the imposition in a franchise of a condition as to the rate of fare to be charged by the company, see *Nellis on Street Railways* (2d Ed.), § 52.

owned and operated a line of street railroad extending from a point westerly thereof into the village of White Plains with various branches. In January of that year its predecessor in name applied to the proper officials for a franchise authorizing it to construct and operate an extension of the line first mentioned from the village of White Plains to a point in the village of Mamaroneck, and such officials granted such franchise on the condition, amongst others, that a fare not exceeding ten cents should be charged over the road so constructed between said villages. The Tarrytown Company accepted said franchise and thereafter constructed its railroad and operated the same in accordance therewith, and the conditions thereof.

On March 1, 1898, said company duly executed to the Knickerbocker Trust Company, as trustee, a mortgage covering property and franchises then owned and thereafter to be acquired to secure an issue of bonds amounting to \$300,000, and said mortgage duly provided amongst other things that the proceeds of said bonds were to be used in part in acquiring franchises and making extensions of the road then owned by said mortgagor.

Some time after the execution of said mortgage and the issue of bonds thereby secured said company made application for a franchise for the extension of its road from the terminus in the village of Mamaroneck over what was known as the Boston post road, and which proposed extension lay both in the village and in the town of Mamaroneck. Said franchise for such extension was granted by the authorities both of the town and the village but on the condition, amongst others, as construed by both parties, that the company should carry passengers between the farther terminus of the proposed extension and said village of White Plains for a single fare of five cents. The railroad subsequently by formal instrument duly filed in the proper public office accepted and agreed to conform to the conditions of the franchise and thereafter constructed said extension and operated its road between the terminus of the extension and the village of White Plains for a single fare of five cents as in the franchise provided.

In January, 1908, a receiver of the road was appointed in proceedings for its dissolution and immediately took possession of its property and entered upon its operation. In September, 1908, the company having failed to pay the interest on its bonds secured by the mortgage above mentioned, foreclosure of the latter was commenced by the trustee which proceeded to a judgment of fore-

closure and sale. Neither the village nor the town of Mamaroneck which granted the franchises over the Boston post road were made parties to this foreclosure action except for a specified purpose which is not of importance in this proceeding. The judgment in said action awarded a sale of the entire line of railroad and of the franchises therefor and the rights therewith connected, including the extension above mentioned. It provided for a provisional sale of the road both as an entirety and in three parcels and in the end the sale in parcels was accepted and approved. By this sale the last extension which has been referred to was sold for \$110,000 to one Babcock, who thereafter assigned to a company other than the appellant, and the other two parcels, one of which embraced the road between the village of White Plains and the village of Mamaroneck, were sold to one Sutro for the sum of upwards of \$800,000. Thereafter Sutro assigned and transferred his bids and rights to the appellant which had in the meantime been organized and which thus became the owner and operator of said line of road. There was a large amount of indebtedness, aside from bonds, to be paid from the proceeds of said sale.

Thereafter the appellant, in disregard of the conditions of the franchises granting the extension over the Boston post road, if such conditions are applicable to it, commenced to charge a fare of ten cents between the village of Mamaroneck and White Plains. The judgment of foreclosure above mentioned provided that the purchaser or purchasers might within ninety days after the confirmation of the sale of the entire property or any part thereof disavow, renounce and relinquish any contract, franchise or agreement with the defendant in that action, the Tarrytown Company, and after purchase and transfer to it of the parcels above mentioned appellant did execute and file an instrument in writing purporting to be a disavowal and relinquishment of the five-cent franchise granted by the town and village of Mamaroneck, but said town and village refused to accept such disavowal or relinquishment and on the contrary have insisted that the conditions of said franchises are binding on the defendant.

In addition to the foregoing facts it was found by the court that under a five-cent fare under present conditions the appellant will not receive the actual cost to it of its public service between the villages of Mamaroneck and White Plains.

William Greenough and Charles F. Mathewson, for appellant.

Ledyard P. Hale, for Public Service Commission, respondent.

William L. Rumsey, for village of Mamaroneck, respondent.

Opinion by HISCOCK, J.:

The decision in this proceeding affirms the obligation of the appellant to carry passengers on a continuous passage between the village of White Plains and the steamboat landing, so called, in the village of Mamaroneck for a single fare of five cents.

As more fully appears in the foregoing statement of facts, its predecessor, the Tarrytown, White Plains and Mamaroneck Railway Company, owned and operated a railroad between said points under franchises granted by said village of Mamaroneck and others under which it was entitled to charge a fare of ten cents. While thus situated it executed a mortgage covering property and franchises then owned and thereafter to be acquired. Later it obtained from the town and village of Mamaroneck, respectively, franchises for an extension beyond the steamboat landing on the condition, amongst others, that it would carry passengers between points on said extension and the village of White Plains, and which included the original section now owned by appellant and involved here, for a single fare of five cents, and by formal instrument it duly accepted said franchises and agreed to all their conditions and entered upon their enjoyment. Thereafter judgment of foreclosure and sale was obtained under said mortgage under which the road of said Tarrytown Company, including said extension, was sold in parcels, the appellant by assignment of bids becoming the owner of the parcel involved here, and some one else of the extension above mentioned.

It will only be necessary in this case to consider the effect of the franchises granted by the village of Mamaroneck and of the acceptance thereof. When the village granted appellant's predecessor an extension of its franchise it had the right as a consideration therefor to exact suitable conditions and agreements from the company in the interest of its inhabitants. There is no doubt that the rate of fare to be charged to and from points in the village was a matter of such municipal and public interest that the municipal authorities might bargain with reference thereto. Therefore the grant of the new franchise on the condition and consideration, amongst others, of a five-cent fare between the points now involved and the acceptance by the company thereof and its

agreement to observe all the "conditions, regulations and restrictions" thereof made a valid contract.

It is urged that this did not have the effect to modify the original or ten-cent franchise covering the section of road here involved. I do not know that particular terms are indispensable, but it seems to me that such was the result. The village had granted a prior franchise duly accepted by the company under which the latter was entitled to charge a ten-cent fare. The village then granted an additional franchise on condition of a reduced fare over that portion of the road covered and affected by the first franchise, and the company accepted it and agreed to abide by its conditions and entered on its enjoyment. It seems to me that thereby the old franchise was presently and effectively modified or superseded by the new contract so far as the village authorities were interested in and could contract for a reduced fare. It is not necessary here to determine whether the latter could contract for a reduced fare on a continuous passage between White Plains and some point short of or beyond the village.

I do not understand that there is any serious question that so long as the Tarrytown Company operated its road including the extension, it was bound to afford a continuous passage for five cents as it had agreed. But it is insisted with much earnestness and ability by appellant's counsel that this obligation has been cut off by the foreclosure of the prior mortgage and by the sale of the road in parcels whereunder appellant did not acquire any part of the extension.

There is no doubt that the agreement of the Tarrytown Company to subject part of its original road covered by its mortgage to a reduced fare was subordinate to the lien of the mortgage and might have been rejected by the mortgage trustee or bondholders. I doubt if it would have been necessary for them to take any affirmative action in this direction or do more than ignore the extension in the foreclosure. But they did not by any means assume this attitude. The mortgage by express terms covered property and franchises acquired after its execution and it was provided therein that part of the proceeds of the bond issue should be devoted to development of extensions. Under these circumstances, the trustee in foreclosing its mortgage elected to enforce its lien on the newly acquired property and secured a judgment directing a sale of the extension which was later made for upwards of one hundred thousand dollars. Certainly and too obviously for

argument this was not a repudiation by the mortgagee but an affirmance of the act of the mortgagor in procuring the extension and, therefore, of the terms on which it was secured. For again I suppose it will hardly be claimed that the mortgagee could thus get the benefit of the extension and at the same time escape the burdens undertaken in its acquisition. If the bondholders had bid off the entire road I think one would not seriously claim that they could at the same time cling to the extension and push away the obligations which it imposed on the balance of the road. Did the purchaser acquire any greater rights even though it bid off a parcel not included in the extension but subjected to its conditions?

The appellant is in no position to claim that the trustees acted improvidently or in violation of the rights of the bondholders in affirming the action of the mortgagor in subjecting the mortgaged property to an undesirable burden. That is a question between the trustee and the bondholders with which the appellant has no concern. It is bound by the sale as it took place and the only question is as to what it secured thereunder. Its assignor and it were chargeable with notice and knowledge of the franchises and terms under which the mortgagor operated its road, both the original part and the extension. They of course knew that franchises from the village were necessary, and those franchises and the consents of the company thereto were public records in the proper office. In addition the road being sold had been operated in accordance with the fare provision for years. This appellant and its assignor, therefore, were chargeable with knowledge that the parcel which it was procuring was subjected to certain obligations or burdens in consideration of the extension franchise. It was likewise chargeable with knowledge of the provisions of the judgment of foreclosure under which its assignor purchased, and that judgment told it that the mortgagee had ratified and proposed to take advantage of the action of its mortgagor in procuring the extension and imposing obligations on the parcel which it was obtaining. Thus it seems clear that the mortgagor and mortgagee united in a modification of the original franchise or right to operate the parcel of road which appellant has purchased, and that the latter bought with full knowledge thereof and subject thereto. In this respect the case differs from the one of *Caccia v. Brooklyn Union Elevated R. R. Co.*, 98 App. Div. 294, cited by appellant, where it was held that a purchaser at a foreclosure sale was not

affected by the release of certain rights from the lien of the mortgage of which he had no notice.

The remaining question in this connection is as to the manner of enforcement of the conditions of the five-cent franchise, because if appellant's counsel is right in his view upon this his client is saved anyway.

It is argued that the franchise for the extension was granted on a condition as to fares and on failure to comply with the condition the remedy is simply a forfeiture of the franchise which rested on it, namely, for the extension. This, of course, would not hurt appellant. It will be assumed that this remedy is open, but if I have been right in my prior reasoning it is not the only remedy. If the later franchise and the acceptance thereof and agreement thereto by the appellant's predecessor then effected a modification of its prior franchise and rights so that only a lower fare could be charged between the points here involved, that modification necessarily controls the operation of the road in the possession of one taking under the circumstances detailed. The road cannot be operated without a franchise and the franchise consists in part of the modification. If the appellant is operating its road in violation of its franchise and obligation there is no doubt that it can be stopped by a proper proceeding at the instigation of a proper party, and such I think are the present ones. Public Service Law, § 57.

The only substantial objection to the present proceeding, assuming that the petitioners are correct in their claims respecting the legal rights of the parties, is that it appears that the appellant cannot carry passengers between the points in question for five cents and that, therefore, this application should be denied as a matter of equity.

If we regard this proceeding as the equivalent of an action for specific performance, the rule undoubtedly is that courts may refuse the prayer for such relief when because of special circumstances it would be inequitable to grant it. But the statute expressly authorizes this form of proceeding, and I am not aware of any principle or authority which compelled the court to refuse to enforce the obligations imposed by the contract involved simply because one of the parties had ill advisedly agreed to unprofitable terms.

There may be considerable force in the appellant's argument that sound public policy is not best subserved by compelling a public service corporation to furnish service at a loss. But even

if that be the fact here we see no opportunity to give relief from it in this proceeding.

The order appealed from should be affirmed, with costs.

CULLEN, Ch. J., GRAY, WERNER, WILLARD BARTLETT. CHASE and COLLIN, JJ., concur.

Order affirmed.

Oklahoma Ry. Co. v. Powell.

(Oklahoma — Supreme Court.)

TRANSFERS; ORDER REQUIRING THE GIVING OF TRANSFERS; TRAFFIC REGULATIONS. — The Corporation Commission ordered: "That on all days except Sundays, between the hours of six and eight A. M. and five-thirty and eight P. M., the defendant (appellant), the Oklahoma Railway Company, shall give transfers when requested by the passenger and that said transfers should be honored at any point on the line for which they are marked. Between the hours of six and eight A. M., when two cars meet on a parallel track, they shall stop for the transfer of passengers. Example: If a University car going west on Main street between Broadway and the terminal should meet a Capitol Hill or Stock Yards car, both cars shall stop to transfer passengers if they have any. Between six and eight A. M., as one car is entering the terminal from Main street, if at the same time another car is coming out on Main street, and passengers on the incoming car desire to transfer to the outgoing car, the same as to Grand avenue, both cars should be stopped until passengers can transfer. At all other hours of the day the rules now in force by the company may be enforced. Transfers given to passengers on the outside of the terminal station may be different to those given on the inside." *Held*, that the Commission had jurisdiction to make this order.

(a) Said order on review here is not shown to be unreasonable and unjust.

(Syllabus by the Court.)

DEFENDANT appeals from judgment for plaintiff. Reported 127 Pac. 1080.

Shartel, Keaton & Wells and Asp, Snyder, Owen & Lybrand, all of Oklahoma City, for appellant.

Chas. West, Atty.-Gen., and *Chas. L. Moore*, Asst. Atty.-Gen., for appellees.

Regulation as to Transfers. — For a discussion of the power to regulate the issuance of transfers, see *Nellis on Street Railways* (2d Ed.), § 139.

Opinion by WILLIAMS, J.:

This proceeding seeks to review an order of the Corporation Commission, which is in words and figures as follows:

"The Commission will issue the following order and should the same be abused by either the railway company or the patrons thereof, or any part thereof work unsatisfactory to the public, the Commission will modify the same at any time upon application of either party, with a view of ultimately working out a satisfactory arrangement to all concerned. It is therefore ordered that on all days except Sundays, between the hours of six and eight A. M. and five-thirty and eight P. M. the defendant, the Oklahoma Railway Company, shall give transfers when requested by the passenger and that said transfers should be honored at any point on the line for which they are marked. Between the hours of six and eight A. M. when two cars meet on a parallel track, they shall stop for the transfer of passengers. Example: If a University car going west on Main street between Broadway and the terminal should meet a Capitol Hill or Stock Yards car, both cars shall stop to transfer passengers if they have any. Between six and eight A. M., as one car is entering the terminal from Main street, if at the same time another car is coming out on Main street, and passengers on the incoming car desire to transfer to the outgoing car, the same as to Grand avenue, both cars should be stopped until passengers can transfer. At all other hours of the day the rules now in force by the company may be enforced. Transfers given to passengers on the outside of the terminal station may be different to those given on the inside."

The appellant insists that (1) the Commission was without jurisdiction to make said order, and (2) that if it had such jurisdiction the order is unreasonable and unjust.

1. The provision contained in section 18, article 9, of the Constitution (section 234, Williams' Anno. Const.), is as follows:

"Provided, however, that nothing in this section shall impair the rights which have heretofore been, or may hereafter be, conferred by law upon the authorities of any city, town, or county to prescribe rules, regulations, or rates of charges to be observed by any public service corporation in connection with any services performed by it under a municipal or county franchise granted by such city, town, or county, so far as such services may be wholly within the limits of the city, town, or county granting the franchise."

On January 30, 1902, the mayor and council of Oklahoma City passed an ordinance (No. 281), entitled:

"An ordinance authorizing the Metropolitan Railway Company, of Oklahoma City, its successors and assigns, to construct and maintain an electric railway system in the streets and alleys of Oklahoma City and regulating the construction, operation and maintenance thereof" —

authorizing said railway company, among other things, to build and construct a system of electric street railways over and along the streets of said city, and defining the conditions of the exercise of the authority therein conferred. On February 8, 1902, the said railway company, in accordance with the requirements of said ordinance, filed with the city clerk of said city its acceptance of the terms and conditions thereof. On June 15, 1904, said railway company sold, conveyed and assigned its said railway system, together with the franchise rights and privileges existing in its favor by virtue of said ordinance, to the Oklahoma Railway Company, the appellant herein.

Section 6 of the said ordinance provides:

"The mayor and councilmen of said city shall not be deemed by the granting of the privileges contained in this ordinance to have waived or abandoned the right to make any and all needful police regulations with reference to the operation or maintenance of said street car system, and shall at all times have the power to pass ordinances regulating the use of headlights, gongs and fenders and all other needful rules and regulations for the protection of the inhabitants of said city, in connection with the operation of said railway."

At the time said ordinance was passed granting said franchise, said Oklahoma City, being a city of the first class, possessed no corporate authority to pass such ordinance. Such authority was then possessed only by incorporated towns. Section 512, Wilson's Rev. & Anno. Stats. of Oklahoma, subd. 20; *South McAlester-Eufaula Tel. Co. v. State ex rel.*, 25 Okl. 524, 106 Pac. 962.

The Legislature of Oklahoma territory in 1903 passed an act entitled:

"An act authorizing the organization of corporations for the construction of electric railways and defining the power of such corporations."

Section 3 of said act, which was approved March 16, 1903, provides:

"All licenses or franchises heretofore granted to any street railway company authorizing the construction and operation of an electric street railroad in any city of the first class in the Territory of Oklahoma, and which have not become forfeited or lapsed by their terms, are hereby ratified, legalized and confirmed."

Section 3, art. 4, c. 9, p. 141, Session Laws of 1903. Section 2 of said act (Session Laws of 1903, p. 141) also provides:

"Such corporations in addition to the powers exercised by railroad corporations generally, may, with the consent of the authorities of any city or town

in the Territory of Oklahoma located upon or along its lines, construct system of street railways upon such streets and upon such terms and conditions as may be agreed upon between such corporations and such city or town, and may also accept lighting contracts with such cities or towns, to supply the said cities or the inhabitants thereof, with light or electric current for power or such railways or such corporation may also acquire by purchase or consolidation, plants, franchises, contracts, good will and other property of any existing street railway or lighting company."

It is insisted that section 6 of the ordinance hereinbefore set out has the effect, by virtue of said section 3 of the Act of March 16, 1903, of granting such power to the municipality of Oklahoma City. It is not essential to determine whether section 3 of the Act of March 16, 1903, in ratifying said franchise, could operate to have such effect by virtue of the ordinance, as we do not construe section 6 as conferring upon the authorities of the city of Oklahoma City the right to prescribe rules, regulations or charges to be observed by said railway corporation in connection with any services to be performed by it for the patronizing public. Section 6 relates to the municipality's ordinary general power and authority over its streets and highways within its limits for the promotion of the health, safety, morals and general welfare of its inhabitants. *South McAlester-Eufaula Tel. Co. v. State ex rel.*, *supra*; Dillon on Municipal Corporations (5th Ed.), vol. 1, § 237, p. 450; *State ex rel. v. M. & K. Tel. Co.*, 189 Mo. 83, 88 S. W. 41. Such power every municipality may exercise, and, if said proviso of said section 18 contemplated such powers on the part of municipalities, then the Corporation Commission could under no state of facts prescribe rules and regulations for street railways in municipalities.

In *South McAlester-Eufaula Tel. Co. v. State ex rel.*, *supra*, this court held that the municipality of Hartshorne, under its ordinary and general authority within its limits, for the promotion of the health, safety and morals and general welfare of its inhabitants, had no right to impose conditions upon the telephone company in consideration for the grant of the use of its streets, unless such authority was expressly granted by the sovereign power. In the same case it was held that the power to regulate the manner of construction of a telephone line did not grant the authority to fix rates by contract, franchise or ordinance.

We conclude that, at the time of the erection of the State, no right had theretofore been conferred by law upon the authorities

of Oklahoma City to prescribe rules and regulations to be observed by said street railway company, as the terms are used in said proviso to section 18, article 9, *supra*.

a. Since the erection of the State, said city has adopted a charter by virtue of the provisions of article 18 of the Constitution. Section 5 of article 1 of the charter authorizes said municipality within its limits and within fifteen miles without to construct, condemn and purchase, acquire, lease, improve, add to, maintain and conduct and operate, in whole or in part, a street railway system. Said section contains the following proviso:

"Provided, however, that the power to condemn shall not be exercised for the purpose of acquiring such utilities now existing and operating under franchises granted by the city, except under the terms of said franchises. Provided, further, that the same exemption from the power to condemn may be embodied in any franchise for any other public service utility corporation that may hereafter be submitted to a vote of the people."

Section 7 of article 18 of the Constitution is substantially incorporated in said charter as section 1, article 8, thereof. Section 2 of the same article of said charter is as follows:

"The board of commissioners shall be vested with the power of adopting all laws and ordinances not inconsistent with the Constitution and laws of this State for the taxation, regulation and control of all public service and public utility corporations now or hereafter existing or operating in whole or in part within the city."

Section 7 of article 18 of the Constitution provides:

"No grant, extension, or renewal of any franchise or other use of the streets, alleys, or other public grounds or ways of any municipality, shall divest the State, or any of its subordinate subdivisions, of their control and regulation of such use and enjoyment. Nor shall the power to regulate the charges for public services be surrendered; and no exclusive franchise shall ever be granted."

This is a limitation (not a grant of power) and prevents the municipality from ever surrendering or contracting away such power when it may be granted to it by the sovereign power. *Thompson et al. v. Rearick*, 124 Pac. 951.

Missouri has substantially the same constitutional provision as this State for framing charters of municipalities. Section 16, art. 9, Const. of Missouri, 1875. Paragraphs 1 and 2 of the syllabus in *State ex rel. v. M. & K. Tel. Co.*, 189 Mo. 83, 88 S. W. 41, are as follows:

"Const. Mo. art. 9, § 16, provides that any city having a population of more than 100,000 may frame a charter for its own government, 'consistent with and subject to the Constitution and laws of this State,' etc. The so-called 'Enabling Act' of 1887, providing the means for cities to avail themselves of that constitutional privilege, provides (Acts 1887, p. 51, § 50; Rev. St. 1899, § 6408) that such city shall have exclusive control over its public highways, streets, etc., section 51 (Rev. St. 1899, § 6409) declares that it shall be lawful for any such city in such charter, or by amendment thereof, to provide for regulating and controlling the exercise by any person or corporation of any public franchise or privilege in any of the streets or public places of such city, whether such franchises or privileges have been granted by said city, or by or under the State or any other authority. Under such act and constitutional provision, Kansas City in 1889 adopted its charter literally embodying therein said two sections. Article 3, § 1, of the charter, provides that the city shall have power by ordinance to regulate the prices to be charged by telephone companies and to compel them and all persons and corporations using, controlling, or managing electric wires for any purpose to put and keep their wires under ground, and to regulate the manner of doing the same. The 'general welfare' clause of the charter authorizes the city to pass any ordinance that 'may be expedient in maintaining the peace, order, good government, health, and welfare of the city, * * * or that may be necessary and proper for carrying into effect the provisions of this charter.' Held that, while the enactment by the city of an ordinance fixing the maximum rate to be charged by telephone companies for telephone service in the city was expressly authorized by the charter, the State had not delegated to the city the power to exercise such authority in framing its charter, and the ordinance was void. (1)

"The regulation of prices to be charged by a corporation intrusted with a franchise of a public utility character is within the sovereign power of the State granting the franchise of suffering it to be exercised within its borders, which power may be conferred on a municipal corporation; but it is not a power appertaining to the government of the city, and does not follow as an incident to a grant of power to frame a charter for a city government." (2)

In the opinion it is said:

"But under that Constitution cities of certain descriptions were authorized to frame their own charters. A charter framed under that clause of the Constitution, within the limits therein contemplated, has a force and effect equal to one granted by an act of the Legislature. But it is not every power that may be essayed to be conferred on the city by such a charter that is of the same force and effect as if it were conferred by an act of the General Assembly, because the Constitution does not confer on the city the right to assume all the powers that the State may exercise within the city limits, but only powers incident to its municipality, yet the Legislature may, if it should see fit, confer on the city powers not necessary or incident to the city government. There are governmental powers, the just exercise of which is essential to the happiness and well-being of the people of a particular city, yet which are not of a character essentially appertaining to the city government. Such

powers the State may reserve to be exercised by itself, or it may delegate them to the city, but until so delegated they are reserved. The words in the Constitution, 'may frame a charter for its own government,' mean, 'may frame a charter for the government of itself as a city,' which includes all that is necessary or incident to the government of the municipality, but not all the power that the State has for the protection of the rights and regulation of the duties of the inhabitants in the city, as between themselves. Nor does the Constitution confer unlimited power on the city to regulate by its charter all matters that are strictly local, for there are many matters local to the city, requiring governmental protection, which are foreign to the scope of municipal government. In none of the cases that have been before this court, bringing into question the charters of St. Louis and Kansas City under the Constitution of 1875, have we given to this constitutional provision any broader meaning than above indicated. *St. Louis v. Bell Tel. Co.*, 96 Mo. 623, 10 S. W. 197, 2 L. R. A. 278, 9 Am. St. Rep. 370; *State v. Field*, 99 Mo. 353, 12 S. W. 802; *Kansas City v. Scarritt*, 127 Mo. 646, 29 S. W. 845, 30 S. W. 111; *State ex rel. Subway Co. v. St. Louis*, 145 Mo. 574, 46 S. W. 981, 42 L. R. A. 113; *Kansas City v. Stegmiller*, 151 Mo. 189, 52 S. W. 723; *Young v. Kansas City*, 152 Mo. 662, 54 S. W. 535. The regulation of prices to be charged by a corporation intrusted with a franchise of a public utility character is within the sovereign power of the State that grants the franchise or that suffers it to be exercised within its borders, and that power may be with wisdom and propriety conferred on a municipal corporation; but it is not a power appertaining to the government of the city, and does not follow as an incident to a grant of power to frame a charter for a city government. The authority of Kansas City to insert in its charter the power to regulate the price to be charged for telephone service within the city is not conferred by the constitutional provision above quoted. Is it conferred by what is called the 'Enabling Act' of 1887? The purpose of that act was to enable cities of the class named to avail themselves of that constitutional provision. It is entitled: 'An act providing that any city having a population of more than one hundred thousand inhabitants may frame a charter for its own government and regulating the same.' There is nothing, therefore, in the title that indicates an intention to confer on such cities any power except that conferred by the Constitution. In its grant of power it so closely copies the language of the Constitution that its meaning to keep within the lines there drawn is obvious. There is nothing in the whole act of 54 sections that purports to confer on the city any powers except those appertaining essentially to the government of the city, unless, as is contended by the relator, sections 50 and 51 above quoted confer such powers. Section 50 confers on the city 'exclusive control over its public highways, streets, avenues, alleys and public places,' etc., and section 51 authorizes the city to provide in its charter 'for regulating and controlling the exercise by any person or corporation of any public franchise or privilege in any of the streets or public places of such city, whether such franchises or privileges have been granted by said city, or by or under the State of Missouri, or any other authority.' The exclusive control of its streets as granted in section 50 is an attribute of municipal authority, and could have been adopted in the charter, under the authority of the Constitution, without the express sanction of the Gen-

eral Assembly. The word 'exclusive,' however, in that connection, is not to be given its unlimited meaning, but must be understood as subject to the control of the State whenever the State chooses to assume control. The constitutional grant of power under which the charter is formed says that it must always be subject to the Constitution and laws of the State, which we interpret to mean that, in all matters not appertaining to city government, the charter is subordinate to the will of the General Assembly. The Legislature, in conferring on the city the exclusive control of its streets, meant exclusive control for the purposes of the city government, not to the exclusion of the State in other matters. The General Assembly, except as limited in the Constitution, has jurisdiction to grant franchises to be exercised in the streets of the cities and other public highways in the State, and that jurisdiction has not been surrendered either to cities with charters under the Constitution or to other municipalities. In adopting these two sections (50 and 51) of the so-called 'Enabling Act,' the Legislature had in view the necessity of power in the city to control its streets and other public places, and the power in the State to grant franchises to be exercised by the grantee in the streets and other public places of the city, and it was not difficult to foresee that a clash might occur between the city in its exclusive control of the street, and the private corporation in the exercise of the franchise granted by the State. Therefore, after granting to the city, as it did in section 50, control of its streets, the thought occurred to the lawmakers that there were private corporations organized and to be organized under the laws of this State with express authority to use the streets and other public highways in the exercise of their franchises, and, in order to prevent any clash that might occur between the city in its control of the streets and the private corporation in its use of the same, section 51 was added, which gave the city power to regulate and control the private corporation in its use of the street. Under the power, the city may regulate the planting of poles, wires, etc., or require the wires to be put under ground, or do anything within reason to render the use of the street by the private corporation as little of injury to the public as may be. But the section does not confer on the city the power to regulate the prices to be charged by the telephone company for its service to the inhabitants of the city."

See also *Straw v. Harris*, 54 Oreg. 424, 103 Pac. 777; *Kiernan v. City of Portland*, 57 Oreg. 454, 111 Pac. 379, 112 Pac. 402, 37 L. R. A. (N. S.) 339.

In *Lackey et al. v. State ex rel. Grant et al.*, 29 Okla. 255, 116 Pac. 913, this court in construing section 3a of article 18 of the Constitution of this State, under which provision the present charter of Oklahoma City was framed, the doctrine of the Missouri Case in construing the charter provision of the Missouri Constitution was approved.

In *Mitchel v. Carter*, 31 Okl. 592, 122 Pac. 691; *Lackey et al. v. State ex rel. Grant et al.*, *supra*, was followed. In the opinion it is said:

"In *Lackey v. State*, 29 Okl. 255, 116 Pac. 913, this court, in construing said statute, said: 'It is clear that the foregoing statute intends to provide that, wherever a freeholders' charter has been adopted under the provisions of the Constitution, and conflicts with any law of the State relating to municipal matters of cities of the first class, the provisions of such charter shall prevail.' In other words, the effect of said statute was to declare the law as it already existed in the Constitution, merely setting out the same in greater detail than as contained in article 18. In *Lackey v. State*, *supra*, the rule was declared that, whenever any matter fell 'within the domain of municipal government' or related solely to municipal affairs, such provision of a municipal charter, adopted pursuant to the provisions of article 18, superseded the general State laws."

Mitchell v. Carter, *supra*, is cited with approval in *Cotteral et al. v. Barker et al.*, 126 Pac. 211. It follows that any provision contained in said charter, unless the same relates purely to municipal matters, is not within the grant, unless the Act of Legislature of May 28, 1908, entitled:

"An act to enable all cities containing a population of more than two thousand inhabitants to frame and adopt charters for their own government, and to extend and define their powers,"

has such effect. Session Laws 1908, c. 12, art. 4. Section 4 of said act is as follows:

"When a charter for any city of this State shall have been framed, adopted and approved according to the provisions of this act, any provisions of such charter shall be in conflict with any law or laws relating to cities of the first class in force at the time of the adoption and approval of such charter, the provisions of such charter shall prevail and be in full force, notwithstanding such conflict, and shall operate as a repeal or suspension of such State law or laws to the extent of such conflict; and such State law or laws shall not thereafter be operative in so far as they are in conflict with such charter: Provided, that such charter shall be consistent with and subject to the provisions of the Constitution, and not in conflict with the provisions of the Constitution and laws relating to the exercise of the initiative and referendum, and other general laws of the State not relative to cities of the first class."

That all legislative grants of powers to municipal bodies which are

"out of the usual range, or which grant franchises, or rights of that nature, or which may result in public burdens, or which in their exercise touch the right to liberty or property, or, as it may be compendiously expressed, any common-law right of the citizen or inhabitant, must be strictly construed."

1 Dillon on Municipal Corporations (5th Ed.), § 239, p. 452, and authorities cited in footnotes 1 and 2.

As was said in *Mitchell v. Carter*, *supra*, said section 4 was merely declaratory of the rights that already existed under the Constitution elaborating and setting out the same more in detail. It does not appear that it was the intention of the Legislature to grant any greater powers of sovereignty than had already been granted under provisions of article 18 of the Constitution, which is self-executing. *State ex rel. v. Scales, Mayor et al.*, 21 Okl. 683, 97 Pac. 584; *Stearns, Mayor et al. v. State ex rel.*, 23 Okl. 462, 100 Pac. 909. In view of said rule of strict construction of corporate powers being applicable to grants of power to municipal bodies, which are out of the usual range, we must conclude that Oklahoma City under its charter, adopted by virtue of sections 3a and 3b, art. 18, Const., without further authorization by the Legislature, may not prescribe rules and regulations to be observed and fix rates to be charged by the appellant in the performance of its duties towards the patronizing public as a public service corporation.

2. The Commission heard the evidence and made the order against the appellant. The matters under consideration here involve the management of a street railway system and are largely administrative in their nature. Corporation commissioners, by experience and study and application, become skilled and proficient in such matters; at least, they are presumed so to be. There are matters connected with the management and operation of such plants that are very difficult to be brought out or made to appear on the record; hence one of the reasons for incorporating the provision in said section that the action of the Commission appealed from shall be regarded as *prima facie* just, reasonable and correct. This court has time and again held that such action, when sustained by any evidence, must be overcome or rebutted by facts in the record as weighed and found by this court on review before it will disturb the same. See authorities cited under section 240 of Williams' Annotated Constitution of Oklahoma.

The only part of the order about which we have any doubt is that which requires:

"Between the hours of six and eight A. M. when two cars meet on a parallel track, they shall stop for the transfer of passengers. Example: If a University car going west on Main street between Broadway and the terminal should meet a Capitol Hill or Stock Yards car, both cars shall stop to transfer passengers if they have any. * * *

Obviously it is intended by this that the cars are to stop only in the event there are passengers who desire to transfer from one to the other car. This could be done by signals, and, if after a test it is impractical to stop these cars except at regular stations or stops on application, this part of the order may be modified.

This appeal has been pending in this court for five months, the order not having been superseded; and, had the practical operation under this order shown that it was impractical to stop the cars to transfer from one to another on signals, it could have been brought to the attention of this court by a proper petition to have the cause remanded to have such evidence taken and incorporated in the record. Such not having been done, it is assumed that the practical operation of the cars in this respect has not brought about any serious inconvenience. As to matters that involve the practical operation of trains and cars, the commissioners who are brought directly and in intimate contact with such matters in the performance of their duties are in a far better position to pass on this question than we are, and the Commission having made this finding, in view of the presumption that the law makes in its favor, we will not disturb the same.

This order cannot be reasonably construed so as to require stop-over privileges on transfer slips to be allowed. No such question is presented on this record. All justices concur.

Oklahoma Ry. Co. v. State.

(Oklahoma—Supreme Court.)

TRAFFIC REGULATIONS; FAILURE TO COMPLY WITH ORDER REQUIRING CARS TO BE STOPPED AT CERTAIN POINTS.—Where a street railway company is charged with not having complied with the order of the Corporation Commission, which required it to stop its cars at certain stations or street crossings, such omission having been proved to have been wilful on the part of the parties in control of said car, *held* that, although the general manager of said company may have instructed its employees in control of such car or cars to observe said order and make said stops, such instructions did not exonerate the appellant.

(Syllabus by the Court.)

DEFENDANT appeals from judgment for plaintiff. Reported 127 Pac. 1085.

Other Cases in This Volume.—For other cases in this volume relative to orders of Corporation Commission of Oklahoma, see *Oklahoma Ry. Co. v. Powell*, *ante*, p. 428; *Oklahoma Ry. Co. v. St. Joseph's Parochial School*, *post*, p. 441.

Asp, Snyder, Owen & Lybrand, of Oklahoma City, for appellant.

Chas. West, Atty.-Gen., and *Chas. L. Moore*, Asst. Atty.-Gen., for the State.

Opinion by WILLIAMS, J.:

The appellant after a trial before the Corporation Commission was adjudged guilty of violating order No. 436, which is as follows:

"It is therefore ordered that the defendant, the Oklahoma Railway Company, stop its local cars upon the customary signal for the purpose of taking on and letting off passengers at each street crossing on what is known as its Belle Isle line until further ordered by the Commission."

The complaint charged the violation of the order in that it failed to stop its south-bound car No. 129 at Fourteenth street and Classen boulevard for the purpose of receiving and allowing passengers to board the car, at or about 12:55 P. M., on September 1, 1911.

The evidence, without contradiction, shows that the motorman and conductor of the car at the time failed to stop said car. Ed C. Rixse, the complaining witness, testified that he ran alongside the car for forty feet expecting it to stop so that he could board it. W. R. Perkins testified as follows:

"* * * The car slowed down, and I took hold of the rail and stepped on it and it started out and left him (Rixse) standing there. * * * I stepped on and said to the conductor, 'Wait a minute, there is another man wants to get on,' and he says, 'Don't make any difference, there is another car coming right behind this one.' Q. You were both standing at the curb, were you? A. Yes, sir. Q. The car wouldn't have had to wait a second? A. No, sir; it didn't come to a full stop. Q. Do you know whether the car stopped at any stations after yours before it arrived at town? A. It passed Fourteenth and stopped on Thirteenth."

The evidence also showed that there was not another car for between eight and ten minutes, which was No. 128, and for which the passenger Rixse waited. Neither the conductor nor the motorman were produced as witnesses at the hearing.

J. J. Johnson, assistant general manager of the appellant, testified that, on the date of the violation, the company had a breakdown at the power house, but that operators of the cars had general instructions to stop at all street crossing where necessary to take

on or let off passengers; that the failure to stop, as alleged in the complaints, was in violation of the company's orders; that Riggensberg, the conductor, had been discharged for this offense, and for his carelessness in the service, his violation of orders, and his general disregard of orders; that Foote, the motorman, had not been discharged for this, his first offense, but let off with a severe reprimand; that it is a joint duty of the conductor and motorman to see that a car stops on signal from the passenger or intending passenger.

Section 19 of article 9 of the Constitution provides:

"In all matters pertaining to the public visitation, regulation, or control of corporations, and within the jurisdiction of the Commission, it shall have the powers and authority of a court of record, to administer oaths, to compel the attendance of witnesses, and the production of papers, to punish for contempt any person guilty of disrespectful or disorderly conduct in the presence of the Commission while in session, and to enforce compliance with any of its lawful orders or requirements by adjudging, and by enforcing its own appropriate process, against the delinquent or offending party or company (after it shall have been first duly cited, proceeded against by due process of law before the Commission sitting as a court, and afforded opportunity to introduce evidence and to be heard, as well against the validity, justness, or reasonableness of the order or requirement alleged to have been violated, as against the liability of the company for the alleged violation), such fines or other penalties as may be prescribed or authorized by this Constitution or by law."

It is insisted that, as the general manager had instructed the motorman and conductor of this car to comply with the order, upon which this prosecution was predicated, that that absolves the appellant from punishment. The motorman and conductor, as agents of the appellant, were in control of this car at the time the order of the Commission was violated by failure to stop same to receive passengers. Said omission of duty was by the act of said agents in the course and scope of their employment.

In *State v. Railroad*, 91 Tenn. 446, 19 S. W. 229, in an opinion by Judge Lurton, whilst a member of the Supreme Court of that State, it is said:

"Being a corporation, it necessarily acts only through its agents. If the obstruction is the act of its agent, it is the act of the corporation; provided the agent did the act in the course and scope of his duty as an agent. It is immaterial that the agent was, by the rules of the company, instructed not to permit such obstruction to continue for a time deemed by the corporation to be unreasonable. If such agent disobeys the reasonable requirement of the corporation, it becomes liable for the nuisance, because the agent was within

the scope of his duty in operating the train and in stopping it across a public road. This principle is necessary to be enforced in regard to acts of misfeasance by corporations of this character. Otherwise the public would be required to look alone to subordinates, in general unknown and irresponsible. 2 Woods, Railway Law, pp. 1383, 1384, and authorities cited."

See also *A., T. & S. F. Ry. Co. v. State* (No. 3,318), 125 Pac. 721, decided by this court on July 23, 1912.

The question of jurisdiction of the Corporation Commission has been determined adversely to the contention of the appellant in *Oklahoma Railway Co. v. Powell et al.* (No. 3,544), 127 Pac. 1080, decided on November 7, 1912.

The order of the Commission is affirmed. All the justices concur.

Oklahoma Ry. Co. v. St. Joseph's Parochial School.

(Oklahoma — Supreme Court.)

REDUCED FARES FOR SCHOOL CHILDREN; "PUBLIC SCHOOLS OF SAID CITY,"

WHAT CONSTITUTE. — The Corporation Commission ordered: "That the defendant (appellant), the Oklahoma Railway Company, furnish to children under the age of fifteen years, going to or from St. Joseph's Parochial School, as pupils therein, tickets at the rate of two and one-half cents each in quantities of twenty tickets at one time. Such tickets to be used only in going to and returning from said school, to be honored for continuous passage and transfer on connecting lines over any other tracks of said defendant within the corporate limits of Oklahoma City. That such book of tickets shall not be limited to use on any particular day, but may be used any day on which the school may be in session." Section 7 of the ordinance granting the franchise under which the appellant operates its line of street railway provides: "Tickets for the use of school children shall be furnished good for one continuous passage, in quantities of not less than twenty rides at the rate of two and one-half cents each, under any reasonable regulations which the company may impose to prevent the abuse of such privilege or the use of such tickets by others than children under fifteen years of age in actual attendance on the public schools of said city." *Held*, that "public schools of said city" include the public schools of said city whether maintained by the public by taxation or by private agencies for the public by private benevolence.

(Syllabus by the Court.)

DEFENDANT appeals from a decree for plaintiff. Reported 127 Pac. 1087.

Regulation of Fares. — For a discussion of the power to regulate fares to be charged by a street railway company, see *Nellis on Street Railways* (2d Ed.), §§ 137, 138.

Asp, Snyder, Owen & Lybrand, of Oklahoma City, for appellant.

Chas. West, Atty.-Gen., and *Chas. L. Moore*, Asst. Atty.-Gen., for appellees.

Opinion by WILLIAMS, J.:

On September 25, 1911, St. Joseph's Parochial School, by its agents, filed complaint against the appellant before the Corporation Commission asking that the appellant be required to carry school children, under the age of fifteen years, to its school at the rate of two and one-half cents each fare. After a hearing, the Corporation Commission made the following order:

"It is therefore ordered that the defendant, the Oklahoma Railway Company, furnish to children under the age of fifteen years, going to or from St. Joseph's Parochial School, as pupils therein, tickets at the rate of two and one-half cents each in quantities of twenty tickets at one time. Such tickets to be used only in going to and returning from said school, to be honored for continuous passage and transfer on connecting lines over any other tracks of said defendant within the corporate limits of Oklahoma City. That such book of tickets shall not be limited to use on any particular day, but may be used any day on which the school may be in session."

Section 7 of the ordinance granting the franchise under which the appellant operates its line of street railway provides as follows:

"Tickets for the use of school children shall be furnished good for one continuous passage, in quantities of not less than twenty rides at the rate of two and one-half cents each, under any reasonable regulations which the company may impose to prevent the abuse of such privilege or the use of such tickets by others than children under fifteen years of age in actual attendance on the public schools of said city. United States mail carriers, policemen, and members of the fire department, while in the discharge of their duties, shall be carried free. Children under five years of age when accompanied by parents or guardians shall be carried free."

Said section also provides:

"The charges for transporting passengers to be exacted by said railway company shall not exceed the sum of five cents for one continuous passage over the said company's lines from points within the city limits to any other point in such city; such limit in price shall not prevent the exaction of an additional fare for return journeys, nor shall transfer slips be good for stop-over privileges."

This section was ratified by the Legislature of the territory of Oklahoma by Act of March 16, 1903. Sess. Laws of 1903, p.

141; *Oklahoma Railway Co. v. Powell* (No. 3,544), 127 Pac. 1080, decided November 7, 1912.

Section 18, article 9 of the Constitution, provides:

"The Commission shall have the power and authority and be charged with the duty of supervising, regulating, and controlling all transportation and transmission companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses and preventing unjust discrimination and extortion by such companies; and to that end the Commission shall, from time to time, prescribe and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, and shall require them to establish and maintain all such public service, facilities, and conveniences as may be reasonable and just, which said rates, charges, classifications, rules, regulations, and requirements, the Commission may, from time to time, alter or amend. All rates, charges, classifications, rules and regulations adopted, or acted upon, by any such company, inconsistent with those prescribed by the Commission, within the scope of its authority, shall be unlawful and void."

The appellant is a transmission company. Section 24, art. 9, Const.; section 252, Williams' Anno. Const. That the Commission has jurisdiction to prescribe rules and regulations to be observed by the appellant is settled by *Oklahoma Railway Co. v. Powell et al.* (No. 3,544), 127 Pac. 1080, decided November 7, 1912. Under appellant's franchise, in the performance of its public duty and its charges therefor, it must furnish tickets for the use of school children.

The free public school system, which the Legislature of this State was directed to establish by section 1 of article 13 of the Constitution, is a matter of State concern and not a municipal affair. *Olson, County Clerk, v. Logan County Bank*, 29 Okl. 391, 118 Pac. 572; *Board of Education of the City of Ardmore v. State*, 26 Okl. 366, 109 Pac. 563. Prior to the erection of the State, the public schools were of general territorial concern. They were agencies of the territory doing the work of the territory. *School Dist. No. 17 v. Zediker*, 4 Okl. 599, 47 Pac. 482. To say that the State is hostile to all schools except the public schools of the State or those carried on in State institutions is not borne out by the record. True, section 5 of article 2 of the Constitution prohibits money or property from being appropriated, applied, donated or used, directly or indirectly, for the use, benefit or support of any sect, church, denomination or system of religion, or for the use, benefit or support of any priest, preacher, minister or other

religious teacher or dignitary, or sectarian institution as such (*Connell et al. v. Gray* [No. 4,342], 127 Pac. 417, decided by this court on October 8, 1912), and section 5 of article 1 also provides, that provisions shall be made for the establishment and maintenance of a system of public schools, which shall be open to all the children of the State and free from sectarian control; but section 4 of article 13 provides:

"The Legislature shall provide for the compulsory attendance at some public school or other school, unless other means of education are provided, of all the children in the State who are sound in mind and body, between the ages of eight and sixteen years, for at least three months in each year."

In said section 4 the makers of the Constitution recognized that parents might prefer their children to attend sectarian, denominational or private schools rather than the public schools maintained by the State, and such is permitted. It is beyond the power of the legislative agencies of this State, under our Constitution, to require a parent to send his child to the public schools if he affords him reasonable educational facilities at a sectarian, denominational or private school. The city of Oklahoma City, as a municipality, had no schools.

A franchise of whatever kind, being against common right, must be strictly construed. Such franchises grant away to private persons or corporations property or rights in which the whole public is interested. Such grant cannot be presumed, and can only be established when the same is unequivocally expressed or is necessarily implied by the terms of the granting act. The grant is made at the solicitation of the grantee, supposed to be drawn up by him or his agents. The words used, therefore, should be treated as those of the grantee and be construed most strongly against him. This rule of construction is a salutary safeguard of the interest of the public against any attempt of the grantee by the insertion of ambiguous language, to take what could not be obtained in express and plain terms. *Minneapolis v. Street Railway Co.*, 215 U. S. 417, 30 Sup. Ct. 118, 54 L. Ed. 259; 3 Thompson on Corporations (2d Ed.), § 2874, and authorities cited.

In the ordinance or grant under consideration, the half-fare tickets were to be furnished for the use of school children. The council of Oklahoma City in adopting this ordinance, which was afterwards ratified by the Legislature of the territory, were acting as agents of the people of the municipality. In attempting to

grant away certain privileges or rights, they exacted certain obligations from the grantee, and that was that school children should be furnished tickets for their use in quantities of not less than twenty rides at the rate of two and one-half cents each, under any reasonable regulation which the company may impose to prevent the abuse of such privilege or the use of such tickets by others than children under fifteen years of age in actual attendance on the public schools of said city. The object in view was to facilitate the education of the children of the city. Is it to be assumed that the mayor and council of said city would enter into a contract with the grantee which could not be impaired in certain respects to extend over a long period of years — it may be in perpetuity — by which children of a certain age should be transported to the public schools maintained by public taxation at half price when other children, going to schools that were maintained by private agencies by private benevolence for the benefit of the public, should pay full fare? Such discrimination in making the contract is not to be presumed. A fair interpretation of this contract leads to the conclusion that it covers children under the age of fifteen years attending schools in Oklahoma City, whether maintained by the public by taxation or by private agencies for the public by private benevolence.

The order of the Commission was entered upon the theory that it had authority to regulate the rates to be charged by the appellant. The Commission has no such power when it has the effect of impairing the franchise contract as ratified by the Legislature of Oklahoma territory. That question is unequivocally settled by the Supreme Court of the United States in *Minneapolis v. Minneapolis Street Railway Co.*, 215 U. S. 417, 30 Sup. Ct. 118, 54 L. Ed. 259. An order on appeal from said Commission will not be vacated if the record shows proper ground to sustain same, though the Commission, in entering same, gives a ground therefor not tenable under the law. *Hancock v. Youree et al.*, 25 Okl. 460, 106 Pac. 841.

It follows that the order will be affirmed. All the justices concur.

O'Leary v. Metropolitan St. Ry. Co.

(Kansas — Supreme Court.)

CONSTRUCTION AND MAINTENANCE; CHANGES IN STREETS PURSUANT TO ORDINANCES; ESTOPPEL OF CITY TO QUESTION LEGALITY OF CHANGES; RIGHTS OF ABUTTING OWNERS. — Under the circumstances stated in the opinion, it is *held* that the city of Kansas City should be estopped from now questioning the legality of certain completed changes in one of its streets made by the street railway company, under color of ordinances of the city, to accommodate its railway.

In such a case the street changes, although not warranted by the ordinances, are to be considered as having been lawfully made, the city having had power in the first instance to authorize them, and an abutting property owner should not be allowed damages for resulting injury to his property on the theory that the work was unlawful and created a nuisance.

(Syllabus by the Court.)

DEFENDANT appeals from judgment for plaintiff. Reported 123 Pac. 746.

O. L. Miller, Samuel Maher and C. A. Miller, all of Kansas City, for appellant.

James F. Getty, of Kansas City, for appellee.

Opinion by BURCH, J.:

The plaintiff sued the defendant for damages to her property resulting from changes in the street made by the defendant to accommodate its railway. The plaintiff recovered, and the defendant appeals.

Street traffic on James street in Kansas City was carried over Pacific avenue on a viaduct reached from the north by an approach. The defendant's right originated in two ordinances numbered 5,634 and 6,102, passed in September, 1903, and March, 1905, respectively, and which read as follows:

"Section 1. * * * There is hereby granted unto the Metropolitan Street Railway Company, its successors and assigns, the right and privilege to cross over James street upon the James street wagon viaduct in Kansas City, Kansas, to the Kansas and Missouri State line; and the further right, privilege and authority is hereby given to build, construct and operate a double track street railway thereon. * * *

Abutting Owners. — As to the rights of abutting owners in the streets used by a street railway company, see *Nellis on Street Railways* (2d Ed.), §§ 77-91.

"Sec. 2. * * * The said grantee, its successors and assigns, shall at their own expense * * * complete the strengthening and reconstruction of said James street viaduct by placing additional or stronger columns thereunder making said structure safe and secure for carrying cars of the grantee and the traveling public and shall widen said viaduct to a width of not less than twenty-six feet. * * *" No. 5634.

"Sec. 1. That the Metropolitan Street Railway Company * * * is hereby given the right, power and authority to construct a double track street railway beginning at or near a point in the center line of Central avenue on James street connecting with the line of said company as now located and operated on James street; thence south on the surface of James street to the south line of Bunker avenue, thence south on an approach to a viaduct to a point approximately sixteen (16) feet above the surface of the south line of Pacific avenue, thence south on a private elevated structure to the State line between the States of Kansas and Missouri." No. 6102.

If the approach were to begin at grade at Bunker avenue, it would of course obstruct travel as far north as it reached. Consequently, the grade of the entire street was raised for some distance, and then returned to the established level, and the rise of the approach was made to begin some eighty-two feet south of Bunker avenue at the point where the old approach commenced. In front of the plaintiff's property the surface of the street was raised seventeen inches at the north line of the lot and twelve inches at the south line. James street is eighty feet wide. Before the work complained of was done, the space for travel between the old approach and the street curb was twenty feet. The space between the curb and the plaintiff's property line was ten feet, six feet of which was occupied by a sidewalk and four feet of which, next to the curb, was vacant. When the approach was reconstructed, it was widened to forty feet, and consequently the roadway on each side was narrowed. To make room for ordinary traffic, the curbing was moved in three feet, making the roadway in front of the plaintiff's property thirteen feet wide, and the space between the curbing and the property line seven feet. A new sidewalk was laid filling this space.

In her petition the plaintiff claimed damages because the grade of the street was raised, because the street was narrowed, thereby impeding free ingress and egress, and because the space between the curbing and the property line was narrowed. The answer pleaded the ordinances referred to and alleged that the new structure in James street was built with the consent of the mayor and councilmen of the city and the city engineer, all of whom appear; that the plans and specifications for the new structure were

prepared by the defendant and were submitted to the mayor and councilmen of the city and under the direction of the city engineer improved the same; that the structure was built in accordance with such plans and specifications; that the change of grade was made with the knowledge and consent of the mayor and councilmen of the city and under the direction of the city engineer; that the change of grade, the resetting of the curb, and the relaying of the sidewalk in fact improved the street, left it in better condition than before, and benefited the plaintiff's property, all of which changes were made with the consent of the mayor and council of the city and of the city engineer.

There was evidence that elaborate plans and specifications showing every detail of the proposed work were prepared by the defendant and submitted to the city; that the plans were presented to the mayor and council in open session and shown to them in detail; that the city engineer indorsed his approval upon the plans, which offered the best practical way of doing the work; and that the work was done strictly according to the plans. A councilman who had continued in office until the time of the trial testified that he personally knew of the changes made in reconstructing the viaduct. The making of the proposed changes was also brought to the attention of the mayor and council by a written protest against them signed by property owners along the street. The presentation of the plans to the mayor and council was shown by oral testimony, and no record of official action thereon was offered. Although the action was commenced in December, 1906, shortly after the work was completed, it was not tried until in January, 1910. Meanwhile the approach and viaduct as rebuilt were used by the defendant for the tracks of the Metropolitan Street Railway system and, so far as the record shows, without any complaint or objection by the city. The city was made a defendant in the action. In its answer the city pleaded the enactment of ordinance No. 6,102, and alleged that the structure of which the plaintiff complained was erected pursuant to its provisions.

The court instructed the jury that express authority for the changes complained of, either by ordinance or resolution, was necessary to make them lawful, excluded from the jury's consideration the subject of assent and acquiescence on the part of the city, and refused instructions permitting the inference of authority for the defendant's conduct from the facts stated.

It will be observed that the ordinances themselves contained no specifications concerning the width of the approach. While it is familiar law that grants of this character are construed strictly against the grantee, it is also well settled that they must be construed reasonably with reference to the subject-matter and the purpose of the grant. 2 Elliott Roads & Streets, p. 575, § 1052. Under the first ordinance the old wagon viaduct was to be widened until it should be not less than twenty-six feet in width. No maximum width was prescribed. If anything beyond that width were reasonably necessary to accomplish the desired ends, it certainly was not prohibited, and in any event it was indispensable that the approach be widened. Under the second ordinance, the approach was left to connect with the old wagon viaduct and with the private elevated structure on which the railway tracks were to be carried. Evidently a widened approach was still contemplated, and whatever was reasonably necessary or proper to make the grant effective was implied. Thus, in the case of *Prince v. Crocker*, 166 Mass. 348, 44 N. E. 446, 32 L. R. A. 610, authority to build a subway in Boston impliedly authorized an entry upon the Boston Public Garden to make suitable connections with surface tracks, and impliedly authorized the erection on the Public Garden of such a structure as might be necessary for subway purposes.

The plan which the defendant adopted for the work was, in the opinion of the city engineer, the best practicable for the purpose, and his judgment was not questioned at the trial. To build an approach of the proposed width it appeared to be necessary to include within the way traveled by vehicles a portion of the unused space between the curb and the property line. The defendant interpreted the ordinance, presented its interpretation to the city, obtained the approval of the city engineer, and received no intimation of any disapproval by the mayor and council. The defendant then completed the work. Up to the present time the defendant has received no suggestion from the city that a nuisance was created in the street; but, on the other hand, the city by its answer in the case justified the approach as having been erected under one of its own ordinances. The city had power to authorize all that the defendant did. It might itself have changed the grade, removed the curbing, and widened and rebuilt the sidewalk, or it might have required the defendant to make such changes as conditions of the street railway license. In order that

street changes of this character may be legal, they should have the sanction of an ordinance or resolution; but it does not follow that a city may in every case deny legality because the prescribed procedure has not been observed. On the other hand, in cases like the present one the city should not be allowed to assail the conduct of the defendant as unauthorized.

"It is true that obstructions of this kind acquire no legality from the fact that they are put in place and operated without interference, and that mere time does not cure their illegal character; but in the case of a *quasi*-public institution, like a railroad or street railroad, there are some exceptions to this rule. A municipal corporation should not be permitted to stand by and see large amounts of money invested in enterprises of this sort by persons who act under the mistaken view that they have legal authority. In this case the appellant had authority by ordinance to lay down a street railroad upon a number of streets; it mistook its rights and placed a part of its track in a place not designed in the ordinance. Technically, it had no right to put its track where it did, but the complaint shows that the municipal officers, from the mayor down, and including the superintendent of streets, knew that the track was being laid on Division street, and no objection was made, and the superintendent of streets himself directed the method of laying the track upon that street. Subsequently the road was put in operation, and continued to be used for upwards of two years, during which time the corporation made no objection, and from year to year levied and collected taxes upon this very property, and up to this time, so far as the complaint shows, no objection has been made to the operation of a street railroad upon Division street. The only interference which has been undertaken is not one for the purpose of clearing the street of an obstruction, but one to enable another street railroad company to lay down and maintain a track in the same place. * * *

The principal point urged by respondent under this head is that the city charter provided that contracts should be made only by ordinance, and that, inasmuch as a street railroad franchise is in the nature of a contract, the right to maintain its track could arise in no other way than by express provision of an ordinance. Charter of 1886, § 85. But it is evident from the reading of that entire section that the contracts there intended are those which would bind the city to the payment of money. The general rule would, of course, be that a franchise of this kind could not be acquired except by the action of the corporation, which must be taken by ordinance, but the statute in question does not prohibit the courts from declaring an estoppel against the city in other matters in the same manner that they would as against private persons."

Spokane Street Ry. Co. v. Spokane Falls, 6 Wash. 521, 523, 525, 33 Pac. 1072, 1073.

"While the statute must be followed in all essential particulars in order that the consent of the electors to the occupation of the streets of the city by a railway company shall be valid and beyond recall, it does not follow that

an irregular exercise of the power possessed by the electors is absolutely void and wholly without force. The manner in which the question of the consent of the electors of the city was submitted was clearly irregular, and the affirmative vote cast thereon just as clearly conferred no power upon the railway companies to use the streets of the city beyond the time when that right should be questioned by some proper authority. But we are not prepared to say that, where the companies acted in good faith and expended their money in the construction of lines under a supposed right to occupy the streets, and this right was not questioned until the bringing of the present action, they or those claiming under them should be ousted from the possession of such streets as are now occupied by their lines, and their property rendered worthless. Under the circumstances of this case, we do not think it would be a wholesome public policy to hold that, because of the irregularity which occurred in granting the right which the people had power to confer, such irregularity renders all proceedings under the vote void and of no effect."

State v. Citizens' Street R. Co., 80 Neb. 357, 114 N. W. 429.

"The only objection to the first ordinance is the fact that it received its first reading at a special meeting, notice of which, it is alleged, was not given to the absent members, and which was held pursuant to an ordinance relating to special meetings under which the council had acted for several years, but which, it is claimed, was never legally adopted. Conceding these irregularities to have existed, the city is not in position to assert them to the manifest injury of the plaintiff. It is estopped from doing so by the conduct of its council at the regular meeting, when the first ordinance was passed, all the aldermen being present; by the conduct of its mayor in indorsing his approval, thereby certifying under the sanction of his official oath that the ordinance was legally adopted; by the conduct of its committee in designating the location of the plaintiff's poles; and by the publication of the ordinance. That the plaintiff in good faith expended large sums of money, relying upon the validity of the ordinance, is undisputed. That the municipal authorities intended to consent to the construction of the plaintiff's line is established beyond the possibility of a doubt. The mayor and council were authorized to give the required consent, they led the plaintiff to believe they had given it, and by every rule of right and justice they should not now be permitted to avoid the consequences of their action by asserting technical objections to the method of their procedure."

Telephone Co. v. City of Mitchell, 22 S. D. 191, 199, 116 N. W. 67, 70. In such cases the estoppel is mutual between the city and its grantee.

"But it is also urged by counsel for appellant (the street railway company) that it had no grant or privilege or franchise from the city or county to operate its tracks upon the public streets, and has simply a license from the owners of the additions through which these streets ran. But it has continuously occupied these streets, since 1892, with its lines, and no objection has

been made by the city or county authorities to such occupation, and it is in undisputed use and occupation of these streets. The city could not object now."

State ex rel. Grinsfelder v. Street Ry. Co., 19 Wash. 518, 531, 53 Pac. 719, 723, 41 L. R. A. 515, 67 Am. St. Rep. 739.

Lapse of time may be sufficient to raise a presumption of acquiescence or of ratification.

"Where a street railway company in laying its tracks on a borough street has slightly deflected from the line for the track established by the borough, and the borough has acquiesced in this location of the track for ten years, it will be presumed to have ratified the deflected line, and if the railway company in reconstructing its track lays it upon the deflected line the borough has no standing to object."

Bridgewater Borough v. Traction Co., 214 Pa. 343, 63 Atl. 796, syllabus.

But lapse of time is only one of the elements to be considered in determining whether or not the municipal corporation ought to be estopped.

"Whilst municipal corporations are not, as respects public rights, within ordinary limitation statutes, still the principle of an estoppel *in pais* is applicable in such cases, as this leaves the court to decide the question, not by mere lapse of time, but by all the circumstances of the case, and to hold the public estopped or not, as right and justice may require."

C., R. I. & P. Ry. Co. v. City of Joliet, 79 Ill. 25, 26, syllabus.

This court on numerous occasions has recognized the applicability of the doctrine of estoppel to municipal corporations. *Sleeper v. Bullen & Dustin et al.*, 6 Kan. 300; *City of Belleville v. Hallowell*, 41 Kan. 192, 21 Pac. 105; *H. & S. R. Co. v. Com'rs of Kingman Co.*, 48 Kan. 70, 28 Pac. 1078, 15 L. R. A. 401, 30 Am. St. Rep. 273.

Inaction, acquiescence, tacit consent, and the like, on the part of city officials, cannot be invoked to justify private invasions of public property or rights, and lapse of time cannot bar remedies appropriate for the protection of public interests. Nor can estoppel be invoked in cases where the city was powerless, under the law, to do the disputed thing in the first instance. But no such questions are presented here. The grant of the defendant's license was made in the interest of the public welfare. The pur-

pose was to meet the need of the traveling public for additional facilities in the way of street car service and to adjust the street in such a way that old uses might be subserved while new possibilities of use were realized. Therefore, in undertaking the street changes complained of, the defendant acted in a certain sense for the city in the accomplishment of the desired public ends; and, all the circumstances considered, the city ought to be precluded from questioning the defendant's interpretation of the scope of the ordinance under which the improvements were made.

Nothing that was said in the case of *Longnecker v. Railroad Co.*, 6 St. Ry. Rep. 364, 80 Kan. 413, 102 Pac. 492, conflicts with this doctrine. In that case the abutting property owner asked in advance for an injunction to prevent the laying of a street car track contrary to the express provisions of a plain grant. In this case the plaintiff waited until the result of the work had taken permanent form under conditions which were the just equivalent of a warrant of authority from the city.

The jury should have been allowed to consider the evidence bearing upon the question of estoppel and should have been instructed that if they found the facts to be as stated above, or otherwise sufficient to constitute estoppel, the street changes complained of were to be regarded as if lawfully made in regular manner under authority duly conferred, but that if they found otherwise such changes should be regarded as unauthorized and wrongful; and the rules relating to the right of an abutting property owner to recover damages applicable to each view should have been stated.

The case having been submitted upon a wholly different theory, the judgment is reversed, and the cause is remanded for a new trial. All the justices concurring.

Alexander v. New Orleans Ry. & Light Co.

(Louisiana — Supreme Court.)

SEPARATE ACCOMMODATIONS FOR WHITE AND COLORED RACES; MOVING PARTITION IN CAR; DUTY OF STREET RAILWAY COMPANY TO PROTECT PASSENGERS FROM INJURY.— Act No. 64 of 1902, requiring street railway companies to provide separate accommodations for the white and colored races, is properly interpreted to mean that the position of the movable partition in a car may be changed as occasion may require; that is to say, should it be found that, at a particular time, there is more space assigned to the one race and less to the other than is needed for the accommodation of the respective classes of passengers, the officer in charge of the car may move the partition to meet that condition and may require the passengers to move their seats accordingly. But, where a passenger has found a seat in the compartment assigned to his race, the officer has no right, by moving the partition, to put him in the wrong compartment, when there is no seat to be found in the compartment thus newly established for his race.

The obligation of a carrier of passengers is to carry them safely and protect them from insult and injury, and *a fortiori*, from injury at the hands of its own officers and employees.

(Syllabus by the Court.)

DEFENDANT appeals from judgment for plaintiff. Reported 57 So. 233.

George W. Flynn, for appellant.

Dart, Kernan & Dart, for appellee.

STATEMENT OF FACTS.

Plaintiff sues for damages resulting from an assault committed upon him by a street car conductor, in defendant's employ, whilst he (plaintiff) was a passenger on the car.

Separation of Races.— In *Nellis on Street Railways* (2d Ed.), § 142, it is said: "A statute which provides for the separation of races upon street cars, and which subjects both to the same restraints and affords them equal privileges and accommodations, does not abridge the privileges and immunities of the citizen and deprive him of the equal protection of the laws to which he is entitled by the Constitution of the United States. Such legislation violates no principle of organic law, and is valid and enforceable as a proper exercise of the police power. And it has been held that such an act is not invalid as being a delegation of police power because it authorizes conductors in charge of street cars to change the line of division between white and colored passengers and to assign seats in accordance with such change."

Plaintiff, who is a negro longshoreman, boarded a Tulane Belt car, at Carrollton, at about half-past 7 o'clock in the morning, in order to get to his work. All the seats were then occupied; the two rear seats on each side being occupied by negroes, and the screens being in front of the rear cross-seats. At Calhoun street a negro woman vacated one of the cross-seats and plaintiff took her place. A few squares down, the other occupant of the cross-seat left the car, whereupon the conductor moved the screen to the back of the seat and told plaintiff to get up, at which plaintiff demurred, as, with the change in the position of the screen, there was no vacant seat in that part of the car assigned to people of his race. He, however, vacated, but, retiring to the platform, he informed the conductor that he had wronged him and that he would report the matter to the company, and he proceeded to take the conductor's number and the number of the car. The conductor then struck him in the face with his bell punch, cutting a gash an inch long, from which the blood flowed freely, and, when the car reached Canal street, plaintiff got off, returned to his home and changed his shirt, and then went to the office of the defendant, where he was referred to the company's surgeon, who dressed his wound. He testifies that his face was bandaged for two weeks and remained disfigured for some three weeks more, so that he did not like to go to his work. We, however, find no sufficient reason, arising from his wound, for such an extended holiday. Defendant produced one witness who tells a story somewhat different from the foregoing, but he also states that, when the conductor requested plaintiff to vacate his seat, the screen was in front of him, and, upon the whole, our conclusions, as to the facts, are as above stated. Plaintiff says that he was earning from six dollars to ten dollars a day, and that he expected fifteen or twenty dollars for "medicines" on account of his injury. The evidence shows that there were two negro men standing on the platform at the time of the occurrence in question, and possibly a few white men, for whom there were no seats. There was judgment in the District Court in favor of plaintiff awarding him fifty dollars, and he has appealed and complains that the amount is insufficient.

Opinion by MONROE, J.:

The law (Act No. 64 of 1902) requires street railway companies, carrying passengers, "to provide equal, but separate, accommodations for the white and colored races, by providing two

or more cars, or by dividing their cars by wooden or wire screen partitions," and further provides that:

"No person * * * shall be permitted to occupy seats in cars or compartments other than the ones assigned to them on account of the race they belong to.

"Sec. 2. * * * That the officers of such street cars shall have the power and are hereby required to assign each passenger to the car or compartment used for the race to which such passenger belongs. Any passenger insisting upon going into a car or compartment to which, by race, he or she does not belong shall be liable to a fine * * * or * * * be imprisoned, * * * and any officer of any street railway insisting on assigning a passenger to a car or compartment other than the one set aside for the race to which said passenger belongs shall be liable to a fine * * * or * * * imprisonment; and, should any passenger refuse to occupy the car or compartment to which he or she is assigned by the officer of such street railway, said officer shall have the power to refuse to carry such passenger on his car. * * *"

Defendant, with a view of complying with the law thus quoted, has provided its cars with wire screen partitions, which can be moved so as to give the large and smaller spaces in the cars to the white or colored people, as occasion may require, and we think the law is properly interpreted to mean that the position of the partition may also be changed as occasion may require; that is to say, should it be found that, at a particular time, there is more space assigned to the one race and less to the other than is needed for the accommodation of the respective classes of passengers, the officer in charge of the car may move the partition to meet that condition, and may require the passengers to move their seats accordingly. But where, as in this case, a passenger has found a seat in the compartment assigned to his race, the officer has no right, by moving the partition, to put him in the wrong compartment, when there is no seat to be found in the compartment thus newly established for his race; and still less has the officer the right to assault the passenger who complains of such treatment. The obligation of defendant is to carry its passengers safely and protect them from insult and injury, and, *a fortiori*, from injury at the hands of its own officers and employees. We concur with plaintiff in the view that the amount awarded him is insufficient.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended by increasing the amount for which defendant is condemned to \$250, and, as thus amended, that said judgment be affirmed. Defendant to pay all costs.

Flynn v. Metropolitan St. Ry. Co.

(Missouri — Kansas City Court of Appeals.)

1. **PLEADING; EXCESSIVE SPEED AND NEGLIGENCE UNDER THE HUMANITARIAN RULE.** — Excessive speed and negligence under the humanitarian rule are not inconsistent and may be alleged in the same petition.
2. **HUMANITARIAN DOCTRINE.** — This principle is not for the benefit of one who, with full knowledge of danger, wilfully or wantonly rushes into it, but it does apply where a party is merely negligent.
3. **COLLISION WITH VEHICLE; EVIDENCE; NEGLIGENCE OF MOTORMAN.** — Where it appears that the driver of a vehicle was in danger of which he did not become aware until too late to save himself, and that his peril was reasonably obvious to the motorman at a time when the latter had a reasonable opportunity to prevent the injury, a recovery should be allowed.
4. **SAME; LAST CHANCE NEGLIGENCE; PROXIMATE CAUSE.** — Where the plaintiff's evidence presents a clear case of "last chance" negligence, such negligence must be considered as the sole producing cause of the injury.
5. **INSTRUCTIONS.** — An instruction that if the jury find for the plaintiff they "may allow him such a reasonable amount, not to exceed the sum of \$6,950," is not a reversible error on the theory that it told the jury that such sum would be a reasonable assessment of damages.

DEFENDANT appeals from a judgment for plaintiff. Reported 148 S. W. 122.

John H. Lucas and *Chas. N. Sadler*, both of Kansas City, for appellant.

H. J. Latshaw, of Kansas City, for respondent.

Opinion by JOHNSON, J.:

Plaintiff, a teamster, was injured in a collision between his team and wagon and an electric street car operated by defendant, and alleges that his injury was caused by negligence in the operation of the car. In his petition for damages, he charges two acts of negligence, viz., first, that defendant ran the car at a high and dangerous rate of speed; and, second, that the operators of the car saw, or should have seen, the peril of plaintiff in time to have avoided the injury by stopping the car, had they been in the exercise of reasonable care. The answer of defendant is a general

Collision with Vehicle. — As to the liability of a street railway company for a collision with a vehicle, see *Nellis on Street Railways* (2d Ed.), §§ 400-402, 414-418.

denial. A trial of the issues resulted in a verdict and judgment for plaintiff in the sum of \$3,000, and the cause is here on the appeal of defendant.

The injury occurred in the forenoon of November 9, 1909, on Nineteenth street, between Cherry and Holmes streets, in Kansas City, at a point twenty-five or thirty feet east of Cherry street. Nineteenth street runs east and west, is paved, and its pavement for vehicles is thirty-three feet six inches wide. Defendant operates a single-track street railway along the middle of the pavement, and all cars run on that track are east-bound. The distance between the north rail of the track and the curb on the north side of the street is fourteen feet seven inches. Going eastward, Nineteenth street crosses Locust, Cherry and Holmes streets in the order named. There is an alley in the block between Locust and Cherry streets, and the distance from the alley to Cherry street is 142 feet. Cherry street is about fifty-five feet wide.

Plaintiff was driving a two-horse dirt wagon, loaded with a stone that weighed about 3,000 pounds. He was going west on Nineteenth street on the pavement north of the track. A two-horse wagon, belonging to the street-cleaning department of the city, was standing, headed east, on this part of the pavement, at a point twenty-five or thirty feet east of Cherry street, and it became necessary for plaintiff to drive on the track to go around this team and wagon. He deflected his horses towards the track when they were fourteen or fifteen feet east of the standing team, and states that just before he did this he looked up and saw a car coming from the west at rapid speed, but concluded that he would have time to go around the obstruction and clear the track before the arrival of the car, and went onto the track, his team and wagon astride the north rail. It was his purpose to keep on the track while passing around the obstruction, and to allow only a sufficient clearance space between his wagon and the other. Thinking no danger from the car was to be anticipated, he bestowed his attention on the wheels of the other wagon to prevent colliding with them, and did not discover his danger from the car until he looked up and saw it just in front of his team, coming on at high speed. At this time the rear wheels of his wagon were about opposite the middle of the other wagon, and he was just beginning to turn his horses off the track. A violent collision occurred, and plaintiff was severely injured.

Plaintiff's team and wagon were from twenty to twenty-five

feet long, and the conclusion is reasonable that the distance traveled by the team from the point where they were turned towards the track to the point of collision approximately was forty-five or fifty feet. Another reasonable conclusion from the evidence is that the team walked at a speed of about three miles per hour. There is evidence to the effect that the car was at the alley between Cherry and Locust streets when it became apparent that plaintiff intended to go around the stationary wagon by driving on and along the track, and that therefore the car was 200 feet or more west of the place of the collision. At that time the speed of the car was from twelve to fifteen miles per hour, and witnesses introduced by plaintiff testified that no effort was made by the motorman to stop or reduce speed. The car was of the double-truck type, and was equipped with air brakes and other appliances for keeping it under control. It was well filled with passengers; and, while the rails were wet, there is some evidence tending to show they were not slippery. Plaintiff's expert evidence states that the car could have been stopped in fifty-five or sixty feet with safety to the passengers; while experts introduced by defendant say that from 100 to 200 feet would have been required. Plaintiff, who was 64 years of age, was sitting on the front end of the wagon bed, and made no effort to escape. He explains that the diversion of his attention from the car to the wagon he was passing prevented him from making any effort to escape by jumping off his wagon.

The court refused defendant's instructions in the nature of a demurrer to the evidence, and on behalf of plaintiff gave the following instructions:

"The court instructs the jury that, if you find for plaintiff, then you may allow him such a reasonable amount, not to exceed the sum of \$6,950, as you may find and believe from the evidence and under the instructions of the court would fairly and reasonably compensate him for the injuries, if any, to plaintiff's left leg or left shoulder, received on November 9, 1909, on East Nineteenth street, between Cherry and Holmes streets, in Kansas City, Missouri, by reason of a collision between his wagon and one of defendant's street cars."

"The court instructs the jury that, even though you may find and believe from the evidence in this case that plaintiff was negligent and careless in driving upon defendant's track, under the facts and circumstances in evidence, still, if you further find and believe from the evidence that defendant's motorman saw, or by the exercise of ordinary care and caution could have seen, plaintiff with his wagon in a perilous position upon said track, and in a position upon said track where his horses and wagon would necessarily be struck

by an east-bound car, within reasonable time for said motorman to thereafter have stopped his car, and with due regard to the safety of the people upon said car, and before striking plaintiff's said horses and wagon, and thus avoided injuring plaintiff, but that said motorman negligently failed to do so, and as a direct result thereof plaintiff's horses and wagon were struck by said car, in direct consequence of which plaintiff was injured, then your verdict must be for the plaintiff."

"By 'ordinary care,' as used in these instructions, is meant such care as an ordinarily prudent person would exercise under similar circumstances. And by 'negligence,' as used in these instructions, is meant a lack or want of said ordinary care."

First, we shall consider the points argued by counsel for defendant in support of their contention that the court should have directed a verdict for defendant.

The first of these points is that the two acts of negligence alleged in the petition, viz., excessive speed and negligence under the humanitarian rule, are so inconsistent that each destroys the other; and therefore the petition should be regarded as stating no cause of action. We disposed of the precise question in the recent case of *Gaedis v. Railway*, 143 S. W. 565, where we held that such acts are not inconsistent, and may be alleged in the same petition. We have nothing to add to what was said in that opinion, and refer to it for an expression of the views we hold on this subject.

Next, it is urged that plaintiff's own evidence discloses that his negligence, and not any negligence of defendant, was the proximate cause of his injury. It will be observed that in his instructions plaintiff abandoned the first charge of negligence, i. e., running the car at excessive speed, and submitted the case only on the issue of whether or not his injury was caused by negligence under the rules of the humanitarian doctrine. Since the verdict was based entirely on the finding that such negligence was the proximate cause of the injury, we shall start with the concession that the peril of plaintiff was created by his own negligence in driving on the track in front of a rapidly approaching car, and in suffering his attention to become diverted from the car. Let us see if this concession compels us to reach the conclusion advocated by defendant that the facts and circumstances of the case afford no room for the application of the humanitarian rule.

The beneficent principle of the humanitarian doctrine does not take into consideration the origin of the peril of the plaintiff which culminated in his injury, but, whether he was careful or negligent, requires of the operator of the car the exercise of reasonable

care to discover the peril, and to avoid the threatened injury. The principle is not for the benefit of one who, with full knowledge of the danger, wilfully or wantonly rushes into it. *Kinlen v. Railway*, 216 Mo., loc. cit. 164, 115 S. W. 523. But it must be borne in mind that knowledge of the presence of a force that may or may not be injurious does not necessarily imply knowledge of the actual peril caused by such presence. Frequently the negligent, and sometimes even the careful, "have eyes and see not," hold in envisagement all of the elements of a dangerous situation, but are oblivious to the danger. Such a person so entering into peril of his own volition cannot be called wilful or wanton, but only negligent; and he becomes an object of solicitude to the vital principle of the humanitarian rules.

The inference is clear that plaintiff passed from a position of safety to one of danger when he turned his horses on to the track. The car then was, perhaps, 250 feet away, and there was nothing to prevent the motorman, who could have stopped within 100 feet, from seeing and knowing that plaintiff was driving into the path of the car with a heavily loaded and slowly moving vehicle; and we say that the negligence of plaintiff in acting on the erroneous supposition that he could drive around the obstruction in safety did not make him an outlaw, and justify the motorman in casting all care to the winds and, without putting forth any effort to save him, deliberately running with unabated speed to a collision with the team and wagon.

There are two principal tests in cases of this character: First, was the plaintiff in danger of which he did not become aware until too late to save himself? And, second, was his peril obvious to a reasonably careful man in the position of the motorman at a time when the latter had a reasonable opportunity to prevent the injury? That plaintiff was oblivious to his danger is manifest; and we think all of the appearances combined to proclaim to the motorman the existence of a real danger and the inability of plaintiff, on account of his inattention, to save himself. In the first place, the motorman must have realized that in going on at a speed of fifteen miles per hour — and he states that was the speed of the car — a collision would be inevitable, unless he reduced speed. The initial movement of the team disclosed the purpose of plaintiff to drive along the track; and the slow speed of his team and the visible directing of his attention to the wagon he was passing were outward, obvious signs that he was neglecting his own safety,

and would be injured, if the motorman made no effort to save him.

The evidence of plaintiff presents a clear case of "last chance" negligence; and, as we have said in other cases, such negligence, when existent, occupies the whole field of culpability, and must be considered as the sole producing cause of the injury. The facts of this case are essentially different from the facts in the cases relied on by defendant, *e. g.*, *Barnard v. Railway*, 137 Mo. App. 684, 119 S. W. 458, where the evidence disclosed that the plaintiff was not oblivious to the danger; nor was the actual danger apparent to the motorman until it was too late to avoid the injury. The court did not err in overruling the demurrer to the evidence.

Objection is offered to the first instruction given at the request of plaintiff, on the ground that, in effect, it told the jury that \$6,950, the maximum of the damages plaintiff could recover under his petition, would be a reasonable assessment of damages. Practically this is the same question ruled on in the case of *Stid v. Railway*, 236 Mo. 382, 139 S. W. 172; and, following the decision in that case, we hold the objection not well taken.

A second objection to the instruction is dismissed, with the observation that the alleged error is shown by the verdict to have been harmless, and therefore cannot be considered as a ground for disturbing the judgment.

The criticism of plaintiff's second instruction is answered in what we have said in ruling on the demurrer to the evidence. Complaint is made of the refusal of the court to give certain instructions asked by defendant; but we find they were properly refused. They present the issue of contributory negligence as a defense to a cause of action solely based on a breach of defendant's humanitarian duty. This defense is not pleaded in the answer, and might be dismissed on that ground; but we will add that contributory negligence that co-operated in the production of the perilous situation is no defense to the negligence of the defendant in failing to exercise reasonable care to discover the peril and avoid the injury.

We find no prejudicial error was committed in the rulings on the admission of evidence; nor does there appear to be any good ground for the point that the verdict was excessive.

The case was fairly tried, and the judgment is affirmed. All concur.

Green v. United Rys. Co. of St. Louis.

(Missouri — St. Louis Court of Appeals.)

1. **VEHICLES; COLLISION WITH HOSE WAGON; DEATH OF DRIVER; NEGLIGENCE; VIOLATION OF ORDINANCES; INSTRUCTIONS; CONTRIBUTORY NEGLIGENCE; QUESTION FOR JURY.**— In an action for the death of a hose wagon driver killed by the collision of defendant's street car with the wagon which he was driving, the negligence relied upon by the plaintiffs was the violation of city ordinances giving the right of way to fire apparatus and regulating the speed and operation of cars. The defendant's answer consisted of a general denial, followed by a plea of contributory negligence. *Held*, that instructions requiring the jury to find for the plaintiffs, if they found that defendant's negligent acts "directly contributed to cause" the injuries, instead of that such acts caused the injuries, was erroneous.

Instructions should be so framed as to limit the jury in their consideration of defendant's negligence, to a consideration of the specific acts and omissions relied upon as contributory negligence.

Whether the driver of the hose wagon was guilty of contributory negligence in driving on the street car track at excessive speed was a proper question for the jury.

2. **USE OF STREETS; BY ORDINARY TRAVELER; BY DRIVER OF HOSE WAGON.**— Although an ordinary traveler should approach a street railroad track cautiously, with his vehicle under control, looking and listening, ready to stop and give way to a street car, a driver of a hose wagon is not required to proceed with such deliberation and caution.

DEFENDANT appeals from judgment for plaintiffs. Reported 145 S. W. 861.

STATEMENT OF FACTS BY COURT.

Plaintiffs, who are minors, sue for the death of their father, hose wagon driver of the city fire department, who was killed in a collision between the hose wagon and defendant's street car at Twenty-second and Olive streets, in the city of St. Louis. Plaintiffs had verdict and judgment for \$5,000, and defendant has appealed.

The negligence relied upon as grounds of recovery in plaintiffs' petition is the violation by defendant of three city ordinances, which were introduced in evidence. The first gives fire apparatus the right of way upon any street when going to an alarm of fire, and makes it a misdemeanor for any street car operative to care-

Collision with Fire Apparatus.— As to the liability of a street railway company for a collision with fire apparatus, see the note to *Dole v. New Orleans Ry. & Light Co.*, 6 St. Ry. Rep. 290.

lessly obstruct or intercept such right of way. The second requires motormen to keep a vigilant watch for all vehicles moving towards the track, and on the first appearance of danger to a vehicle to stop the car in the shortest time and space possible. The third prohibits the running of cars at a rate of speed exceeding ten miles per hour in a certain defined district, or at any other speed dangerous to persons on the streets. The defendant's answer consisted of a general denial, followed by a plea of contributory negligence. The reply was a general denial.

At the time with which this case is concerned, Olive street and Twenty-second street were, and for a long time had been, open and intersecting public streets in the city of St. Louis. Defendant operated a double-track street railroad along Olive street and across Twenty-second street; the east-bound cars running on the south track, and the west-bound cars on the north track. Each of the streets, at the point of their intersection, were thirty-six feet wide from curb to curb, and sixty feet wide from building line to building line. Olive street sloped downward with rather a steep grade from the west into Twenty-second street, and Twenty-second street sloped downward with a steeper grade from the north into Olive street. Olive street was paved with granite; Twenty-second street with brick. Locust and St. Charles streets and Washington avenue ran parallel to Olive street, and were also crossed or intersected by Twenty-second street. Locust street was the first street north of Olive street, St. Charles the second, and Washington avenue the third. Pine street also ran parallel with Olive street, and was the first street south of Olive street. Plaintiffs' evidence tends to prove that their father, James Green, who was young and of powerful build, great strength, and good habits, was an experienced fireman, driver of a hose wagon in the fire department of the city of St. Louis. On January 30, 1905, about 4:30 o'clock in the afternoon, the hose wagon and its crew, returning to quarters from a fire at Jefferson avenue and Olive street, had reached Twenty-second street and Washington avenue, and were proceeding northwardly along Twenty-second street, when another alarm reached them, this time from Twenty-second and Pine streets, due south along Twenty-second street. Green, who was driving, swung the team around and started south along Twenty-second street; Casserly sat on the seat beside him, with his foot working the fire gong. This seat was over the front axle, and some ten feet back of the horses' heads. Captain Brennan and Moore stood on the

rear step. Shiveley stood up in the wagon. The hose lay coiled in the bottom of the wagon. The wagon with its load weighed two and one-half tons, and was six or seven feet long, and had a wheel gauge of four feet ten inches.

The team trotted up an incline to St. Charles street, where the down slope of Twenty-second street toward the south began. Down this incline, the team went at a gallop, but not exceeding the usual rate of speed going to a fire. Green, holding the lines, had his legs braced. Casserly was ringing the fire gong continuously. It was a dry, rather clear day; the gong rang loudly, and could be heard for three blocks around. They passed Locust street and started on toward Olive. But in Olive street a man stood waving westwardly, as if at some one coming eastwardly along Olive street. Green slowed down the team at the alley, 105 feet north of Olive street, until a coal wagon on Olive street hove into view from the west and passed eastwardly across Twenty-second street. All this time the fire gong rang continuously. When the coal wagon passed, Green, as if he supposed that this was what the man had been waving at, let his horses go again, and they started toward Olive street in a lope, though not so fast as they had been going before reaching the alley. When the wagon got near Olive street, Green started again to pull down his team; but the ground was sleety and slippery, the hose wagon heavy, and the horses' heads had reached the defendant's north track when those on the hose wagon saw defendant's east-bound car close by, coming from the west. Green was trying to stop the team, pulling so hard he seemed literally to lift them off their feet. He could not stop them. It was too late to swing them due east along the north track, so with a great pull on the lines he lifted the horses around and started them toward the southeast, and tried to get across in front of the car. This maneuver was unsuccessful. At about the east building line of Twenty-second street, the left front corner of the car struck the right front wheel of the wagon, broke it and broke the tongue from the wagon, the horses escaping in safety on the south side of the car, leaving the wagon on the north side. The wagon tipped, Green fell, the car passed on until its rear end was about fifteen feet east of the east crossing over Twenty-second street. Green was under the front truck of the car, suffering from injuries which caused his death some two months later.

Plaintiffs' evidence tended to prove that defendant's street car

approached Twenty-second street at a very high and dangerous rate of speed, fifteen or twenty miles an hour, and, though signaled to by the man in the street, paid no attention and gave no signal, by bell or otherwise, of its approach, and made no effort to stop or slacken speed until the collision was imminent and unavoidable. The evidence on the part of the defendant tended to prove that Green drove down Twenty-second street from Locust street to Olive street at breakneck speed without a pause or care, urging the horses along until the collision was inevitable; that the street car approached Twenty-second street at a speed of between nine and ten miles an hour; that the hose wagon was twenty-five or thirty feet north of Olive street when the motorman discovered it; that the front end of the car was then about forty feet west of Twenty-second street; that the motorman reversed the power on the car; that the reverse action commenced and continued, but the tracks were muddy and slippery, and the car slid some seventy-five feet, struck the hose wagon, and slid thirty feet farther; that the vestibule in which the motorman stood was inclosed in glass, and he could not hear the fire gong above the noise and ringing of the bell of the street car; that it was a dark day, with flurries of snow in the air; that the motorman did not see the man waiving to him.

Boyle & Priest and Glendy B. Arnold, for appellant.

A. R. & Howard Taylor, for respondents.

Opinion by CAULFIELD, J.:

1. Respondents' counsel concede, and we are constrained by the decisions of our Supreme Court to hold, that the judgment must be reversed, because the instructions for plaintiffs required the jury to find for the plaintiffs, if they found that defendant's negligent acts or omissions complained of "directly contributed to cause" the injuries of which plaintiffs' father died, instead of that such acts and omissions caused the injuries. Where the pleadings and the evidence were substantially in the same State as in the case at bar, like instructions have been emphatically condemned and held to be reversible error. *Hoff v. Transit Co.*, 213 Mo. 445, 111 S. W. 1166; *Krehmeyer v. Transit Co.*, 220 Mo. 639, 120 S. W. 78; *Schmidt v. Transit Co.*, 140 Mo. App. 182, 120 S. W. 96; *Wilson v. Transit Co.*, 142 Mo. App. 676, 121 S.

W. 1083. So far as their effect on this appeal is concerned, it is unnecessary to further discuss the instructions; but, to avoid further error upon a retrial, the first and second instructions should be reframed, not only to avoid the error for which the judgment is reversed, but also so as to limit the jury, in their consideration of defendant's negligence, to a consideration of the specific acts and omissions relied upon as constituting defendant's negligence. In their present form, they tend to broaden the issues in that respect. It would also obviate the necessity of meeting another point if the plaintiffs prove that the collision occurred within the district defined by the speed ordinance.

2. The real controversy between the parties on this appeal is as to whether the cause should be remanded; defendant's contention being that the conduct of plaintiffs' father, as shown without conflict by their own evidence, in approaching the crossing at such a rate of speed that it was impossible to stop in time to avoid the collision after discovering the close proximity of the car, constituted contributory negligence *per se* as matter of law. Such conduct on the part of an ordinary traveler in a vehicle, under ordinary circumstances, has been held to be negligence *per se* as matter of law (see *Wheeler v. Wall*, 157 Mo. App. 38, 137 S. W. 63); but it does not follow that it is to be denounced as negligence under any and all circumstances.

"The true legal rule is that one approaching a railway crossing must exercise reasonable and ordinary prudence to avoid the danger necessarily to be apprehended there."

Kenney v. Hannibal & St. J. R. Co., 105 Mo. 270, 288, 15 S. W. 983, 16 S. W. 837. And it is elementary that the same act may be careful or negligent, according to the variant facts and circumstances. This is true of the act of one approaching a railroad crossing, as well as of the act of one in any other situation. As was said by our Supreme Court, in *Jennings v. St. Louis, I. M. & S. R. Co.*, 112 Mo. 268, 20 S. W. 490, concerning the rule requiring the traveler to look and listen,

"such a general rule of conduct must have grown out of experience and observations that were common and ordinary; hence the rule, like most others, is not of universal application, but has exceptions under exceptional circumstances."

The case of *Kenney v. Railroad Co.*, *supra*, is to the same effect. Let us consider, then, whether the facts and circumstances sur-

rounding Green, the plaintiffs' father, at the time of and just before the collision, were so different from those usually surrounding the ordinary traveler that what would have been negligence in the latter *per se* might, by reasonable minds, be deemed consistent with the care to be expected of the ordinarily prudent man under such circumstances here disclosed.

Whether he be an ordinary traveler or a fireman, the ordinarily prudent man acts in the light of his experience of what is customary and usual; and whether he has acted carefully or negligently must be adjudged in that light. Great speed on the part of the ordinary traveler is usually needless and of no public interest. Not being usual, he must know that it is not to be expected of him by others lawfully on the streets. It is of very slight inconvenience to him, and none to the public, if he be compelled to approach a street railroad track at slackened speed, ready to stop on the slightest warning. No alarm precedes his coming. No necessity exists for giving way to him. It is not customary to do so. He cannot reasonably expect it. On the contrary, it is his duty to give way to street cars, which have a public duty to perform with reasonable dispatch. *Hickman v. Union Depot Railway Co.*, 47 Mo. App. 65. Therefore it is proper to exact of him that he approach a street railroad track cautiously, with his vehicle under control, looking and listening, ready to stop and give way to the street car; and any contrary course may well be deemed negligence *per se* as matter of law.

With plaintiffs' father, the driver of this hose wagon, the circumstances were entirely different. He must of necessity have responded to the alarm of fire with the greatest practicable speed; for the safety of life and property might, and often does, depend upon his apparatus and the firemen on it arriving promptly at the fire. He drove down Twenty-second street at the speed usual in going to a fire. This cannot be considered negligence *per se*. It was not reasonably to be expected that he should proceed with the deliberation and caution of an ordinary traveler. He was bound only to drive with that care which a prudent person would exercise under similar circumstances. By ordinance and public necessity, his hose wagon had the right of way, and street cars had no right to intercept or obstruct it. The vehicle on its way down Twenty-second street was preceded by a continuous clamor of the gong, a sound so loud and penetrating that it could be heard far ahead and for blocks around. He slowed down at the alley just before reach-

ing Olive street, evidently seeing the man waving. A coal wagon went by as if it was the thing waived at. The way seemed clear. The gong was sounding, and those on Olive street could well hear it in ample time to hold back, if they would. It was their duty to hold back; it was customary for them to hold back. He had the right of way by ordinance; and there was nothing to indicate that any one was about to deny it to him. He was justified in assuming that those in charge of vehicles and cars on Olive street knew of his coming; he had a right to assume that they would heed the warning and give him the right of way. It was his duty to proceed in haste; he decided to proceed; he did proceed with moderate haste, and if defendant's motorman had heeded the warning gong, and, heeding it, had observed the ordinance and held back from the hose wagon's way, he would have made the crossing in safety. We are not prepared to hold that his decision to proceed was unreasonable under the circumstances. Although it would have been negligence in law for a traveler, under ordinary conditions, to have approached the crossing at the speed with which Green drove, still the circumstances surrounding Green so differ that reasonable minds might consider the same conduct by him within the bounds of due care; hence we are of the opinion that the question was one properly for the jury. There is ample authority for this holding. See *Michael v. Kansas City Western Ry. Co.*, 143 S. W. 67; *Hanlon v. Milwaukee E. R. & L. Co.*, 1 St. Ry. Rep. 821, 118 Wis. 210, 95 N. W. 100; *Warren v. Mendenhall*, 77 Minn. 145, 79 N. W. 661; *Geary v. Metropolitan St. Ry. Co.*, 1 St. Ry. Rep. 581, 84 App. Div. 514, 82 N. Y. Supp. 1016; *City of New York v. Metropolitan St. Ry. Co.*, 2 St. Ry. Rep. 781, 90 App. Div. 66, 85 N. Y. Supp. 693, aff'd in 182 N. Y. 536, 75 N. E. 1128; *Farley v. Mayor, etc.*, 152 N. Y. 222, 46 N. E. 506, 57 Am. St. Rep. 511; *Chicago City R. R. Co. v. McDonough*, 125 Ill. App. 223, aff'd 221 Ill. 69, 77 N. E. 577; *Flynn v. Louisville Ry. Co.*, 110 Ky. 662, 62 S. W. 490.

The defendant cites us to *Guiney v. Southern E. Ry. Co.*, 167 Mo. 595, 67 S. W. 296, as sanctioning a contrary view; but we are not persuaded to so construe it. In that case our Supreme Court did nothing more in this respect than construe an instruction and hold that it did not declare, as a matter of law, that the failure of the driver of a fire department fuel wagon to look and listen is, under all circumstances, negligence, but required of him nothing more than the exercise of ordinary care.

For the reason stated in the first paragraph of this opinion, the judgment in the case at bar is reversed, and the cause is remanded.

REYNOLDS, P. J., and NORTON, J., concur.

Schlauder v. Chicago & Southern Traction Co.

(Illinois — Supreme Court.)

1. **INTERURBAN TROLLEY RAILWAY; COMMERCIAL RAILROAD; RIGHTS AND LIABILITIES.** — An interurban trolley railway, organized under the general act for the incorporation of railroads, is a commercial railroad, and has the rights and is subject to the burdens imposed by law upon railroads so organized, and the statute concerning fencing and operating railroads applies to it.
2. **INJURY TO PASSENGER; COLLISION OF TROLLEY CAR WITH STEAM CAR AT CROSSING; NEGLIGENCE OF BOTH COMPANIES.** — Where a passenger in an interurban trolley car was injured by the car being struck by a steam car at a railroad crossing, the fact that the railroad company was negligent does not relieve the trolley company from its negligence.
3. **SAME; PRESUMPTION THAT OTHER COMPANY WILL PERFORM ITS DUTY.** — Although the presumption that every person will perform the duty enjoined by law or imposed by contract is to have due weight in determining questions of negligence, it is not conclusive, and no one has a right to rely solely upon it in regulating his own conduct.
4. **SAME; NEGLIGENCE; QUESTION FOR JURY.** — Where in an action for injuries to a passenger in a trolley car which was struck by a train at a railroad crossing, there were charges of negligent management of the car, the question whether it was negligence to have the car standing from three to five minutes on the track of the steam railroad without any precaution to ascertain whether a train was approaching, or to give notice to such a train that the track was blocked, was properly submitted to the jury.
5. **SAME; EVIDENCE; OPINION OF WITNESS.** — Where in an action for personal injuries the defendant denied that the plaintiff was injured, the physician who attended the plaintiff will not be permitted to state his opinion as to whether the plaintiff was permanently injured as a result of the accident.
6. **SAME; INSTRUCTIONS.** — An instruction which refers the jury to several counts of the declaration is not improper, although there is no evidence to sustain some of the counts.

The practice of giving instructions referring the jury to the declaration is not approved.

DEFENDANT brings error from judgment for plaintiff. Reported 97 N. E. 233.

Injury to Passenger from Collision with Steam Railroad Train. — For a discussion of the liability for the collision between a street car and railroad train resulting in an injury to a passenger of the street car, see *Nellis on Street Railways* (2d Ed.), § 398.

Lowes & Richards (Mayer, Meyer, Austrian & Platt and Frederick D. Jordan, of counsel), for plaintiff in error.

J. L. O'Donnell, T. F. Donovan and J. A. Bray, for defendant in error.

Opinion by CARTWRIGHT, J.:

The Appellate Court for the Second District affirmed the judgment for \$6,000 and costs recovered by defendant in error against plaintiff in error in the Circuit Court of Will county, and a writ of *certiorari* was granted by this court for the purpose of reviewing the judgment of the Appellate Court.

The suit was an action on the case for personal injuries received by plaintiff while a passenger on the car of defendant. The plea was not guilty, and the defendant asked the court to direct a verdict of not guilty, which the court refused to do. The evidence from which the correctness of that ruling must be determined was as follows:

The defendant is a railroad company organized under the general act for the incorporation of railroad companies and operates a railroad from Chicago to Kankakee. The power used is electricity, applied by means of an overhead trolley wire and pole. On August 30, 1909, the plaintiff, with her husband, took passage from Chicago to go to Peotone. After passing Blue Island the car approached a crossing of the Grand Trunk Railroad on the same level. The trolley pole became disconnected from the wire, and the car stopped on the crossing and stood there from three to five minutes, as testified to by several of the plaintiff's witnesses, and there was no contradictory evidence on that question. There were about thirty passengers, who remained seated in the car until a train on the Grand Trunk Railroad was seen coming around a curve from the west at a distance of from 600 to 800 feet from the car. The defendant's conductor ran out on the track and signaled to the approaching train, and the engineer made every effort to stop it. An alarm being given, the passengers made a general rush for the door to get out. A number of them were crowded at the door to the vestibule when the other train reached the car. The train was almost stopped and moving not faster than a slow walk, but it pushed the end of the car around and stopped beyond the car somewhere from fourteen feet up to the length of the engine, or perhaps forty or fifty feet. As a result of the collision

the plaintiff was thrown forward into the vestibule, which was considerably lower than the floor of the car, and several other women fell on her. There was a bruise on her hip three or four inches in diameter, where considerable swelling followed, and this was the only external sign of injury. She was treated for some time by a physician and suffered from other disabilities which the evidence in her behalf tended to prove had not existed before the accident.

There were five counts in the declaration. The negligence charged in the original declaration was that the defendant carelessly, recklessly, negligently and improperly propelled and ran the car and permitted and allowed it to stand on the railroad track on which the train was approaching. The first of four additional counts afterward filed charged as negligence that the defendant did not use due, proper or reasonable care that the plaintiff should be safely carried on the car. The second alleged that the defendant did not use due care and caution that the plaintiff should be safely carried, but so recklessly and improperly drove and managed the car that it collided with the locomotive and train propelled by steam on the other road. The negligence charged in the third was that the defendant failed to bring its car to a stop at a reasonably safe distance from the steam railroad, and failed to use any reasonable precaution to ascertain whether or not any train or locomotive was approaching thereon, and carelessly and negligently ran and propelled its car over and upon said steam railroad tracks. The fourth charged that the defendant so carelessly and negligently managed, conducted and propelled its car that the car was struck and came in collision with the passenger train.

It is not claimed that there was any want of care on the part of the plaintiff, but it is insisted that the defendant was entitled to the benefit of the presumption of law that the other railroad would obey the statute and comply with the law which required it to stop within 800 feet of the crossing of another railroad on the same level and to positively ascertain that the way was clear and that the train could safely resume its course before proceeding to pass over the crossing. Basing their argument on that presumption, counsel contend that the defendant was not guilty of any negligence in failing to anticipate a disregard of the statute by those in charge of the train.

The defendant being organized under the general act for the incorporation of railroads, its railroad is a commercial railroad,

and we so decided in *Bradley Mfg. Co. v. Chicago & Southern Traction Co.*, 229 Ill. 170, 82 N. E. 210. It has the rights and is subject to the burdens imposed by law upon railroads so organized, and the statute concerning fencing and operating railroads applies to it. *Butler v. Aurora, Elgin & Chicago Railroad Co.*, 250 Ill. 47, 95 N. E. 44.

The train on the Grand Trunk Railroad was not stopped as required by the statute, and if it had been the accident would not have happened, but if defendant was negligent the fact that the other railroad company was also negligent was no defense. *Chicago & Eastern Illinois Railroad Co. v. Mochell*, 193 Ill. 208, 61 N. E. 1028, 86 Am. St. Rep. 318.

There is a presumption of law that every person will perform the duty enjoined by law or imposed by contract, and anticipation of negligence in others is not a duty which the law imposes. *Chicago, Burlington & Quincy Railroad Co. v. Gunderson*, 174 Ill. 495, 51 N. E. 708; *Chicago City Railway Co. v. Fennimore*, 199 Ill. 9, 64 N. E. 985. While that statement has often been made and the presumption is to have due weight in determining questions of negligence, it is manifest that the presumption is not a conclusive one and that no one has a right to rely solely upon it in regulating his own conduct. The presumption does not absolve one from exercising such care and prudence as a reasonably prudent person would under the same circumstances, nor relieve a carrier of passengers from the duty of exercising that degree of care demanded by the law in view of the circumstances and surroundings. One who has an unobstructed view of an approaching train would not be justified in closing his eyes and crossing a railroad track in reliance upon the presumption that a bell would be rung or a whistle sounded. No one can assume that there will not be violations of the law or negligence of others and offer the presumption as an excuse of failure to exercise care. Although the presumption is to be considered, it is not conclusive that the defendant was not guilty of negligence.

Counsel who seek to sustain the ruling say that there was evidence that the car jiggled and jerked in coming up an incline under the tracks of another railroad which tended to show that the equipment of the car was out of order, but there was no charge of that kind in the declaration. It is also contended that there was negligence in not stopping the car before reaching the railroad;

but if it was not stopped the fact had nothing to do with the accident.

There were, however, very general charges of negligent management of the car — so general, in fact, as to admit of almost any evidence respecting what was done in its management — and also general charges of the want of proper care to safely carry the plaintiff.

Under these charges the question whether it was negligence to have the car standing from three to five minutes on the track of the steam railroad without any precaution to ascertain whether a train was approaching or to give notice to such a train that the track was blocked was properly submitted to the jury, and the court did not err in refusing to direct a verdict.

On the examination of the physician who attended the plaintiff he testified to the existence of the bruise on the right thigh which existed for a few weeks, and said that the plaintiff had soreness over the lower part of the abdomen and other physical troubles peculiar to women; that she became depressed, morbid, melancholy and hysterical; and that she had a sense of suffocation, and suffered from a loss of memory, morbidness, brooding, worry and fear that some calamity would happen. He had received an account of the accident from her and her husband, and he was asked this question:

“Have you an opinion whether or not Mrs. Schlauder is or is not permanently injured as a result of that accident?”

The question was objected to on the ground that it placed the doctor in the position of the court and jury to determine one of the issues in the case, but the objection was overruled. He answered that he had an opinion, and that he thought she was permanently injured. The rule is that a witness cannot be permitted to give his opinion on the very fact which the jury is to determine. *Illinois Central Railroad Co. v. Smith*, 208 Ill. 608, 70 N. E. 628. In *City of Chicago v. Didier*, 227 Ill. 571, 81 N. E. 698, it was explained that, where there is a conflict in the evidence as to whether the plaintiff was injured in the manner claimed, it is not competent for witnesses to give their opinions on that subject; but in that case there was no dispute as to the manner and cause of the injury, nor any dispute that the injury to the plaintiff's knee was caused by the fall. Inasmuch as there was no controversy on those questions, it was not considered improper to ask the doctor

what he would say was the cause of the condition in which he found the knee. There were the same admissions in *Chicago Union Traction Co. v. Roberts*, 229 Ill. 481, 82 N. E. 401, and *Fuhry v. Chicago City Railway Co.*, 239 Ill. 548, 88 N. E. 221. That was not the case here. The evidence was admitted while the plaintiff was making out her case to establish the cause of action alleged, and the plea was not guilty. The record shows no admission of an injury to the plaintiff; but, while it was not denied that the plaintiff fell, the fact that she was injured was disputed, and the evidence for the defendant tended to prove that she was not injured. Two physicians testifying for the defendant, in answer to hypothetical questions embracing conditions and symptoms testified to by the plaintiff's doctor, gave it as their opinion that they had no relation to or connection with the accident. Under the rule stated in the *Didier Case* the ruling was wrong.

The second instruction given at the request of the plaintiff stated that if she had proved the allegations in one or more counts of her declaration and was injured as therein alleged, and the injury was caused by or through the negligence of the defendant as alleged in such count, she was entitled to recover. The third told the jury that if they believed the plaintiff was injured, as alleged in some one count of the declaration, by reason of the failure of the defendant's servants, as alleged in the declaration or some count thereof, to exercise the degree of care stated in the instruction, while she was in the exercise of ordinary care and caution, she was entitled to recover, and they should find the defendant guilty. The fourth stated that if the defendant was guilty of negligence as charged in some one count of the plaintiff's declaration, and by reason of such negligence the plaintiff was injured while in the exercise of ordinary care, they should find the defendant guilty. It is contended that there was no evidence tending to sustain the allegations of the second or third additional counts, and, therefore, the instructions were erroneous.

It has always been the rule that it is error to give an instruction telling the jury that if a certain fact exists a certain rule of law applies or a certain verdict is to be returned, if there is no evidence of the fact. Such instructions must be based upon evidence in the case, and a statement of an hypothesis of fact virtually tells the jury that there is evidence from which they may believe in the existence of the fact, and if there is no evidence the instruction is misleading. *Alexander v. Town of Mt. Sterling*, 71 Ill. 366;

Indianapolis & St. Louis Railroad Co. v. Miller, 71 Ill. 463; *Nieman v. Schnitker*, 181 Ill. 400, 55 N. E. 151; *Spring Valley Coal Co. v. Robizas*, 207 Ill. 226, 69 N. E. 925.

If the court, instead of stating an hypothesis of fact and basing thereon a rule of law or direction to the jury, refers the jury to the declaration or to the several counts, the instruction is equivalent to one embodying facts stated in the declaration as such an hypothesis. The jury must go to the declaration or the several counts to learn the facts which the court says they are to believe from the evidence; but, if that method is employed, it is held not improper to give the instruction, although there is not evidence to sustain some of the counts. That rule was stated in the recent case of *Chicago City Railway Co. v. Foster*, 226 Ill. 288, 80 N. E. 762, where several cases holding the same doctrine were reviewed. The argument, therefore, that these instructions were erroneous because there was no evidence tending to support some of the counts referred to in them, cannot be sustained.

There was at least one count, however, which alleged a fact and charged it to be negligence which was proved by the evidence but did not entitle the plaintiff to recover or authorize a verdict of guilty. The charge in the third additional count was that the defendant failed to bring its car to a stop at a reasonable distance from the steam railroad and then and there failed to use any reasonable precaution to ascertain whether or not any train or locomotive was then and there approaching on said steam railroad and carelessly and negligently ran and propelled its car over and onto said railroad tracks. Witnesses testified that the car did not stop before reaching the tracks of the Grand Trunk Railroad; but there was an utter failure to connect the act with the injury to the plaintiff. According to the uncontradicted testimony of the plaintiff's witnesses, the car stood on the tracks from three to five minutes, and it would have availed nothing if it had been stopped and the conductor had looked for the train, which was from a mile and a half to two miles distant. If he had looked he would have seen nothing; but the failure to stop the car and look was alleged as a fact and charged as negligence, and there was evidence to prove the fact. The first point made by counsel in support of the refusal to direct a verdict is that the evidence conclusively established the negligence of the defendant in not bringing its car to a stop before it reached the railroad tracks, and the testimony of witnesses is recited at length to show that the fact was proved.

If learned counsel take that view of the liability of the defendant for the accident, it certainly cannot be said that the instructions were not calculated to mislead the jury and induce them to adopt the same theory.

Furthermore, the practice of giving instructions referring the jury to the declaration has been repeatedly disapproved. The evidence as to whether there was any substantial injury to the plaintiff, and the extent of such injury, if there was any, was conflicting, and the errors pointed out were prejudicial to the defendant.

The judgments of the Appellate and Circuit Courts are reversed, and the cause remanded to the Circuit Court.

Reversed and remanded.

Mather v. Metropolitan St. Ry. Co.

(Missouri — Kansas City Court of Appeals.)

1. **USE OF STREET CAR TRACK BY DRIVER OF VEHICLE.** — The driver of a vehicle has no right to appropriate a street car track to his own use, and by obstinately remaining on the track unnecessarily obstruct or hinder the passage of street cars.
2. **DUTY OF DRIVER ON TRACK WHEN CAR IS APPROACHING FROM BEHIND.** — It is the duty of a person driving on a track in the same direction cars are operated thereon to give reasonable attention to the way behind him to discover the approach of a car, and to make a reasonable effort to give way to the car, in order that its progress may not be unnecessarily retarded.

APPLICATION OF "LAST CLEAR CHANCE" OR "HUMANITARIAN" DOCTRINE TO CASE OF COLLISION WITH VEHICLE DRIVEN ALONG TRACK IN SAME DIRECTION AS CAR IS PASSING.

It is not negligence *per se* for a person to drive a vehicle along a street railway track. See Nellis on Street Railways (2d Ed.), § 418. As the "last clear chance" or "humanitarian" doctrine is involved only where the driver or person injured has, to some extent, been guilty of negligence, the doctrine is not always applicable to accidents arising from the driving of a vehicle along the track. In some cases, however, it is held that the driver or person in such a vehicle may be guilty of negligence, as where the duty is imposed upon him of occasionally looking back for approaching cars and he fails to fulfil such duty. See *Degel v. St. Louis Transit Co.*, 1 St. Ry. Rep. 459, 101 Mo. App. 56, 74 S. W. 156; *Abbott v. Kansas City Elev. Ry. Co.*, 5 St. Ry. Rep. 675, 121 Mo. App. 582, 97 S. W. 198.

In such a case, where the driver of the vehicle or person therein was guilty

3. **DUTY OF MOTORMAN APPROACHING VEHICLE DRIVEN ON TRACK; NEGLIGENCE; HUMANITARIAN RULE.** — Where a car was being run at a high speed, and the motorman could see a buggy when it was a long distance ahead, it imposed on him the active duty of giving close attention to the vehicle, as long as it remained in the pathway of the car, and of keeping the car under such control that he could avert a collision by stopping, should the vehicle not turn out in time. The conduct of the motorman in colliding with the buggy under such circumstances is negligence under the humanitarian rule.
4. **INSTRUCTION; FAILURE TO DEFINE WORDS "CARELESS" AND "NEGLIGENCE."** — Where in instructions to the jury the words "careless" and "negligence" are employed merely to characterize the acts stated in a given hypothesis, a failure to define them is not reversible error.

DEFENDANT appeals from judgment for plaintiff. Reported 148 S. W. 383.

John H. Lucas and Hogsett & Boyle, all of Kansas City, for appellant.

I. B. Kimbrell and W. B. Kelley, both of Kansas City, for respondent.

Opinion by JOHNSON, J.:

Plaintiff sued to recover damages for personal injuries received in a collision between a buggy in which he was riding and an electric street car operated by defendant. The petition alleges that

of negligence, if the motorman of the approaching street car saw the danger of the persons on the track, or by the exercise of reasonable care would have seen such danger in time to have avoided a collision, and he failed in his duty, the negligence of the person injured does not bar his recovery against the street railway company. *Degel v. St. Louis Transit Co.*, 1 St. Ry. Rep. 459, 101 Mo. App. 56, 74 S. W. 156; *Kimble v. St. Louis, etc., Ry. Co.*, 3 St. Ry. Rep. 579, 108 Mo. App. 78, 82 S. W. 1096; *Union Biscuit Co. v. St. Louis Transit Co.*, 3 St. Ry. Rep. 578, 108 Mo. App. 297, 83 S. W. 288; *Abbott v. Kansas City Elev. Ry. Co.*, 5 St. Ry. Rep. 675, 121 Mo. App. 582, 97 S. W. 198; *Reektenwald v. Metropolitan St. Ry. Co.*, 5 St. Ry. Rep. 681, 121 Mo. App. 595, 97 S. W. 557; *Funk v. Metropolitan St. Ry. Co.*, 133 Mo. App. 419, 113 S. W. 694; *Maness v. Joplin, etc., Ry. Co.*, 149 Mo. App. 259, 130 S. W. 87.

In *Degel v. St. Louis Transit Co.*, 1 St. Ry. Rep. 459, 101 Mo. App. 56, 74 S. W. 156, the court said: "It is a familiar and well established legal principle that, although a person may have negligently exposed himself to danger, the duty still remains to refrain from killing or injuring him. The general rule may be deduced that a party plaintiff who has placed himself in a dangerous position, where injury is likely to result, and does ensue, notwithstanding such negligence on his part, may still recover for such injury, if he

the injury was caused by negligence in the operation of the car, and includes negligence under the humanitarian rule as one of the causes. The answer is a general denial.

The cause is here on the appeal of defendant from a judgment of \$2,770, recovered by plaintiff in the Circuit Court. The injury occurred in the morning of February 15, 1910, on Electric street, in Independence. The street runs west from the courthouse several blocks, and then deflects to the southwest. Defendant operates a double-track car line on this street, and the injury was inflicted by a west-bound car running on the north track.

Plaintiff, who is a physician living in Independence and familiar with the locality in question, was riding westward on Electric street in a single buggy. His driver was doing the driving, and, according to the evidence of plaintiff, the buggy was driven over the north rail of the west-bound track a distance of over 400 feet. They overtook a light delivery wagon that was being driven on the north side of the street, and had just started to turn a little to the left to pass the wagon, when some one called to them that a car was coming from behind, and the driver immediately turned the horse to the right behind the delivery wagon to allow the car to go by. The car, which was running at a speed of over fifteen miles per hour, overtook the buggy before it could be driven from the track, and the right side of the front end of the

can establish that the defendant knew, or by the exercise of reasonable diligence could have known, of plaintiff's peril in time to avoid injuring him, and failed to exert reasonable care by which such injury might have been averted. The testimony shows that the plaintiff herein was guilty of such negligence as would preclude a recovery unless the motorman of the defendant saw, or could have seen, her exposure to danger in time to have avoided the accident, if he had exercised reasonable care. The case falls within the now well-established exception in the law of negligence permitting a recovery, notwithstanding the contributory negligence of the party injured, if defendant, after seeing the party in danger, or where such duty was imposed on defendant, by the exercise of ordinary care, might have seen him in time, and averted the accident, failed to do so. If defendant's motorman saw, or by the exercise of ordinary care could have seen, the peril of plaintiff, even though caused by her own contributory negligence, in time to avoid injury to her, the plaintiff was entitled to recover, and her failure to look and listen for the colliding car was no bar."

If the motorman could not have seen the person in danger in time to have stopped the car and avoided the injury, the doctrine is not applicable, and the person, if guilty of contributory negligence, cannot recover. *Abbott v. Kansas City Elev. Ry. Co.*, 5 St. Ry. Rep. 675, 121 Mo. App. 582, 97 S. W. 198. But

car — not the fender — struck the rear axle of the buggy about midway between the wheels. The impact threw the buggy to the right of the track, and threw plaintiff to the pavement, inflicting the injuries for which he seeks to recover in this action.

The buggy had a top, and neither plaintiff nor the driver looked back to see if a car was approaching; and neither knew of the presence of the car until a bystander shouted a warning a moment before the collision. Witnesses introduced by plaintiff say that the bell was not sounded; nor did the motorman attempt to reduce speed until after the collision. Defendant's witnesses give a different version of the injury. They say the bell was sounded as the car neared the buggy, and that, until an instant before the collision the buggy was being driven on the pavement to the right of the track; that suddenly the driver attempted to pass the wagon in front by turning to the left, and onto the track, right in front of the car, and that the car struck the left side of the buggy and threw it off the track.

The court overruled the demurrer to the evidence offered by defendant, and, at the request of plaintiff, gave instructions which submitted no other issue of negligence than that pleaded as a breach of the humanitarian duty defendant owed plaintiff. The principal instruction was as follows:

it is generally a question for the jury whether the motorman could have seen him in time to have avoided the injury. *Kimble v. St. Louis, etc., Ry. Co.*, 3 St. Ry. Rep. 579, 108 Mo. App. 78, 82 S. W. 1096; *Union Biscuit Co. v. St. Louis Transit Co.*, 3 St. Ry. Rep. 578, 108 Mo. App. 297, 83 S. W. 288; *Funk v. Metropolitan St. Ry. Co.*, 133 Mo. App. 419, 113 S. W. 694.

If the person injured saw or heard the approaching car in time to have driven off the track and himself avoided the injury, he was guilty of negligence that directly contributed thereto and cannot recover, though the motorman saw or could have seen him in time to have stopped the car and avoided the injury. *Kimble v. St. Louis, etc., Ry. Co.*, 3 St. Ry. Rep. 579, 108 Mo. App. 78, 82 S. W. 1096.

Although it is negligence for one to drive along a street car track without looking back for approaching cars, nevertheless, in an action for injuries received by a collision from the rear with such a car, in daylight on a straight track, where the plaintiff's wagon was in sight of the motorman for a thousand feet, it is a question for the jury whether the motorman had the last chance to avoid the collision, and, if he had, the plaintiff may recover.

In *Pusateri v. Chicago City Ry. Co.*, 156 Ill. App. 578, the court said: "However irritating the slowness of a wagon driver in getting out of the track may be, nevertheless the car company, notwithstanding its superior right

"The court instructs the jury that, if you believe from the evidence that the plaintiff, Joseph Mather, was, at the time and place in question, in a position of imminent peril of being struck by the car mentioned in evidence, by reason of the fact that the buggy in which he was seated was upon the track upon which said car was running, and that the motorman saw him in such position of danger, if any, or by the exercise of reasonable care would have so seen him in time to have slackened the speed of said car, or to have stopped the same, and avoided striking and injuring plaintiff, but negligently and carelessly failed to do so, and if you further believe and find from the evidence that, by reason of the foregoing careless and negligent acts of said motorman, if you find them to have been careless and negligent, the buggy in which plaintiff was riding was struck, and plaintiff was thrown out of the same and injured, then your verdict must be for the plaintiff, even though you believe and find from the evidence that plaintiff negligently placed himself in danger upon the street car track mentioned in the evidence."

Among the instructions given at the request of defendant were the following:

"The court instructs the jury that, if you find and believe from the evidence that the plaintiff either went upon the track, or so close to the same, in front of the moving car, when the car was so close to him that it could not be stopped by the exercise of ordinary care before it struck the buggy in which he was riding, your verdict must be for the defendant."

"If the physical facts, as shown by the evidence in this case, and common observation and experience are in conflict with and contrary to the testimony of any witness in this case, then it is your duty to take into consideration such

of way, is bound to exercise ordinary care not to run into the wagon and injure even the obstreperous driver; *a fortiori* does it owe this duty to another occupant of the wagon."

The driving of a noisy wagon along and upon a street railway track does not in itself necessarily constitute such contributory negligence as will relieve the street railway company from responsibility for an accident which might have been avoided by the exercise of due care on its part. *Luby v. Morris County Tract. Co.*, (N. J.) 83 Atl. 184.

In *Swift & Co. v. New York, etc., Ry. Co.*, 136 N. Y. App. Div. 34, 120 N. Y. Supp. 203, where a light was suspended from the rear axle of a wagon which was driven along a street railway track, it was held that the company was liable for injuries resulting from a rear collision with a street car, as the motorman must have known of the presence of the wagon. The court said: "It is not the law that a railway company may, with knowledge, yet without effort to save, run down any valuable animal, much less man, upon railway tracks, however unlawfully or however negligently they may be there."

In *Brachfeld v. Third Ave. R. Co.*, 29 Misc. (N. Y.) 586, 60 N. Y. Supp. 988, it was held that the presence of a wagon driven along the track of a street railway company affords the company no justification for permitting its car to collide with the rear of the wagon.

physical facts and common observation and experience, and to disregard the testimony of any such witness in conflict therewith and contrary thereto, in so far as they so conflict.

"If you believe and find from the evidence that at the time and place in controversy plaintiff could, by the exercise of reasonable and ordinary care, have avoided injury from the car in question, and that he failed to do so, and by reason thereof he was injured, then your verdict must be for the defendant."

It is argued by counsel for defendant that the court erred in overruling the demurrer to the evidence. Much stress is laid on the theory of the physical impossibility of the account of the injury given in the evidence of plaintiff. It is the idea of counsel that if this heavy, double-trucked street car, running from fifteen to twenty miles per hour, had struck the rear end of the buggy, it would have demolished both of the hind wheels; and that, since no such result followed the collision, we must dismiss plaintiff's version of the injury as a story too incredible to be believed. There is evidence that the left hind wheel was mashed down, and that the rear axle was badly sprung. The position of the buggy, as described by the evidence of plaintiff, left only its rear end in the path of the car. The right wheel was in the clear, the left just over the north rail. The rear axle was on a highly obtuse angle with the rail; and it is not difficult to believe that the corner of the car passed between the wheels and struck the axle a glancing blow, the result of which was the hurling of the buggy to the right. The reasoning of counsel for defendant applies with stronger and more persuasive force to the description of the injury in defendant's own evidence. If, as defendant's witnesses aver, the driver had turned the horse to the left, and had driven on the track in front of the car, then not only the broadside of the vehicle, but the horse as well, was in the path of the car, and it is hard to understand how the buggy escaped demolition and the horse serious injury. We shall not hold that the evidence of plaintiff indisputably is contradicted by the conceded physical facts. The jury were entitled to draw the conclusion that the buggy was being driven along and astride the north rail of the track for a distance of over 400 feet, and that, without giving any warning and without checking speed, the motorman ran his car at high speed into a collision with a buggy in plain view on the track, and that, until too late for a collision to be averted, the driver of the buggy gave no sign of turning out to give the car a clear track.

It has been said by the courts of this State over and over again

that the public streets of a city are for the general use of the public, and that no class of vehicles is allowed a paramount right to any part of the street. The driver of a horse-drawn vehicle has a right to drive in that part of the street occupied by street railway tracks, and cannot be convicted of negligence in so doing, as long as he exercises his right reasonably and with due regard for the rights of others who are lawfully using the street. Inasmuch as street cars are run on fixed tracks at higher speed than that of horse vehicles, the driver of a horse, who has the whole roadway for his use, has no right to appropriate a street car track to his own use, and by obstinately remaining on the track unnecessarily obstruct or hinder the passage of street cars. To allow him such privilege would be to bestow on him a superior right to the use of the track. It is his duty, when he is driving on a track in the same direction cars are operated thereon, to give reasonable attention to the way behind him to discover the approach of a car, and to make a reasonable effort to give way to the car, in order that its progress may not be unnecessarily retarded. *Hicks v. Railway*, 124 Mo., loc. cit. 123, 27 S. W. 542, 25 L. R. A. 508; *Rapp v. Transit Co.*, 190 Mo. 144, 88 S. W. 865.

Since the judgment before us is founded solely upon a breach of the last-chance rule, the issue of whether or not the peril of plaintiff was caused, in whole or in part, by his own negligence is unimportant, and we pass from the duty of a traveler, such as he, to that of the operator of the street car. The car was being run at high speed, and the motorman could see the buggy when it was a long distance ahead. He could see the driver was making no effort to turn out. He would have been justified in assuming that the occupants of the buggy would not be remiss in the observance of their duty; but the law did not give him the right to rely implicitly on such presumption. It imposed on him the active duty of giving close attention to the vehicle, as long as it remained in the pathway of the car, and of keeping the car under such control that he could avert a collision by stopping, should it turn out that the occupants of the vehicle were negligent and would not turn out in time.

The function of the humanitarian principle and its effluent rules is to deal with just such cases as this; and to say that the motorman had a right to run his car at high speed to a collision with a buggy, on the excuse that he assumed the buggy would leave the track at the last moment, would amount to a repudiation of the

principle, and to a declaration that the driver of a horse vehicle could travel along a street railroad only at his own risk of injury. The conduct of the motorman, as depicted in the evidence of plaintiff, clearly was negligent, under the humanitarian rule. The demurrer to the evidence was properly overruled.

Counsel for defendant object to the principal instruction given at the request of plaintiff, on the ground, first, that it employs different forms of the words "careless" and "negligent," without defining the words. Instructions for the plaintiff, which, without defining the word "negligence," or stating any hypothesis of facts, merely direct a verdict on the finding that the injury was negligently inflicted, are erroneous. As is said in *Hinzeman v. Railroad*, 182 Mo., loc. cit. 624, 81 S. W. 1138:

"It is the duty of the court, by instructions, to submit to the jury questions of fact and enlighten them as to the legal effect to be given to the facts, when found. When a man has committed certain acts, we say that he has been guilty of negligence; but when we submit the case to a jury we do not say, 'If you find that the defendant has been guilty of negligence you should find for the plaintiff,' but we define negligence in the instructions, and say to the jury, 'If you find that the defendant has done certain acts in the manner covered by that definition, then he has been guilty of negligence, and you should find accordingly.'"

But where, as here, the terms are employed merely to characterize the acts stated in a given hypothesis, a failure to define the words "careless" and "negligent" is not reversible error. The case of *Sweeney v. Railway*, 150 Mo. 385, 51 S. W. 682, is in point:

"This [negligence] is a word the meaning of which is well understood, and no definition of it was necessary. As used in the instruction, it could not have been misunderstood by the jury, or in any way have misled them."

See also *Rattan v. Railway*, 120 Mo. App., loc. cit. 279, 96 S. W. 737.

The rule that the term "negligence" must be defined does not refer so much to a mere law dictionary definition as to a definition by the statement of facts, or acts from which the inference of negligence would have to be implied. Or, to state it differently, the rule is merely corollary to the fundamental rule that the instructions of the plaintiff in negligence cases, which relate to the issue of negligence, must restrict the recovery to the precise acts of

negligence pleaded in the petition. This point must be ruled against the contention of defendant.

Nor do we agree with defendant that the instruction failed to require the jury to find that plaintiff was oblivious to his peril, and that both the peril and his oblivion were known, or should have been known, to the motorman. The facts of the hypothesis submitted in the instruction sufficiently embody those elements of a last chance cause, though they were not stated in specific terms. Certainly the jury, following the instructions, were compelled, in order to find for plaintiff, to believe that his oblivion to his peril was real and obvious to the motorman, had he been in the exercise of reasonable care. We find no prejudicial error in the instruction.

Objections to the rulings of the court on evidence are argued; but all clearly are without merit, and need not be discussed. Point, also, is made that the verdict is excessive; but we think the assessment of damages was well within evidentiary bounds.

The cause was fairly tried, and the judgment is affirmed. All concur.

Hymarsh's Administrator v. Paducah Traction Co.

(Kentucky — Court of Appeals.)

1. **INJURY TO PEDESTRIAN ON TRACK; WHEN COMPANY NOT LIABLE.** — In order to excuse a street railway company from liability upon the ground that the person injured came upon the track so close to the car that the motorman, in the exercise of ordinary care, could not have stopped it in time to prevent the injury, the car must have been operated at a reasonable rate of speed.
2. **DUTY OF MOTORMAN TO AVOID INJURING PERSONS USING TRACK.** — The duty to keep a lookout and use ordinary care to avoid injuring persons using the track requires the motorman not only to use ordinary care to avoid injuring a pedestrian after his peril is discovered, but to use ordinary care to discover his peril.
3. **BOY KILLED ON TRACK; INSTRUCTIONS.** — Instructions in an action for the death of a boy killed on the track by defendant's car examined and approved.

PLAINTIFF appeals from a judgment for defendant. Reported 150 S. W. 9.

Injury to Pedestrian. — For a discussion of the liability of a street railway for injuries received by a pedestrian struck by a street car, see *Nellis on Street Railways* (2d Ed.), §§ 404-406, 419-424.

Berry & Grassham, of Paducah, for appellant.

Wheeler & Hughes, of Paducah, for appellee.

Opinion by CLAY, C.:

Albert Hymarsh, Jr., a little boy six or seven years of age, was struck by a car owned by the Paducah Traction Company and killed. His administrator brought this action against the Traction Company to recover damages. The jury returned a verdict in favor of defendant. Plaintiff appeals.

It appears from the evidence that Jefferson street, in Paducah, runs practically east and west. Sixth street runs north and south, and is traversed by a line of electric cars which enters the street at Broadway, which parallels Jefferson street, and is one block distant therefrom. On September 30, 1911, Albert Hymarsh, Jr., was playing in the rear of a building on the northwest corner of Jefferson and Sixth streets. This building is spoken of as the garage or "automobile house." Playing with Albert Hymarsh, Jr., at the time, was a little boy three or four years his senior, by the name of Fred Merry. After the car had passed Jefferson street, and was proceeding along Sixth street, the two boys ran from the rear of the garage at Jefferson and Sixth streets to the center of the street. Albert Hymarsh, Jr., was in front, and he alone was struck. Plaintiff's evidence tends to show that the motorman was not keeping a lookout; that the car was not run at a reasonable rate of speed, and was not under reasonable control; and that the motorman failed to use ordinary care to avoid injuring the decedent. On the other hand, the evidence for the defendant is to the effect that the motorman was keeping a lookout, that the car was running very slowly at the time, and was under proper control, that he sounded his gong, put on his brakes, and did everything in his power to avoid striking the boy, who had suddenly run in front of the car, and was so close to it that the car could not possibly be stopped.

The only ground urged for reversal is that the court erred in its instructions to the jury. In addition to instructions defining ordinary care and negligence, and giving the measure of damages, the court instructed the jury as follows:

"(1) The court instructs you that it was the duty of defendant's motorman in charge of its street car at the time and place complained of by plaintiff to keep a lookout ahead, to operate said car at a reasonable rate of speed, and

to have same under reasonable control, and to give notice to others using the street of the approach of said car by sounding the gong, and to exercise ordinary care generally to avoid injuring other persons using the street, and if you shall believe from the evidence in this case that defendant's motorman in charge of said car failed to do either of these things, and by reason of such failure, and as the direct and proximate result of such failure, said car was run over deceased, Albert Hymarsh, and he was thereby killed, then defendant is chargeable with negligence, and the law is for the plaintiff, and you will so find. But, unless you shall so believe from the evidence, then the law is for the defendant, and you will so find.

"(2) If you shall believe from the evidence in this case that plaintiff's decedent at the time and place complained of by plaintiff suddenly or unexpectedly run on defendant's track in front of its moving car and by reason of which and as the sole cause thereof, and not on account of any negligence on the part of defendant's motorman in charge of said car, as defined to you by instruction No. 1 herein, said decedent was run over and killed by said car, then the law is for the defendant and you will so find."

It is well settled that, in order to excuse the company upon the ground that the person injured came upon the track so close to the car that the motorman, in the exercise of ordinary care, could not have stopped it in time to prevent the injury, the car must have been operated at a reasonable rate of speed. *Netter's Adm'r v. Louisville Railway Co.*, 134 Ky. 678, 121 S. W. 636; *Louisville Railway Co. v. Gaar*, 112 S. W. 1130; *Louisville Railway Co. v. Byer's Adm'r*, 130 Ky. 437, 113 S. W. 463. The principal objection urged to instruction No. 4 is that the foregoing qualification is not properly presented. For the purpose of determining the question, the two instructions must be read together, and considered as a whole. It will be observed that instruction No. 1 imposed upon the defendant's motorman the following duties: (1) To keep a lookout ahead; (2) to operate the car at a reasonable rate of speed; (3) to have the car under reasonable control; (4) to give notice to others using the street of the approach of the car by sounding the gong; (5) to exercise ordinary care generally to avoid injuring other persons using the street. For a failure in any one of these respects, causing the death of decedent, a recovery by plaintiff was authorized.

The duty to keep a lookout and use ordinary care to avoid injuring persons using the track required the motorman, not only to use ordinary care to avoid injuring decedent after his peril was discovered, but to use ordinary care to discover his peril. By instruction No. 4 the jury were not authorized to find for the defendant unless they believed from the evidence that decedent

suddenly or unexpectedly ran on defendant's track in front of the moving car, and by reason thereof, and as the sole cause thereof, and not on account of any negligence on the part of defendant's motorman in charge of the car, as defined by instruction No. 1, the decedent was run over and killed. In other words, before plaintiff could recover, the jury were not only required to believe that decedent's running in front of the car was the sole cause of his death, but the further fact that his death was not caused by any negligence on the part of the motorman, as defined in instruction No. 1; that is, that there was no failure on his part to keep a lookout, or to operate the car at a reasonable rate of speed, or to have same under reasonable control, or to give notice to others using the street of the approach of the car, by sounding the gong, or to exercise ordinary care to avoid injuring persons using the street. While it is perhaps the better plan to follow the language of instructions that have been repeatedly approved by this court, yet the law does not require any particular set of words. Just so the language employed clearly presents to the jury the precise questions to be determined. As under the instructions given, the jury, before finding for the defendant, had to believe not only that decedent's running in front of the car was the sole cause of his death, but that his death was not occasioned by the fact that the car was not running at a reasonable rate of speed, or by the failure on the part of the motorman to use ordinary care to avoid injuring the decedent, both before and after his peril was discovered, we conclude that the qualification contended for by counsel for defendant was properly included in the instruction; that is, that notwithstanding the decedent ran in front of the car so close to it that the motorman could not, by the exercise of ordinary care, have avoided injuring him, this inability on the part of the motorman to avoid the injury did not excuse the defendant, unless the car was being operated at a reasonable rate of speed.

Judgment affirmed.

Nehring v. Connecticut Co.

(Connecticut — Supreme Court of Errors.)

1. **COLLISION WITH PEDESTRIAN; FAILURE TO LOOK AND LISTEN; CONTRIBUTORY NEGLIGENCE.** — A pedestrian, who is struck and killed by a car while crossing the street without paying any apparent attention to a car approaching from his rear, is guilty of contributory negligence.
2. **CONTRIBUTORY NEGLIGENCE; PROXIMATE CAUSE.** — The contributory negligence rule has no practical application save in cases where the defendant has been guilty of actionable negligence.

Contributory negligence cannot be invoked as a defense unless it was the proximate cause of the injury.

3. **LAST CLEAR CHANCE DOCTRINE.** — The last clear chance doctrine embraces only cases where the careless conduct of the injured person cannot be said to have been the cause of the injury.
4. **PROXIMATE CAUSE DEFINED.** — That only is a proximate cause of an event juridically considered which, in a natural sequence, unbroken by a new and intervening cause, produces that event, and without which that event would not have occurred. It must be an efficient act of causation separated from its effect by no other act of causation.
5. **PROXIMATE CAUSE, AS RELATED TO LAST CLEAR CHANCE DOCTRINE, DEFINED.** — Where, after the plaintiff's peril, to which he has carelessly exposed himself or his property, becomes known to the defendant, the latter introduces into the situation a new and independent act of negligence without which there would have been no injury committed, such act must be regarded as the sole proximate cause of the accident.

Where a plaintiff by his lack of care places himself in a position of danger from which he either cannot, or cannot reasonably, escape after the discovery of his danger, if the defendant after discovering plaintiff's danger fails to use reasonable care to save him from harm, and harm results from such failure, the former's want of care will be regarded as the sole proximate cause, and the latter's a remote cause only.

Where a plaintiff by his lack of care has placed himself in a position of danger, the means of escape from which are open to him by the exercise of reasonable care, but it is apparent to the defendant, in time to avoid the accident by the exercise of due care, that the plaintiff will not avail himself of them, the want of care on the part of the plaintiff will be regarded as a remote and not a proximate cause.

Where a plaintiff continued as an active agent in producing the conditions under which his injury was received down to the time of its occur-

Last Clear Chance. — For a discussion of the "last clear chance" doctrine, see *Nellis on Street Railways* (2d Ed.), §§ 462, 463.

Notes in This Series upon Last Clear Chance. — The "last clear chance" doctrine has been discussed in notes in this series as follows: 4 St. Ry. Rep. 685; 5 St. Ry. Rep. 192; 6 St. Ry. Rep. 33, 451, 514-527. See also the note to *Mather v. Metropolitan St. Ry. Co.*, p. 477.

rence, or at least until it was too late for the defendant with knowledge of his peril to have saved him by the exercise of reasonable care under the circumstances, his negligence must be deemed the proximate cause of his injury.

Where it is reasonably apparent to the one who inflicts the injury that the injured one is careless of his safety, and that, in continuance of his carelessness, he is about to place himself in a position of danger, which he subsequently does, and where the former thereafter, having a reasonable opportunity to save him from harm, fails to do so, the conduct of the latter must be regarded as the proximate and not the remote cause of resulting injury.

6. **NEGLIGENCE; FAILURE TO ACQUIRE KNOWLEDGE.** — Unreasonableness in one's conduct as a foundation for responsibility to others may be predicated upon negligence in not having acquired more knowledge.

PLAINTIFF appeals from judgment on directed verdict for defendant. Reported 84 Atl. 301.

STATEMENT OF FACTS BY THE COURT.

Main street in Ansonia runs substantially north and south, and is about forty-one feet wide between curbs. A single line of trolley tracks extends through the middle of it. Bank street crosses it at substantially right angles. October 11, 1910, Paul Nehring, the plaintiff's intestate, left his horse and wagon standing beside the west Main street curb a short distance south of Bank street. He visited a baker's wagon which was standing by the curb on the opposite side of Main street and some short distance north of Bank street, and there made a purchase. Having done so, he started with the expressed purpose of going to his own wagon, and walked in direct line of it. The route which he thus took, and continued until he was injured, would have taken him diagonally across the street and trolley tracks, approaching the latter at a sharp acute angle. He kept on his way without stopping until he was struck by the fender of a car which came upon him from the north at a fairly fast rate of speed. He was hit in the rear upon the right side. In his fall he was drawn under the car in such a way that death resulted. No one of the several witnesses of the affair, or portions of it, saw him look about him as he walked across the street, or take any other precautions for his safety. The witnesses all testified to his going directly forward in his course without, as far as they observed, giving apparent attention to anything about him. He was somewhat hard of hearing. The defendant introduced no evidence, but rested upon the close of the

plaintiff's case, and asked that a verdict be directed in its behalf. The facts bearing upon the alleged negligence of the defendant need not be recited, as they have no pertinence to the opinion. It is not claimed that the injury was wilfully or maliciously caused.

Robert L. Munger, of Ansonia, for appellant.

John P. Kellogg, of Waterbury, and *Joseph F. Berry*, of New Haven, for appellee.

Opinion by PRENTICE, J.:

It is clear and unquestioned that there was evidence, justifying its submission to the jury, tending to establish the defendant's negligence in the premises directly contributing to produce the fatal injury which the plaintiff's intestate suffered. The verdict for the defendant was directed upon the ground that the plaintiff had failed to present evidence sufficient to go to the jury tending to establish the intestate's freedom from contributory negligence. Plaintiff's counsel in his brief formally takes issue with this conclusion of the court, asserting that the evidence was such as entitled the plaintiff to go to the jury upon the question of the intestate's negligence. It is apparent, however, that little reliance is placed upon this particular claim, and that the contention that the court erred must fail unless the appeal which is made to the so-called doctrine of "the last clear chance," otherwise known as supervening or intervening negligence, is well made. This appeal is urged with vigor, so that the plaintiff's main contention, which alone calls for serious consideration, is that, notwithstanding the intestate's failure to use ordinary care, the defendant is liable through the operation of the doctrine referred to, which, it is said, the court disregarded.

The appeal which is thus made is one which has become quite common of late, and it is repeated in several other cases pending for decision. It is apparent from the variety of circumstances under which they are made, and the positions which are assumed in support of them, that there exists in many quarters a by no means clear understanding of the doctrine thus invoked. This is by no means strange in view of the lack of consistency and intelligent statement which characterizes the numerous cases which have dealt with the subject, and the confused condition in which many of them have left it. It is hard to find a branch of the law

which has received more unsatisfactory and inadequate treatment at the hands of the courts than has this, or one which is more in need of intelligent and consistent determination. The cases involving in some way the matter are numerous, and one must be hard to suit who cannot find in some of them implied or express support for his preconceived view. The most difficult thing to find is a clear expression of fundamental principles, and logical and consistent statements of their application to varying conditions. The late Seymour D. Thompson, in his work on Negligence, calls attention to this feature of the situation, and makes some forcible observations concerning the positions which have been taken by some courts. Section 231 *et seq.*

It is fortunate for us, however, that this court early asserted, and has since held true, to one general position. We are thus spared the embarrassment, under which text-writers and not a few courts have labored, of dealing with a variety of *dicta* or decisions troublesome to harmonize with each other, if not with sound reason. It is further our good fortune that the position thus early assumed in this jurisdiction is one which stands the test of reason, and comports with public policy best of all, and has come to claim the concurrence of the best authorities, courts and text-writers.

The notion appears to be more or less prevalent that this so-called doctrine is a discovery of recent years, that it embodies a new legal principle, and that this principle is one which invades the domain formerly assigned to contributory negligence, and sets limitations upon the operation of this latter doctrine, so long and so deeply imbedded in English and American jurisprudence. This is by no means true as respects either the age or the character and scope of the principle which it embodies. The names by which it has come to be known are indeed of recent origin, and perhaps its present vogue, and the misconception which prevails as to its true place in the law of negligence, is due in part to its thus being given an independent status in the terminology of the law. In fact, the principle is no modern discovery. It runs back to the famous "Donkey Case" of *Davies v. Mann*, 10 Mees. & W. 546, decided in 1842. It was distinctly recognized by this court in *Isbell v. New York & N. H. R. Co.*, 27 Conn. 393, 71 Am. Dec. 78. It was then not only recognized, but its true place in the law was assigned to it. It was shown to be no independent principle operating by the side of, and possibly overstepping the bounds of, other principles, but merely a logical and inevitable corollary of

the long accepted doctrine of actionable negligence as affected by contributory negligence. The definition of its place, which was made in the clear-cut language of Judge Ellsworth, inexorably forbade that it could by possibility run counter in its application to the contributory negligence rule. This fundamental principle we have steadily adhered to. *Smith v. Connecticut Ry. & Ltg. Co.*, 80 Conn. 268, 270, 67 Atl. 888, 17 L. R. A. (N. S.) 707; *Elliott v. New York, N. H. & H. R. Co.*, 83 Conn. 320, 322, 76 Atl. 298; *Id.*, 84 Conn. 444, 447, 80 Atl. 283.

There are, indeed, cases which give countenance to a different view upon this latter subject. But their *dicta* oftentimes, not to say generally, uttered without an apparent comprehension of their logical consequence, would create havoc with the law, and leave it guideless, or with two conflicting guides. A sober second thought is, however, fast correcting this mistake, so that there has already come to be a general concurrence of the well-considered authorities in the view which has been taken in this jurisdiction.

The contributory negligence rule has no practical application save in cases where the defendant has been guilty of actionable negligence. It proceeds upon the theory that, whenever a person injured has contributed essentially to his injury by his own negligent conduct, the law will not give him redress, even against another who may have been directly instrumental in producing the result. To furnish a basis for its application there must have been a concurrence of negligent conduct. This negligent conduct, furthermore, must have been of such a character and so related to the result as to entitle it to be considered an efficient or proximate cause of it. If there is a failure to use due care on the part of either party at such a time, in such a way or in such a relation to the result that it cannot fairly be regarded as an efficient or proximate cause, the law will take no note of it. *Causa proxima, non remota, spectatur.*

It thus logically follows that, although a plaintiff may have failed to exercise reasonable care in creating a condition, or in some other way which cannot be fairly said to have been the proximate cause of the injuries of which he complains, the contributory negligence rule cannot be invoked against him. The question with respect to negligent conduct on the part of a person injured through the negligence of another as affecting the former's right to recover thus becomes resolved in every case into one as to whether or not that conduct of his was a proximate cause of the

injury. If it was, then the contributory negligence rule is applicable, and the plaintiff will by its operation be barred from recovery. If it was not, that rule has no pertinence to the situation, since there was no concurrence of negligence, without which there can be no contributory negligence in the legal sense. It is conduct of the latter kind — that is, conduct careless in itself, but not connected with the injury as a proximate cause of it — to which the so-called doctrine of “the last clear chance” relates, and that doctrine embraces within its purview such conduct only.

This being so, it may well be questioned whether the doctrine deserves a classification and a name as of an independent principle. But if for convenience sake or other reason it is to be dignified in that way, it is apparent that there is no manner of inconsistency between it and the contributory negligence rule, and that the domain of the latter rule is in no way invaded or narrowed by a full recognition of it. It follows that the decisive question, in each case where a plaintiff injured is found to have been at fault in the premises from his failure to exercise the required degree of care, resolves itself into one as to whether that fault was or was not a proximate cause of the injury, and that the answer to that question will infallibly determine whether or not it will bar a recovery.

These principles and this ultimate conclusion have become firmly established in the law of this State by the course of the decisions already referred to and others. *Knowles v. Crampton*, 55 Conn. 336, 345, 11 Atl. 593; *Smithwick v. Hall & Upson Co.*, 59 Conn. 261, 269, 21 Atl. 924, 12 L. R. A. 279, 21 Am. St. Rep. 104. They have also had the approval of numerous cases elsewhere, of which the following are typical: *Button v. Hudson River Co.*, 18 N. Y. 248; *Murphy v. Deane*, 101 Mass. 455, 3 Am. Rep. 390; *Richmond v. Sacramento Valley R. Co.*, 18 Cal. 351; *Nashua Iron & Steel Co. v. Worcester, etc., Ry. Co.*, 62 N. H. 160. See 16 Va. Law Reg. 162. A note found in 55 L. R. A. 419, contains an exhaustive review of the many cases, and strongly supports this position. Thompson, in his work on Negligence, section 230, forcibly comments that any doctrine which brings the contributory negligence and last clear chance rules into conflict

“introduces a principle of manifest injustice, and throws the whole subject into confusion.”

Thus far we have had the way marked out for us by the clearly defined doctrine of former opinions. But the proposition just

stated, which is thus supported, while sufficient for the determination of many cases, and furnishing a helpful guide in most others, does not resolve all the difficulties which may be encountered. It leaves the question open as to when negligent conduct in a person injured in his person or property is to be regarded as a proximate cause of the injury. How close must be the causal connection between the negligence and the injury? It is at this point that any real uncertainty or trouble arises under the doctrine of this jurisdiction.

We are indeed furnished with general definitions of "proximate" cause, as in *Smith v. Connecticut Ry. & Ltg. Co.*, 80 Conn. 268, 270, 67 Atl. 888, 889, 17 L. R. A. (N. S.) 707, where the following language is used:

"That only is a proximate cause of an event juridically considered which in a natural sequence, unbroken by a new and intervening cause, produces that event, and without which that event would not have occurred. It must be an efficient act of causation separated from its effect by no other act of causation."

But admirable as this definition is as an abstract statement, it leaves the door of uncertainty open when an attempt is made to make application of it to certain concrete situations.

The defendant in another pending case involving the principle under discussion asserts that the last clear chance doctrine is one which can have no application except to cases where the plaintiff's negligence had ceased in time for the defendant to have saved him by the exercise of due care. A considerable number of authorities are cited in support of that proposition, which is strongly advocated in a note found in 7 L. R. A. (N. S.) 132, in which the cases thus cited and others are reviewed.

We have no occasion to quarrel with these cases, or their conclusion, since upon examination the proposition asserted in them does not essentially change the nature of the ultimate decisive inquiry which is required to be made under our statement of the governing rule. The negligence referred to in the claimed rule is, of course, that which the law so denominates, to wit, want of due care which is a proximate cause of harm. The proposition is not dealing with a lack of due care which the law ignores. When it speaks of the negligence ceasing, negligence in the legal sense is meant. It may in a given case cease in the sense that prudent conduct takes its place. It may for all legal purposes cease

through the relegation of it, as events progress, to the domain of remote cause. In other words, it ceases when and only when the conditions of contributory negligence disappear. The claimed test thus solves no problems. It only brings one back in doubtful cases to the inquiry whether the plaintiff's conduct, lacking in due care, was of such a character, or so related to the injury that it ought to be regarded as a proximate cause of it, as the real test which must be applied.

The impossibility of framing any general abstract statement which will suffice to resolve the difficulties which may be presented under varying conditions, or to anticipate all such conditions, is apparent. We shall undertake no such task. There are, however, certain sets of conditions of not infrequent occurrence concerning which general conclusions may be made safely and profitably.

There is, for instance, the occasional case where, after the plaintiff's peril, to which he has carelessly exposed himself or his property, becomes known to the defendant, the latter introduces into the situation a new and independent act of negligence without which there would have been no injury committed. Such was the case of *Smith v. Connecticut Ry. & Ltg. Co.*, 80 Conn. 268, 270, 67 Atl. 888, 17 L. R. A. (N. S.) 707, and it was there held in accordance with sound reason that this new negligence was to be regarded as the sole proximate cause of the accident which ensued. The rule for that type of case is thus furnished.

Cases of another class occasionally arise where it is disclosed that the plaintiff has by his lack of care placed himself in a position of danger from which he either cannot, or cannot reasonably, escape after the discovery of his danger. Here again there can be no hesitation in saying that if the defendant, after his discovery that the plaintiff is in the situation described, fails to use reasonable care, and that is care proportioned to the danger, to save him from harm, and harm results from such failure, the former's want of care will be regarded as the sole proximate cause, and the latter's a remote cause only.

The situation just stated is not infrequently changed in that means of escape were open to the plaintiff by the exercise of reasonable care, but it was apparent to the defendant in season to have avoided the doing of harm by the exercise of due care that the plaintiff would not avail himself of them. Here it is assumed that the situation of exposure had been created and established by the plaintiff's action before the period of time began within which

the defendant acting reasonably might have saved him, and that within that period the plaintiff did nothing to create or materially change that situation by active conduct which was not marked by reasonable care. Under the assumption he remains passive, in so far at least as negligent action is concerned, and can be regarded as careless only in this that he did not awake to his surroundings, and do what he reasonably could to avoid the threatened consequences of a situation which he had already negligently brought about. In such cases the humane, and to our mind the better, reason, all things considered, leads to the conclusion to which our former opinions already cited commit us, and which a large number of cases elsewhere approve, that the want of care on the part of the plaintiff will be regarded as a remote and not a proximate cause.

Another important variation is oftentimes introduced into the situation, in that the plaintiff continued as an active agent in producing the conditions under which his injury was received down to the time of its occurrence, or at least until it was too late for the defendant with knowledge of his peril to have saved him by the exercise of reasonable care under the circumstances. This variation imports into the situation an important factor. The plaintiff, during the period named, is not merely passively permitting an already fixed condition to remain unchanged. He is an actor upon the scene. He is by acts of his volition bringing into the situation which confronts the defendant changed conditions, and in the fullest sense co-operating with the latter in bringing about the ultimate result. In such case his conduct must be regarded as a concurring efficient cause. It is in the fullest sense a proximate and not a remote one, making his negligence contributory.

It is said, however, that there are cases, and there, of course, are, where it is reasonably apparent to the one who inflicts the injury that the injured one is careless of his safety, and that, in continuance of his carelessness, he is about to place himself in a position of danger, which he subsequently does, and where the former thereafter, having a reasonable opportunity to save him from harm, fails to do so, and it is contended that in such cases the conduct of the latter be regarded as a remote cause only of the resulting harm. We are unable to discover any logical reason for such a conclusion, or any place at which a practical or certain line of division can be drawn between that careless conduct of a man, playing some part in an injury to him, which the law will regard

as having that causal connection with the injury which makes it a proximate cause, and that careless conduct which will not be so regarded, if the contention under consideration is to be approved. The conduct of the man who inflicts the injury under such general conditions may indeed be such that it is open to the charge of wilfulness or wantonness. If so, the case is not one of negligence, and the defense of contributory negligence would not be available. *Rowen v. New York, N. H. & H. R. Co.*, 59 Conn. 364, 371, 21 Atl. 1073. If the conduct is not wilful or wanton, it is negligent only. Thus treated, it forms one factor of negligence in the situation. The plaintiff's want of care is another factor, and it certainly has something substantial to do in bringing about the result reached. Upon what theory or foundation in reason it can be said that, under the circumstances assumed, it is not an efficient cause of that result co-operating concurrently with the other cause to be found in the other party's negligence, we are unable to discover. The causal connection is plain to be seen, and the act of causation is that of a positive act of volition. The two actors upon the scene owe precisely the same duty to be reasonably careful. *Dexter v. McCready*, 54 Conn. 171, 174, 5 Atl. 855. Neither occupies in that regard a superior position, and the one who suffers can claim no precedence over his fellow actor or at the hands of the law. To say that no matter if one be negligent in going forward into danger, or in creating new conditions or complicating them, the law will protect him and cast upon the other party the responsibility for the result, is to ignore the fundamental principle of contributory negligence, and bring the law upon that subject into hopeless confusion, and merit for it the condemnation which Thompson has so forcibly expressed. Thompson on Negligence, §§ 230, 233. The well-considered cases which have directly dealt with this subject agree with us, we think, in our view that active continuing negligence of the kind assumed is to be regarded as contributory in the legal sense. *Butler v. Railway Co.*, 99 Me. 149, 160, 58 Atl. 775, 105 Am. St. Rep. 267; *Murphy v. Deane*, 101 Mass. 455, 465, 3 Am. Rep. 390; *Dyerson v. Union Pacific R. Co.*, 74 Kan. 528, 87 Pac. 680, 7 L. R. A. (N. S.) 132, 11 Ann. Cas. 207; *Little v. Superior Rapid Transit R. Co.*, 88 Wis. 402, 409, 60 N. W. 705; *Green v. Los Angeles, etc., R. Co.*, 143 Cal. 31, 47, 76 Pac. 719, 101 Am. St. Rep. 68; *Olson v. Northern Pacific R. Co.*, 84 Minn. 258, 87 N. W. 843.

We have thus far dealt with cases in which actual knowledge

on the part of the defendant of the plaintiff's peril enters into the assumption of facts. Suppose, however, that such knowledge is not established, but facts are shown from which it is claimed that the defendant ought in the exercise of due care to have known of it. What shall be said of such a situation?

In so far as imputed or constructive knowledge may be embraced in the assumption, the simple answer is to be found in the legal principle that full and adequate means of knowledge present to a person when he acts are under ordinary circumstances treated as the equivalent of knowledge. *Post v. Clark*, 35 Conn. 339, 342.

But our assumption reaches outside of the domain of knowledge, either actual or constructive. It suggests, in the use of the phrase "ought in the exercise of due care to have known," frequently met with in the books, the existence of a duty to exercise due care to acquire knowledge, and the query is whether the law recognizes the existence of such a duty to the extent of making it a foundation for responsibility for conduct, akin to that which flows from conduct with actual or constructive knowledge.

We have frequently held that the character of one's conduct in respect to care is to be determined in view of what he should have known as well as of what he did in fact know. *Snow v. Coe Brass Co.*, 80 Conn. 63, 66 Atl. 881. In these cases the question has been as to one's duty for his own self-protection. That duty, according to established principles, involves the making of reasonable use of one's senses under the penalty of forfeiture of all claim for redress in the event that harm results. *Popke v. New York, N. H. & H. R. Co.*, 81 Conn. 724, 71 Atl. 1098.

But how about a duty of acquiring knowledge, owed to others for their safety, which, not being performed, will furnish a basis of liability? In *Elliott v. New York, N. H. & H. R. Co.*, 83 Conn. 320, 76 Atl. 298, we recognize that such a duty might exist. That case involved the conduct of a locomotive engineer operating his engine at a grade crossing, and we approved a charge which gave to the knowledge which the engineer, under the conditions, ought in the use of due care to have had, the same effect as actual knowledge. The duty imposed upon him was one to be watchful in order that needless harm might not come to persons who might be using the crossing from the dangerous instrument of his calling. The duty was one toward others which the circumstances and conditions must be regarded as fairly creating. For a like reason a similar duty rests upon other persons and under other conditions,

in greater or lesser measure. Whether it exists, and the extent of it, depends upon the circumstances of each situation. A circumstance of chief significance, perhaps, is one which concerns the character of that about which the person is engaged in respect to its being calculated, under the conditions, to work injury to others. And so it is that a locomotive engineer, a motorman of a trolley car running in a highway, or a chauffeur driving an automobile, is under a duty to be watchful for the protection of others which another man under other conditions would not owe to his fellows. Unreasonableness in one's conduct as a foundation for responsibility to others cannot justly be established upon the basis of knowledge not possessed. It can with propriety be predicated upon negligence in not having acquired more knowledge. Negligence in this respect, as in all others, implies the existence of a duty to make use of means of knowledge. This duty must be found in the circumstances, and caution must be exercised in order that it, with its consequences, be not raised where the circumstances do not fairly impose it, or be extended beyond the limits which the circumstances fairly justify.

An examination of the evidence in the present case, and all of it is the plaintiff's, discloses that she failed entirely to prove that her intestate was free from contributory negligence. On the contrary, it clearly shows that he did not exercise due care, and that his want of care was a proximate cause of his death. The witnesses are in entire accord in showing that immediately prior to the moment when he was struck by the car, and down to that moment, he was walking in a diagonal course across the main street in Ansonia, and in a course which would take him across the trolley tracks laid therein, that his course was one which would, as he approached these tracks, bring him to them at a pronounced acute angle, so that his view of them in one direction would be practically obscured, that he, not having the benefit of a normal sense of hearing, did not look about him or take any of the ordinary precautions for his safety, that he kept steadily on his way until he was hit in the rear upon the right side by the fender of the car which approached from that direction. It thus appeared, and a jury could not have found otherwise reasonably, that the intestate down to the final moment of impact continued in his negligent course of action, and in a most effective way helped to create the dangerous situation in which he was injured. For

aught that appears, he did not step onto the zone of danger until the very instant that he was hit, and he took that step by the voluntary act of his own volition. Under the principles already laid down, his negligent conduct must be regarded as a proximate cause of the harm which befell him, and he as having been guilty of contributory negligence barring recovery in the action.

There is no error. The other judges concurred, except GEORGE W. WHEELER and RALPH WHEELER, JJ.

Vine v. Berkshire St. Ry. Co.

(Massachusetts — Supreme Judicial Court.)

1. **PASSENGERS; ASSURANCE TO OF OPPORTUNITY TO ALIGHT.** — Where a conductor, having been informed of a passenger's desire to alight, stops the car for that purpose, the passenger is thereby assured that she will have a reasonable opportunity to pass safely to the street.
2. **DUTY OF CONDUCTOR BEFORE SIGNALING CAR TO START AFTER DISCHARGING PASSENGERS.** — After a street car has been stopped to allow passengers to alight, it is the duty of the conductor, before giving the signal to start the car again, to use reasonable care to see if all passengers have alighted.
3. **QUESTION FOR JURY; CONDUCTOR'S NEGLIGENCE; DUE CARE BY PASSENGER ALIGHTING.** — Action for injuries to a passenger by the starting of a car while she was alighting. *Held*, that the question of plaintiff's due care and of the conductor's negligence were for the jury.
4. **INSTRUCTIONS.** — An instruction that if the plaintiff was injured in attempting to alight while the car was moving she could not recover amply protected the rights of the defendant, and it was not error to refuse its

Injury to Alighting Passenger by Starting of Car. — In *Nellis on Street Railways* (2d Ed.), § 305, it is said: "Where a bell has been sounded to stop the car at a certain street, the operators in charge of the car are bound to know that passengers may and constantly do act upon the warning thus given. And it is the duty of the motorman to use reasonable care in listening for the usual signal to stop the car and give passengers an opportunity to alight, and, when signaled by a passenger, to stop his car at a usual and customary station for stopping, a sufficient length of time to give him a reasonable opportunity to alight in safety, and his failure to perform this duty constitutes negligence. Where a car has stopped to permit passengers to alight, it is the duty of the conductor to ascertain and know whether the passengers have alighted before he starts the car. The conductor of a street car, when he knows that passengers desire to leave his car at a certain street, must hold the car at a standstill until all of them have safely alighted, and see that all have done so before he gives the motorman his signal to start."

request to charge that if, at the time the signal to start the car was given, plaintiff was in a position of safety on the floor or body of the car, and such signal was heard by her, she cannot recover.

DEFENDANT excepts to verdict for plaintiff. Reported 99 N. E. 473.

C. P. Niles, of North Adams, and *J. W. Lewis* and *J. F. Noxon*, both of Pittsfield, for plaintiff.

Henry W. Ely, *J. B. Ely* and *J. D. Lennehan*, all of Springfield, for defendant.

Opinion by BRALEY, J.:

The rulings requested by the defendant could not have been given. It apparently offered no evidence directly controlling the testimony of the plaintiff, from which the jury would have been warranted in finding that the conductor, who had been informed of the plaintiff's purpose, stopped the car to enable her and other passengers to alight. By this act the defendant assured the plaintiff that she would have a reasonable opportunity to pass safely to the street, and in appropriate language the jury were so instructed. *Rand v. Boston Elev. Ry.*, 198 Mass. 569, 571, 84 N. E. 841, and cases cited. The only account of what followed appears in the plaintiff's statements, which if believed were sufficient to show that as the car stopped she arose from her seat nearly in the center and moved toward the side, where she grasped a stanchion with her right hand, and stood with one foot on the car floor preparing to step down. But before taking the step the conductor, who remained on the running board, gave a signal, and the motorman at once turned on the power. The sudden movement forward caused the plaintiff to be thrown forcibly to the running board, where for some distance she was carried with one foot trailing on the ground. It was the duty of the conductor before he gave the signal to use reasonable care to ascertain if the plaintiff had alighted, and as it further appears that he looked only toward the rear where a passenger was alighting, but gave no attention to that part where the plaintiff stood, the jury could say that the car was prematurely started. The questions of the plaintiff's due care and of the conductor's negligence were manifestly for the jury. *McCarthy v. Boston Elev. Ry.*, 3 St. Ry. Rep. 407, 208 Mass. 512, 513, 94 N. E. 749, and cases cited; *McDermott v. Boston Elev. Ry.*, 1 St. Ry. Rep. 325, 208 Mass. 104, 94 N. E. 309.

It is, however, urged by the defendant, that the plaintiff left her seat, and attempted to alight after the signal had been given, and while the car was moving. But even if this view as to the cause of the accident may be rested on some of her answers in cross-examination, the plaintiff also testified, that although hearing the bell, she did not understand that it was used solely as a signal to the motorman. If she was ignorant of the purpose of the conductor, then even on the defendant's contention, the mere hearing of the bell prior to any attempt to move to the side of the car after it had been stopped would not of itself be conclusive evidence of negligence, and whether from her experience as a traveler in street cars she should have been held to have known that the invitation had been withdrawn, was for the jury to decide. *Brooks v. Boston & Maine R. R.*, 135 Mass. 21; *Merritt v. N. Y., N. H. & H. R. R.*, 162 Mass. 326, 38 N. E. 447; *Garland v. Boston Elev. Ry.*, 210 Mass. 458, 97 N. E. 97. The court moreover was not required under the second request to rule upon a part, but only on the whole of the material testimony and the instruction that if the plaintiff was injured in attempting to alight while the car was moving she could not recover amply protected the rights of the defendant. *Kellogg v. Thompson*, 142 Mass. 76, 80, 6 N. E. 860; *McDonough v. Miller*, 114 Mass. 94.

Exceptions overruled.

Velthusen v. Union Railway Company of New York City.

(New York — Appellate Division, First Department.)

DEATH OF PEDESTRIAN STRUCK WHILE CROSSING TRACKS; CHARGE; LAST CLEAR CHANCE; VERDICT AGAINST WEIGHT OF EVIDENCE; EVIDENCE; FREEDOM FROM CONTRIBUTORY NEGLIGENCE. — Where, in an action to recover for the death of plaintiff's intestate, who was struck by a street car while crossing defendant's tracks, there is no evidence to show that the deceased took any precaution for his own safety, or that when he started to cross the track, or indicated an intention to do so, the motorman could have prevented the collision, it is error for the court to instruct the jury that "if under all the circumstances in the case the jury find that the motorman had the last clear chance to avoid the accident, that in such a case it is immaterial

Collision with Pedestrian. — For a discussion of the liability of a street railway company for injuries arising from a collision with a pedestrian, see *Nellis on Street Railways* (2d Ed.), §§ 404-406, 419-424.

whether or not the intestate was guilty of contributory negligence," and a verdict for the plaintiff is against the weight of evidence.

The last clear chance doctrine does not apply unless the character of the accident is such that it can fairly be said that the negligence of the injured party was not its proximate cause.

An instruction that "Where the person dies as a result of the injuries, thus rendering it impossible for the giving of testimony by the decedent, inferences may be indulged from all the facts in the case to the effect that the intestate was free from contributory negligence," is erroneous where there was an eye-witness to the accident, since the rule only applies where there is no eye-witness.

DEFENDANT appeals from a judgment in favor of plaintiff. Reported 136 N. Y. Supp. 622.

Bayard H. Ames, for the appellant.

Daniel P. Hays, for the respondent.

Opinion by McLAUGHLIN, J.:

The plaintiff's intestate, between eight and nine o'clock on the evening of November 24, 1907, was struck by one of the defendant's cars at the intersection of Westchester and Union avenues, and so injured that he died a few days later. This action is in negligence to recover the damages alleged to have been sustained by the widow and next of kin. Plaintiff had a verdict of \$20,000, and from the judgment entered thereon, and an order denying a motion for a new trial, defendant appeals.

The trial court, at the request of counsel for the plaintiff, to which an exception was taken, charged the jury that

"if under all the circumstances in the case, the jury find that the motorman had the last clear chance to avoid the accident, that in such a case it is immaterial whether or not the intestate was guilty of contributory negligence."

I am of the opinion that this was error and necessitates a reversal of the judgment. There is no evidence that when the deceased started to cross the uptown track, or indicated an intention to do so, the motorman could have prevented the collision. There is some evidence that the motorman increased the speed of the car after crossing the intersection of the avenues referred to, but there is nothing to show that the motorman saw the deceased, or by the exercise of ordinary care should have discovered the perilous position in which he had placed himself. The deceased, when first seen, was between the uptown and downtown tracks. The dis-

tance between these tracks is five feet. The distance between the westerly and easterly rails of the uptown track is a little over four feet. He was struck just as he was leaving the easterly rail of the uptown track, and from the time when he was first seen until he was struck he traveled at an ordinary walk. The car could not have been running at a very great rate of speed because, during the same time, it traveled at most double the distance that the deceased did. So that, if he were negligent in going upon the track when the car was so near as to render the act dangerous, then such negligence cannot be regarded as so remotely connected with the accident as to make the rule laid down in the charge applicable. The rule of law stated does not apply unless the character of the accident is such that it can fairly be said that the negligence of the injured party was not its proximate cause. *Rider v. Syracuse R. T. R. Co.*, 171 N. Y. 139; *Bambace v. Interurban St. R. Co.*, 188 id. 288.

I am also of the opinion that the court erred in giving the jury the following instructions:

"Where the person dies as a result of the injuries, thus rendering it impossible for the giving of testimony by the decedent, inferences may be indulged from all the facts in the case to the effect that the intestate was free from contributory negligence."

This instruction permitted the jury to infer that the intestate was free from negligence, because, being dead, he was unable to testify. It is true, less proof is required as establishing freedom from negligence in death cases than where a person injured is able to testify; but, in death cases, it must be shown either by direct evidence or from surrounding circumstances that the deceased exercised the care which the law requires. *Baxter v. Auburn & Syracuse El. R. R. Co.*, 190 N. Y. 439; *Wieland v. D. & H. C. Co.*, 167 id. 19. Besides, I do not think this rule applies, because there was an eyewitness to the accident, and the relaxation of the rule is only when there is no eyewitness. *Ceidman v. Long Island R. R. Co.*, 104 App. Div. 4.

Furthermore, I think the verdict is against the evidence. There is nothing to show that the deceased took any precautions whatever for his own safety. The car was lighted, and had he looked he must have seen it. The truth is, as it seems to me, that he stepped right in front of an approaching car and in this way

the unfortunate accident happened. *Zucker v. Whitridge*, 7 St. Ry. Rep. 547, 205 N. Y. 50.

The judgment and order appealed from, therefore, are reversed and a new trial ordered, with costs to appellant to abide the event.

INGRAHAM, P. J., LAUGHLIN, CLARKE and SCOTT, JJ., concurred.

LAUGHLIN, J. (concurring): I concur, but am of opinion that there is no rule or doctrine of "last clear chance" as charged.

Judgment and order reversed and new trial ordered, with costs to appellant to abide event.

State ex rel. City of St. Paul v. St. Paul City Ry. Co.

(Minnesota — Supreme Court.)

MANDAMUS TO COMPEL CONSTRUCTION AND OPERATION OF STREET RAILWAY PURSUANT TO CITY ORDINANCE. — Appeal from a judgment awarding a peremptory writ of mandamus to compel the St. Paul City Railway Company to construct and operate a street railway upon Maryland street, from Rice street to Como boulevard, pursuant to an ordinance of the city. *Held*, construing section 18 of Ordinance No. 1227, that the city has, by its common council, the vested right to require the railway company to construct new lines of street railway; that such right was not suspended or modified by sections 32 and 33 of chapter 4 of the home rule charter; that the ordinance requiring the construction of the new line is valid; that compliance therewith may be enforced by mandamus; that the question whether public interest or necessity requires the construction of any particular new line is one resting in the discretion of the common council, and its action cannot be interfered with by the courts, unless it is clearly

Mandamus to Compel Construction of Street Railway. — In *Nellis on Street Railways* (2d Ed.), § 132, it is said: "Permission to construct and operate a street railroad in the streets of a city, although accepted by the company, does not create such an obligation upon it as may be enforced in equity or by mandamus. But if the company has entered upon the streets and made a partial construction of its track, the duty to complete it according to the provisions of its charter or franchise is imperative, and its performance may be so enforced. If the charter or franchise requires the construction to be completed within a limited time, and also provides that otherwise the company's rights should be forfeited, a proceeding to have the forfeiture declared and enforced may be successfully maintained, unless the failure to complete the road is in nowise the fault of the company; as, for example, when there has been interference on the part of the city authorities or by the courts."

an arbitrary one; and, further, that the finding of the trial court that a public necessity exists for the new line, and that it is not a cross-town line, is sustained by the evidence.

(Syllabus by the Court.)

DEFENDANT appeals from a judgment awarding a peremptory writ of mandamus. Reported 135 N. W. 976.

J. C. Michael and *N. M. Thygeson*, both of St. Paul, for appellant.

O. H. O'Neill, of St. Paul, for respondent.

Opinion by START, C. J.:

On February 21, 1910, the common council of the city of St. Paul duly passed an ordinance requiring the St. Paul City Railway Company, hereinafter referred to as the Railway Company, to lay, construct and operate a double line of street railway upon Maryland street, from Rice street to Como boulevard, and connect the tracks thereof with its railway tracks on Rice street. The Railway Company refused to comply with the ordinance. Thereupon this action was commenced in the District Court of the county of Ramsey to compel the construction and operation of such street railway as required by the ordinance. The cause was tried by the court without a jury, and findings of fact made to the effect that the allegations of the petition are true, and, further, that a public necessity exists for the construction and operation of the line of street railway upon Maryland street, and that the same is not a cross-town line. As a conclusion of law, judgment was ordered, awarding a peremptory writ of mandamus, requiring the Railway Company to construct and operate the line as directed by the ordinance. Judgment was so entered, from which the Railway Company appealed.

The appellant's assignments of error raise the general questions whether the findings of fact are sustained by the evidence, and whether the ordinance is valid, and, if so, whether a compliance therewith may be enforced by mandamus. The questions as to the validity of the ordinance and its enforcement are the important ones presented by the record. Their solution involves a consideration of the provisions of several city ordinances relating to the appellant. The Railway Company as originally organized acquired its rights in the streets of St. Paul by an ordinance of the

common council, No. 57, approved in January, 1872, which gave the Railway Company the right to construct and operate its street car lines upon any or all of the streets and avenues of St. Paul, except on a designated portion of Third street. This ordinance provided that only animal power should be used in the operation of the lines. Section 7 of this ordinance contained this proviso:

"Provided, that if required by a resolution of the common council adopted by a vote of two-thirds of its members, to build, equip and operate an additional mile of said railway on any street or streets designated by the city council, every six months thereafter, the company accepting this franchise shall so build, equip and operate said mile or miles of railway, or forfeit to said city all rights or privileges to construct and operate any line of railway or track in any street or streets, or part of street or streets upon which said company has not constructed any railway tracks."

This was the only provision relating to any right reserved to the council to order new lines to be constructed.

Additional and valuable rights were granted to the Railway Company by an ordinance, No. 1227, approved September 20, 1889, in consideration of which, and by the same ordinance, material rights and powers with reference to the control of the Railway Company by the common council were acquired by reservations and stipulations therein and the acceptance of the ordinance by the Railway Company. In and by this ordinance the Railway Company was granted the right to construct its lines and to operate them by electricity on designated streets of the city, which right, by a subsequent ordinance, No. 1502, was extended to all other streets upon which the Railway Company had the right to operate its lines. In consideration of the grant to it by Ordinance No. 1227, the Railway Company surrendered its rights as to certain other streets, but Maryland street was not one of them. The following provisions of the ordinance are here material:

"Sec. 18. The common council reserves and shall possess the right at any time, and from time to time, after January 1, 1892, to order the construction and completion by said St. Paul City Railway Company of any new lines of railway, or the extension of any present or future lines of railway upon any and all streets in the city of St. Paul upon which sewers shall have been constructed, and all lines or extensions so ordered shall be constructed and in operation within one year after such orders are made: Provided, that when such new lines or extensions are constructed all the provisions of this ordinance shall apply thereto.

"Sec. 19. If said St. Paul City Railway Company shall fail or neglect to complete, equip and operate all of said lines of railway designated in section

one (1) of this ordinance within the time and in the manner herein specified, or shall fail to comply with the provisions of this ordinance, then all rights and privileges hereby granted shall be forfeited to the said city of St. Paul."

"Sec. 23. The said St. Paul City Railway Company, its successors and assigns, shall be entitled to enjoy the rights and privileges hereby granted for the term of fifty (50) years after the passage and publication of this ordinance.

"Sec. 24. Nothing in this ordinance contained shall have the effect of taking away or abridging any franchises, rights, powers and privileges granted to said company by any other ordinance or other authority, whether as respects the right to construct or maintain any railway or operate the same, or the power to be used in operating the same, or otherwise as may be prescribed by such other ordinance or authority, except as to the streets hereinbefore mentioned in section 16 of this ordinance."

The ordinance requiring the construction of the new line is based upon section 18 of Ordinance No. 1227. It is the contention of the Railway Company that the ordinance is invalid, and; further, that, if it is held to be valid, compliance therewith by the Railway Company cannot be enforced by mandamus; the sole effect of a failure to comply with the ordinance being a forfeiture of its rights in the street. It is urged in this connection that the ordinance was not authorized by section 18 of Ordinance No. 1227, because the right of street railways in the streets of a municipality is a franchise, that the reservation and stipulation, in section 18, that the common council shall possess the right at any time after January 1, 1892, to order the construction of new lines, constitute in no sense a grant of franchise to build and operate such new lines, and, further, that the section

"is only a reservation of the right to enact further legislation at some future time, in the nature of an additional grant, but at the time of the enactment of Ordinance No. 1227, indefinite and uncertain, both as to the exercise of the reserved power and the streets to which it might apply."

It may be conceded that a right given to construct and operate street railways in the public streets is a franchise, and that section 18 is not in and of itself a grant of a franchise; but the conclusion claimed does not follow the concession, for the Railway Company had the right, by virtue of Ordinance No. 57 and the provisions of Ordinance No. 1227, to construct and operate its railway lines in all of the streets of the city, except as stated in Ordinance No. 1227. The street here in question is not within the exception. There was then no occasion for granting a franchise for any proposed new lines not within the exception. What,

then, was the purpose of section 18? It is obvious on the face of this section that its purpose was to secure to the municipality rights which it did not possess under the original ordinance, by virtue of which no absolute obligation rested upon the Railway Company to construct any new lines, on streets which it had the right so to do, on the demand of the common council. It is to be noted that section 7 of Ordinance No. 57 was limited to the building of an additional mile every six months, and, further, that the obligation imposed on the Railway Company was not absolute in its terms, but in the alternative. It was only required to comply with the requirement of the council to build the new line

"or forfeit to said city all rights or privileges to construct and operate any line of railway or track in any street * * * upon which"

the company had not built any railway track. While such an alternative obligation may have been sufficient for the protection of the interests of the city under the conditions existing at the time the original ordinance was enacted, and in view of the fact that only animal power could be used, yet it is quite apparent that it was not so under the conditions existing in 1889, when electricity was to be substituted for animal power. The Railway Company at this time was asking for additional and valuable rights, which the city by its common council could deny or grant absolutely or on condition that the Railway Company surrender rights on its part which were then deemed to be disadvantageous to the city. Thereupon the parties by section 18 made a new compact as to the building of new lines, whereby the Railway Company absolutely obligated itself to build new lines as therein required. The Railway Company had, after accepting the ordinance, no longer the option to build the required lines or forfeit its franchise.

It is, however, contended that section 24 of the new ordinance, which we have quoted, preserves to the Railway Company this option to build or forfeit. This section cannot be construed as applying to any subject which was specifically dealt with and fully covered by the parties by their express stipulation in the ordinance. Clearly section 24 refers to rights and privileges theretofore granted which were not dealt with in the new ordinance. For example, the right to construct and operate street railways with animal power on any streets it might select other than the streets excepted in Ordinance No. 1227. Any other construction would emasculate the express concessions and stipulations on the part

of the Railway Company contained in the new ordinance. We accordingly hold that section 18 of Ordinance No. 1227 upon its acceptance by the Railway Company became a valid contract between it and the city of St. Paul, whereby the city acquired the vested right to require the construction and operation of new lines as therein provided and that the legal obligation to comply with the requirement was assumed by the Railway Company.

The next contention of the Railway Company is that, if the right of the city by its common council to require the building of new lines under section 18 ever existed, it has been suspended or repealed by the Home Rule Charter of the city of St. Paul, sections 32 and 33, chapter 4. These sections provide, in effect, that no extension or modification of any franchise or privilege heretofore granted, or any franchise hereafter granted, shall be valid, unless the grantee thereof shall agree in writing that the same shall be held subject to the conditions and limitations of the city charter, including the payment of a license fee of 5 per cent. of the gross earnings. The object of these provisions is obvious. They were intended to prevent in the future the enlarging of existing franchises and privileges and the granting of new ones, except upon conditions which will secure the city some just compensation for the franchises and privileges granted. These sections of the charter have, however, no application to the ordinance directing the construction of the new line, for clearly it is not an extension of any existing franchise or privilege, or the grant of a new one; for, as we have stated, the Railway Company had the right to construct the new line, if it so elected, without first securing from the common council the right so to do. The ordinance was only the exercise of a right secured to the city by section 18 of Ordinance No. 1227. It follows that the ordinance requiring the new line to be built is valid.

The next contention to be considered is that, even if the ordinance is valid, mandamus will not lie to enforce it because the only remedy for the refusal of the Railway Company to construct any line required is by a forfeiture *pro tanto* of its franchise. The case of *State ex rel. v. Railway Co.*, 18 Minn. 40 (Gil. 21), is relied on in support of the contention. That case was one in which the State sought to compel a railroad company, by mandamus, to construct its line to the village of La Crescent, and it was held that mandamus would not lie, because no complete and perfect legal obligation had ever been imposed upon the company to build

the road. Such is not the case at bar, for, by the stipulations of section 18 of Ordinance No. 1227, a clear legal obligation was imposed upon the Railway Company to construct new lines as required therein, therefore mandamus will lie to enforce the obligation. *State ex rel. v. Railway Co.*, 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656.

The Railway Company also urges that the finding of the trial court that public necessity requires the construction of the line in question, and that it is not a cross-town line, is not sustained by the evidence. It is clear from the record that the proposed line is not a cross-town line, even if it be conceded that such fact is here material. Whether public interest and necessity require the construction of a new line of railway upon any particular street upon which sewers have been constructed is a question resting in the discretion of the common council by virtue of section 18 of the Ordinance No. 1227. The court cannot interfere with the action of the council in ordering new lines unless such action is clearly arbitrary. The evidence in this case is sufficient to sustain the finding complained of.

The last assignment of error is this:

"The court erred in making its findings of fact, conclusions of law, order for judgment, and decree herein, and in making each thereof, for the reason that the same are, and each of them is, contrary to and in violation of section 1 of article 14 of the amendments to the Constitution of the United States, and of section 10 of article 1 of the Constitution of the United States."

There is no merit in this assignment, if our construction of section 18 of Ordinance No. 1227 is correct, and we hold that it is.

Judgment affirmed.

Angelary v. Springfield St. Ry. Co.

(Massachusetts — Supreme Judicial Court.)

1. CHILD STRUCK BY RUNNING BOARD; CONTRIBUTORY NEGLIGENCE. — The plaintiff, about twelve years of age, and four other children, including his sister, was riding on a wagon over the roadway parallel to and near defendant's track. As the driver stopped, the plaintiff, after looking for and not

Injuries to Children. — For a discussion of the liability of a street railway company for injuries to children upon or near its tracks, see *Nellis on Street Railways* (2d Ed.), §§ 408-410, 428, 429, 464.

observing an approaching car, alighted, passed around to the side of the wagon and stood helping his sister to alight by the steps between the wheels, when he was struck by the running board of an open car and injured. *Held*, that the plaintiff was not guilty of contributory negligence as a matter of law.

2. **DEGREE OF CARE REQUIRED OF CHILD.**—The degree of care required of a child twelve years of age cannot be measured by the standard applicable to adults when acting under similar conditions.
3. **PRESUMPTION THAT MOTORMAN AND CONDUCTOR WILL EXERCISE CARE.**—The plaintiff had the right to rely upon the presumption that the defendant's motorman and conductor would exercise reasonable diligence.

DEFENDANT excepts from verdict for plaintiff. Reported 99 N. E. 970.

Wm. P. Hayes, of Springfield, for plaintiff.

Henry W. Ely and *Jos. B. Ely*, both of Springfield, for defendant.

Opinion by **BRALEY, J.**:

The defendant, although asking generally at the close of the evidence that a verdict be ordered in its favor, has waived the question whether there was any proof of its negligence, and contends, as matter of law, that the plaintiff failed to exercise due care. It appears that with four other children, including his sister, the plaintiff was riding in a wagon moving over the roadway parallel to, and within four to seven feet of, the defendant's railway track located at the side of the way. The evidence while conflicting, would have warranted the jury in finding, that as the driver stopped the plaintiff alighted, passed around from the rear to the side next to the track, and stood fronting the wagon helping his sister to alight by the steps between the wheels, when an open car moving in the same direction with the wagon came up and he was struck and injured by the running board. It may be assumed in the defendant's behalf, and in accordance with the plaintiff's evidence, that when sitting on the floor at the rear end of the wagon he looked over the track on which the car approached, where his view was unobstructed for a long distance, and in passing from the wagon he again looked, but failed in each instance to observe the car, which the jury could find was plainly visible. It is urged that he stands no better than if he had neglected to look at all, and consequently must be held to have acted carelessly. *Fitzgerald v. Boston Elev. Ry.*, 5 St. Ry. Rep. 444, 194 Mass.

242, 243, 80 N. E. 224; *Willis v. Boston & Northern St. Ry.* 202 Mass. 463, 465, 89 N. E. 31; *Kennedy v. Worcester Cons. St. Ry.*, 210 Mass. 132, 96 N. E. 78. But the plaintiff at the time of the accident was not quite 12 years of age, and the degree of prudence required of him cannot be measured by the standard applicable to adults when acting under similar conditions.

"It is commonly a question of fact to be determined in each case as it arises whether, considering his age, experience, intelligence, judgment and alertness, the particular child was capable of understanding the nature and extent of the danger in which he was placed. A situation which may carry plainly to the mind of an adult comprehension of danger might have little or no impression upon a child."

Berdos v. Tremont & Suffolk Mills, 209 Mass. 489, 495, 95 N. E. 876, Ann. Cas. 1912B, 797. See also *Dowd v. Tighe*, 209 Mass. 464, 467, 95 N. E. 853, and cases cited; *Callahan v. Dickson*, 210 Mass. 510, 96 N. E. 1029. The gong was not sounded nor any warning given by the motorman, and the exceptions state that the events leading to the accident "happened very quickly."

The plaintiff, while required to use proper care, might rely upon the presumption that the defendant's motorman and conductor also would exercise reasonable diligence. *Donovan v. Bernhard*, 208 Mass. 181, 182, 94 N. E. 276. It does not appear that he knew, or from personal experience ought to have known or anticipated, that a passing car might project beyond the rail sufficiently to expose him to the danger of a collision, and it is of some significance that the wagon remained untouched. If as the defendant contends the plaintiff looked carelessly, and therefore must be deemed to have seen the car, his failure to exercise the judgment of the ordinary adult traveler, who could be found to have appreciated the possible danger from the overhang, cannot on the evidence as matter of law be imputed to him. *Goldthwait v. Haverhill & Groveland St. Ry.*, 160 Mass. 554, 36 N. E. 486. Nor would his neglect to look or to listen for a car, as he at first testified, have been conclusive. *Hennessey v. Taylor*, 189 Mass. 583, 76 N. E. 224, 3 L. R. A. (N. S.) 345, 4 Ann. Cas. 396. It still remained under either assumption a question of fact whether in the judgment of the jury his conduct evidenced the lack of such care as boys of his age, capacity and experience should be required to exercise. *Butler v. N. Y., N. H. & H. R. R.*, 177 Mass. 191, 192, 193, 58 N. E. 592; *Callahan v. Dickin-*

son, 210 Mass. 510, 96 N. E. 1029; *Chiuccariello v. Campbell*, 210 Mass. 532, 96 N. E. 1101. The present case is clearly distinguishable from cases where children while using the public ways as pedestrians with knowledge of dangerous conditions have been injured in attempting to pass in front of an oncoming car without taking any reasonable precautions to avoid it. *Stackpole v. Boston Elev. Ry.*, 5 St. Ry. Rep. 406, 193 Mass. 562, 79 N. E. 740; *Holian v. Boston Elev. Ry.*, 194 Mass. 74, 80 N. E. 1, 11 L. R. A. (N. S.) 166. See also *Russo v. Charles S. Brown Co.*, 198 Mass. 473, 84 N. E. 840.

The denial of the request was right. The defendant undoubtedly was entitled to have the jury instructed as to the rule of law by which they were to be guided in passing upon the question of the plaintiff's due care. *Woodbury v. Sparrell Print*, 198 Mass. 1, 84 N. E. 441. The entire charge, however, is not reported. It must be presumed in the absence of any statement to the contrary that full and appropriate instructions were given, and if so, the portion excepted to went no further than to leave to the jury whether under the circumstances to which the judge specifically referred the plaintiff had been shown to have been negligent. But even on the defendant's assumption that a question of law was submitted, the jury, having decided the question rightly, it has not been prejudiced. *Rogers v. Abbot*, 206 Mass. 270, 274, 92 N. E. 472, 138 Am. St. Rep. 394.

Exceptions overruled.

Denver City Tramway Co. v. Armstrong.

(Colorado — Court of Appeals.)

COLLISION WITH VEHICLE; INJURY TO PASSENGER OF VEHICLE; NEGLIGENCE PER SE; FAILURE OF DRIVER OF VEHICLE TO LOOK AND LISTEN; IMPUTED NEGLIGENCE; CONTRIBUTORY NEGLIGENCE. — Action by a person, riding with

Imputation of Negligence. — For a discussion of the question of when negligence may be imputed, see Nellis on Street Railways (2d Ed.), §§ 464, 466, 467.

Imputation of Negligence of Driver of Automobile to Passenger Therein. — For a discussion of the question whether the negligence of the driver of an automobile may be imputed to a passenger therein, see the note in this volume to *Kneeshaw v. Detroit United Ry.*, p. 615. See also *Huddy on Automobiles* (3d Ed.), §§ 113 and 114.

the driver of a vehicle at his invitation, for injuries sustained from a collision of the vehicle with a street car at a crossing.

Held, that the failure of the driver to look or listen for the approach of the street car was negligence as a matter of law;

That the negligence of the driver was not imputed to the plaintiff;

That the plaintiff exercised reasonable care.

Negligence of a driver cannot be imputed to a passenger, either of a public or of a private conveyance, unless it appears that the relation of master and servant, or principal and agent, or association in a common enterprise, exists.

DEFENDANT appeals from judgment for plaintiff. Reported 123 Pac. 136.

Gerald Hughes and *H. S. Robertson*, both of Denver, for appellant.

H. N. Hawkins, of Denver, for appellee.

Opinion by KING, J.:

On November 8, 1903, plaintiff was injured in a collision with a street car operated by the defendant. The collision occurred about 6 o'clock in the afternoon at what is known as the intersection of York street and Fortieth avenue in the city and county of Denver. Plaintiff at the time was riding in a one-horse, open carriage owned and driven by John Campbell, with whom she was a gratuitous passenger, his guest, accompanying him by his invitation. He was able-bodied, of mature years, an experienced driver whom plaintiff, from long acquaintance and frequent observation, believed to be capable and prudent. The car approached the crossing from the west through a cut some three or four feet in depth, in addition to which the evidence tended to show other obstructions such as fences, piles of stone, etc., which interfered to some extent with the view of the approaching car from the carriage, and, likewise, of the approaching carriage from the car. It was dark or dusk. The car was lighted inside, and had a head-light consisting of one 16-candle power lamp which the motorman testified cast a light about ten feet in front of the car. The carriage approached the crossing from the north, the horse on a trot. Neither plaintiff nor the driver looked or listened for an approaching car. The driver testified that he did not hear the car nor see it until he was crossing the track, at which time the car was within twenty feet; that he then struck the horse with whip and the horse lunged forward, but the rear wheels of the carriage were struck

by the car and the occupants thrown out. Plaintiff was suffering from toothache, and for that reason was holding her hand and handkerchief to her face, and giving slight, if any, attention to where they were driving. It is not in evidence that she knew of the approach to the railway tracks, or was conscious of danger, or the risk assumed by the driver. The noise of an automobile close behind the carriage diverted the attention of the driver. The motorman testified that he did not see the carriage until his car was within three feet of it; that he sounded no gong, and was running the car at full speed. The city ordinance required the motorman or person controlling the motive power of a street car, when approaching any street crossing, to sound the gong or bell within a distance not exceeding sixty feet from such crossing. The jury returned a verdict, and judgment was entered thereon, in favor of the plaintiff, from which the defendant appealed.

We have given careful consideration to each of the seventy-six assignments of errors, but shall make specific mention of but few. The others may be understood as disposed of by the reason contained within, as well as by the express direction of section 84, Code of Civil Procedure, Rev. St. 1908, and section 20, c. 6, Session Laws of 1911, which latter section reads as follows:

"It [the Supreme Court] shall disregard any error or defect in the proceedings which shall not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect."

The verdict is supported by the evidence, except in so far as absence of negligence on the part of the driver may be considered necessary to sustain it.

In view of the failure of said driver to look or listen for the approach of the car, under the circumstances shown to exist, the writer of this opinion believes he is shown to have been negligent as a matter of law, and that, therefore, the case should be determined upon other questions, viz.: (1) Whether the contributory negligence of the driver, if shown, can be imputed to the plaintiff; (2) whether, under the circumstances, plaintiff was herself guilty of contributory negligence as a matter of law.

1. The question of imputed negligence has not been fully decided by the courts of review of this State. In *Denver City Tramway Co. v. Martin*, 6 St. Ry. Rep. 605, 44 Colo. 324, 98 Pac. 836, that issue was raised and earnestly argued, but the court avoided it by deciding that the driver was not as a matter of law guilty of

contributory negligence, and therefore affirmed the judgment of the trial court; while in *Colorado & Southern Ry. Co. v. Thomas*, 33 Colo. 517, 81 Pac. 801, 70 L. R. A. 681, 3 Ann. Cas. 700, in which the question was also raised and argued, the court avoided it by deciding that plaintiff's intestate, as well as the driver, was guilty of contributory negligence as a matter of law, and reversed the judgment of the lower court. In the latter case, however, the court, by Mr. Justice Goddard, said:

"Upon the question of imputable negligence, as applicable to occupants of private conveyances, there is much conflict among the authorities, and we think the weight of authority supports the rule that a person injured by the negligence of a defendant and the contributory negligence of one with whom the injured person is riding as guest or companion is that such negligence is not imputable to the injured person; but there is a well-recognized exception to this rule when the injured person is in a position to exercise authority or control over the driver, or is guilty, or fails to exercise such care under the circumstances, as he could, or should exercise under the circumstances to protect himself" — citing cases.

In this case the question is squarely raised by plaintiff's instruction No. 8, given by the court, and instruction No. 17, offered by defendant and refused, and the exceptions thereto, and by argument on this appeal. Plaintiff's instruction No. 8 is as follows:

"The court instructs the jury that the plaintiff, Katherine M. Armstrong, cannot be held to be guilty of contributory negligence so as to defeat a recovery in this action upon that ground, unless you find from the evidence that the said Katherine M. Armstrong failed herself to exercise that degree of care and caution which a reasonably prudent and cautious person would have exercised under similar circumstances, and that failure on her part caused or contributed to cause the striking of the vehicle in which she was riding, by the defendant's car. If the plaintiff exercised no control over the movements of the vehicle in which she was riding, but was simply an invited guest of the driver, and had no control over the manner or way in which the buggy was driven, the negligence of the driver, if there was any such negligence, cannot be imputed or charged to her."

In some of the States the courts have adopted the rule of imputable negligence, following the doctrine of the English courts in *Thorogood v. Bryan*, 8 C. B. 115, either upon the theory of "identification" of the passenger with the driver, or upon the principle that the driver of a private carriage is *pro hac vice* the agent of every person voluntarily committing himself to the carriage. Wisconsin, Michigan and Montana are among those States. *Prideaux v. Mineral Point*, 43 Wis. 513, 28 Am. Rep. 558; *Lake Shore & M. S. Ry. Co. v. Miller*, 25 Mich. 274; *Whittaker v.*

Helena, 14 Mont. 124, 35 Pac. 904, 43 Am. St. Rep. 621. Pennsylvania adopted the same rule, but later overruled the earlier cases. *Dean v. Pennsylvania R. Co.*, 129 Pa. 514, 18 Atl. 718, 6 L. R. A. 143, 15 Am. St. Rep. 733. *Thorogood v. Bryan* was overruled in England in *Mills v. Armstrong*, 53 L. T. N. S. 423, 13 App. Cas. 1, and condemned by the Supreme Court of the United States in *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 652. And we think it may be safely said that at the present time the great weight, if not the unbroken line, of authority of all of the States in the Union, as well as of the Federal courts, is opposed to the imputation of negligence from driver to passenger, either of a public or of a private conveyance, unless it appears that the relation of master and servant, or principal and agent, or association in a common enterprise, exists. *Skultz v. Old Colony Street Ry. Co.*, 193 Mass. 309, 79 N. E. 873, 8 L. R. A. (N. S.) 597, and cases cited, 118 Am. St. Rep. 502, 9 Ann. Cas. 402; *Little v. Hackett*, *supra*; *Duval v. Atlantic Coast Line Ry. Co.*, 134 N. C. 331, 46 S. E. 750, 65 L. R. A. 722, 101 Am. St. Rep. 830; *Colorado & Southern Ry. Co. v. Thomas*, 33 Colo. 517, 81 Pac. 801, 70 L. R. A. 681, and notes thereto in 3 Ann. Cas. 700; *White on Railroads*, § 1055. In 1 *Shearman & Redfield on the Law of Negligence* (5th Ed.), § 66, it is said:

"In former editions we devoted much space to the refutation of this doctrine of 'identification.' But it is needless to do so any longer, since the entire doctrine has since our first edition been exploded in every court, beginning with New York and ending with Pennsylvania. * * * The notion that one is the 'agent' of another, who had not the smallest right to control or even advise him, is difficult to support by any sensible argument. This theory is universally rejected, except in the three States mentioned, and it must soon be abandoned even there."

No further citation of authority is necessary, as the cases cited, with their annotations, are exhaustive of the subject, and justify the rule laid down in 1 *Thompson's Commentaries on the Law of Negligence*, § 502, as follows:

"While there are a few untenable decisions to the contrary, nearly all American courts are agreed that the rule under consideration extends so far as to hold that where a person, while riding on a private vehicle by the invitation of the driver, or the owner or the custodian of the vehicle, and having no authority or control over the driver, and being under no duty to control his conduct, and having no reason to suspect any want of care, skill or sobriety on his part, is injured by the concurring negligence of the driver and a third

person or corporation, the negligence of the driver is not imputed to him so as to prevent him from recovering damages from the other tortfeasor"—

and, we may add, would not prevent him from recovering damages from either tortfeasor. The plaintiff in this case neither had, nor attempted to exercise, authority or control over the driver. She was not responsible for his acts, had no reason to suspect want of skill or care on his part. The relationship of master and servant, or principal and agent, or of associates in a common enterprise, did not, in fact, exist. She was injured by the negligence of the defendant; or by that negligence and the concurring negligence of the driver, Campbell. Therefore, we conclude that the negligence of her driver cannot be imputed to plaintiff.

2. The duty and liability of plaintiff in this case was declared by the trial court in instruction No. 20, given upon request of the defendant, as follows:

"You are instructed that plaintiff, while in a buggy as the guest of another, and when such other is driving, is charged with certain duties to care for her own safety, and that such duties are those imposed upon an ordinarily careful and prudent person under the circumstances, and that said plaintiff cannot, because another is driving, escape all obligation and care for her own safety; and that, if you find from the evidence that she failed to exercise the care and caution that an ordinarily careful and prudent person would have done under the circumstances, then she is guilty of contributory negligence, and cannot recover in this action, even if defendant was guilty of the negligence charged."

The rule as applied to a case of this kind seems to be fairly stated in *Shultz v. Old Colony Street Ry. Co.*, 193 Mass. 323, 79 N. E. 878, 8 L. R. A. (N. S.) 597, 118 Am. St. Rep. 502, 9 Ann. Cas. 402, as follows:

"The plaintiff would not be entitled to recover if in the exercise of common prudence she ought to have given some warning to the driver of carelessness on his part which she observed or might have observed in exercising due care for her own safety, nor if she negligently abandoned the exercise of her own faculties and trusted entirely to the vigilance and care of the driver. She cannot hide behind the fact that another is driving the vehicle in which she is riding, and thus relieve herself of her own negligence. What degree of care she should have exercised in accepting the invitation to ride, or in observing and calling to the attention of the driver perils unnoticed by him, depends upon the circumstances at the time of the injury. On the other hand, she would be permitted to recover if, in entering and continuing in the conveyance, she acted with reasonable caution, and had no ground to suspect incompetency, and no cause to anticipate negligence on the part of the driver, and if the impending danger, although in part produced by the driver, was so sudden or of such a character as not to permit or require her to do any act for her own protection."

The rule here announced appears to be the moderate view, or middle ground, as between the courts which have never adopted the rule of imputed negligence, and those which have at one time recognized such rule, and later receded from it. The instruction given by the court corresponds with the rule announced in the foregoing quotation, and is clearly in accord with the authorities hereinbefore cited; and, notwithstanding the negligence of the driver, leaves the question of plaintiff's due care, or negligence, subject to the same conditions as in other instances of alleged contributory negligence, to be determined by the jury as a matter of fact, and not, as a rule, by the court as a matter of law. It is sufficient to say that there was ample evidence in this case submitted to the jury, from which, viewed in the most favorable light in which it may be reasonably considered in behalf of plaintiff, together with the allowable inferences of fact adducible from such evidence in favor of the plaintiff, to support and justify the jury in finding that the plaintiff did exercise the care and caution that an ordinarily careful, prudent and cautious person would have exercised under the circumstances, and that, therefore, she was not guilty of contributory negligence without which such injury would not have occurred.

* * * * *

The judgment is affirmed.

Champlin v. Pawcatuck Valley St. Ry. Co.

(Rhode Island — Supreme Court.)

1. **EVIDENCE; ADMISSIBILITY OF STATEMENT OF BYSTANDER TO EXPLAIN OTHER EVIDENCE.** — The statement of a bystander is admissible where necessary to the understanding of a motorman's reply thereto which has been admitted in evidence.

ADMISSIBILITY OF STATEMENTS OF MOTORMAN AS RES GESTÆ.

(For a general discussion of the subject of *res gestæ* see Chamberlayne's Modern Law of Evidence.)

As a general rule, a statement or exclamation of the motorman of a street railway car causing injury to a pedestrian or other person in the street, where such statement or exclamation throws light upon the main issue involved and

* Portion of opinion not relating to street railways omitted.

2. **SAME; RES GESTÆ.** — Statement by a bystander, made six or seven minutes after an accident, that the railway company was to blame, and the reply of the motorman, "There has no one denied it, has there?" are admissible as part of the *res gestæ*.
3. **WITNESS; COMPETENCY AS TO WIDTH OF STREET.** — A witness may testify as to whether there was room for two teams to meet and pass, although he does not know the exact measurement of the street.
4. **EVIDENCE; STATEMENT OF MOTORMAN; RES GESTÆ.** — Statement made by a motorman three or four minutes after his car hit plaintiff's wagon, that "he thought he could pass him without hitting him," is admissible as part of the *res gestæ*.
5. **SAME; ADMISSIBILITY OF EVIDENCE AS TO WIDTH OF STREET.** — In an action for injuries to the driver of a wagon caused by a collision with a street car in a place where the wagon was forced near the track by the presence of an automobile, the question "Was there room at that place, where he met the automobile, for an automobile and a team to pass in the traveled part of the road?" was proper.
6. **SAME; STATEMENT OF MOTORMAN; RES GESTÆ.** — A statement by a motorman that he did not stop his car because he was sure he was going to miss the plaintiff is admissible as part of the *res gestæ*.
7. **DAMAGES; EVIDENCE.** — Where it was alleged that the plaintiff was permanently injured, "and he has been hitherto, and will be for the rest of his life, wholly incapacitated from working and earning the wages and acquiring the income which, but for said injuries, he would have earned and acquired, evidence as to his former wages is admissible.
8. **EVIDENCE.** — Where a wagon was struck by a street car, the driver in an action for personal injuries may testify as to whether there was anything he could have done to have gotten out of the way sooner than he did.

is spontaneous in character, and made under such circumstances as to exclude the idea or design of deliberation, is admissible in an action to recover damages for the injury.

United States. — *Lightcap v. Philadelphia Tract. Co.*, 60 Fed. 212.

Alabama. — *Mobile Light & R. Co. v. Baker*, 158 Ala. 491, 48 So. 119.

Arkansas. — *Little Rock Ry. & Elec. Co. v. Newman*, 77 Ark. 599, 92 S. W. 864.

Delaware. — *Baldwin v. People's Ry. Co.*, 7 Pen. 81, 76 Atl. 1088.

Illinois. — *Quincy Horse Railway, etc., Co. v. Gnuse*, 177 Ill. 264, 27 N. E. 190; *Springfield Consol. Ry. Co. v. Welsh*, 155 Ill. 511, 40 N. E. 1034; *Chicago City Ry. Co. v. McDonough*, 4 St. Ry. Rep. 205, 221 Ill. 69, 77 N. E. 577.

Indiana. — *Cincinnati, etc., R. Co. v. Stahle*, 37 Ind. App. 539, 76 N. E. 551.

Missouri. — *Knittel v. United Rys. Co. of St. Louis*, 147 Mo. App. 677, 128 S. W. 5.

Thus, in an action for injuries resulting from a collision of a car with a wagon, evidence is admissible that when the vehicles collided the motorman called out: "God damn you, get out of the way." *Lightcap v. Philadelphia Tract. Co.*, 60 Fed. 212. Where a child is run over by a street railway car, it is proper to prove that almost instantly after the accident, the motorman, while lowering the window to look out and see what had happened, asked if

9. **DAMAGES; EVIDENCE; INSTRUCTIONS.** — Where, in an action for personal injuries, the driver of a wagon simply proved the value of his services as teamster and of his labor in the stable, the court may instruct the jury to disregard his loss of profits from business as a teamster or keeper of a stable.
10. **NEGLIGENCE; INSTRUCTIONS.** — Where the plaintiff alleges that the defendant was negligent in causing a collision with his wagon, it is proper for the court to charge, "if you find that this accident was caused to the plaintiff by reason of the negligence of the motorman, or of the conductor, or of both, in that case the defendant is liable to the same extent that it would be if the defendant was an individual."
11. **MOTORMAN; CARE REQUIRED.** — Where a motorman saw that by continuing with his car he would be likely to strike a wagon which had been forced near the track by an automobile, he had no right to proceed and speculate upon his chances of possibly getting through without injury to the plaintiff.
12. **LAST CLEAR CHANCE DOCTRINE; INSTRUCTIONS.** — Instructions covering the last clear chance doctrine held proper.
13. **AMOUNT OF DAMAGES.** — A verdict of \$15,000 is not excessive where it appears that the plaintiff, fifty years of age, a teamster, was in good health up to the time of the accident, when he was permanently injured and incapacitated for labor during life.

DEFENDANT brings exceptions from judgment for plaintiff. Reported 82 Atl. 481.

A. B. Crafts, for plaintiff.

Everett A. Kingsley and *Donald G. Perkins*, for defendant.

there was a dog under the car. *Knittel v. United Rys. Co. of St. Louis*, 147 Mo. App. 677, 128 S. W. 5. A remark made by a motorman to a person waving his hat and hands and hollering for the car to stop, to go to hell out of there or he would run over him, where the car immediately thereafter collided with a fire engine, is admissible. *Chicago City Ry. Co. v. McDonough*, 4 St. Ry. Rep. 205, 221 Ill. 69, 77 N. E. 577. Evidence that just before an accident injuring a passenger, the motorman exclaimed, "My God," is admissible as part of the *res gestæ*. *Baldwin v. Peoples Ry. Co.*, 7 Pen. (Del.) 81, 76 Atl. 1088.

On the other hand, where the statement of the motorman is not cotemporaneous with the happening of the accident but is a mere recital or narrative of a past event, it is inadmissible as against the street railway company.

Alabama. — *Mobile Light & R. Co. v. Baker*, 158 Ala. 491, 48 So. 119.

California. — *Kimic v. San Jose-Los Gatos Interurban Ry. Co.*, 156 Cal. 379, 104 Pac. 986.

Connecticut. — *Morse v. Consolidated Ry. Co.*, 81 Conn. 395, 71 Atl. 553.

Maryland. — *Dietrich v. Baltimore, etc., Ry. Co.*, 58 Md. 347.

Michigan. — *Rouston v. Detroit United Ry.*, 6 St. Ry. 503, 115 N. W. 62, 14 Det. L. N. 909.

Missouri. — *Koenig v. Union Depot Ry. Co.*, 173 Mo. 698, 73 S. W. 637.

Opinion by JOHNSON, J.:

This is an action of the case, brought by George E. Champlin, of Westerly, in Washington county, against the Pawcatuck Valley Street Railway Company, a corporation doing business in said Washington county, to recover damages for personal injuries alleged to have been sustained by said plaintiff through the negligence of the defendant company in the operation of one of its street cars.

On the 13th day of July, 1910, the plaintiff was driving a pair of horses attached to a cart carrying a load of gravel weighing from 5,000 to 5,500 pounds along a highway in the town of Westerly, known as the "Westerly Road," between Ninigret avenue and Wauwinnet avenue. At a place in said highway on the part of the road between the railroad track and the sidewalk he met an automobile. The automobile turned to the right and ran upon the sidewalk, but was not able to continue until it had passed the cart, because of a pole standing in the sidewalk. About five or six feet from this pole the automobile stopped. The plaintiff drove to the right so far that his off wheels rubbed against the rail, and in this position the high wheels of his cart just cleared the automobile. While the plaintiff's team was in this position he heard the car approaching from behind. He looked back, and, as he testified, saw it 200 feet away. He could not turn from the

New York. — Brauer v. New York City Interborough Co., 131 App. Div. 682, 116 N. Y. Supp. 59; Norris v. Interurban St. Ry. Co., 90 N. Y. Supp. 460.

Tennessee. — Citizens St. R. Co. v. Howard, 102 Tenn. 474, 52 S. W. 864.

Thus, evidence of declarations made by the driver of a street car about half an hour after an injury to a boy getting on the car is not admissible. Dietrich v. Baltimore, etc., Ry. Co., 58 Md. 347. Statements of a motorman as to the cause of an accident made seven or eight minutes thereafter are not part of the *res gestæ*. Kimic v. San Jose-Los Gatos Interurban Ry. Co., 156 Cal. 379, 104 Cal. 986. In Cincinnati, etc., R. Co. v. Stahle, 37 Ind. App. 539, 76 N. 9. 551, the court said: "Three witnesses testified that immediately after the collision the motorman stated to the conductor that on account of the wet rail the brakes failed him and caused the accident. The admissibility of the evidence depended upon whether the statement was a natural emanation from the occurrence, made spontaneously or so nearly contemporaneously as to be in the presence of the occurrence and under such circumstances as to exclude the idea of design or deliberation. * * * If it was so made, it was part of the occurrence and admissible; if it was only a narrative of a past transaction, it was hearsay and inadmissible."

It is often a difficult matter to determine whether statements made by a motorman are part of the occurrence so as to be admissible as *res gestæ* or

track in the position he then occupied by reason of the presence of the automobile. He urged his horses, and made an effort to pass the automobile. He had partly passed the automobile, and was turning away from the railroad track, when the car came up behind him, and the running board of the car, after clearing the plaintiff's rear wheel, struck his forward wheel, causing a jolt which threw the plaintiff off the cart to the ground, and in that position the wheel of the cart crushed and injured him.

The case was tried in the Superior Court in Washington county before Mr. Justice Brown and a jury on the 1st and 2d days of December, 1910, and resulted in a verdict for the plaintiff for \$15,000. The defendant moved for a new trial on the grounds that the verdict was against the evidence and the weight thereof; that it was, on the evidence in the case, contrary to the law as given to the jury by the court; that the damages awarded were excessive; that counsel for the plaintiff, in arguing said case to the jury on the subject of damages, stated to the jury, "They say country juries give small damages;" that since the trial the defendant has discovered evidence of facts of which the defendant had no knowledge prior to said trial, and at said trial could not have discovered by the exercise of reasonable diligence.

The motion for a new trial was heard January 11, 1911, and on February 10, 1911, was denied. February 17, 1911, the defend-

whether they are a narrative of a past event. In this respect the decisions of the different States are conflicting. In some States the statements to be admissible must be made at the time of the accident and must be a part of the accident itself.

Connecticut. — *Morse v. Consolidated Ry. Co.*, 81 Conn. 395, 71 Atl. 553.

Missouri. — *Ruschenberg v. Southern Elec. R. Co.*, 161 Mo. 70, 61 S. W. 626; *Koenig v. Union Depot Ry. Co.*, 173 Mo. 698, 73 S. W. 637.

New York. — *Seipp v. Dry Dock, etc., R. Co.*, 45 App. Div. 489, 61 N. Y. Supp. 409; *Brauer v. New York City Interborough Co.*, 131 App. Div. 682, 116 N. Y. Supp. 59; *Norris v. Interurban St. Ry. Co.*, 90 N. Y. Supp. 460.

Tennessee. — *Citizens St. R. Co. v. Howard*, 102 Tenn. 474, 52 S. W. 864.

Thus, the declarations of a motorman as to how an accident happened made two or three minutes thereafter and before the car had left the place of the accident is inadmissible. *Morse v. Consolidated Ry. Co.*, 81 Conn. 395, 71 Atl. 553. A statement made by the motorman of a car which killed a person, made after the car had stopped and the motorman was helping to extricate the deceased from the wheels of the car is not part of the *res gestæ*. *Ruschenberg v. Southern Elec. R. Co.*, 161 Mo. 70, 61 S. W. 626. Where a child was run over by a car, evidence that the motorman immediately after stopping the car came back to where the child was and was asked, "Are you

ant excepted to the decision denying its motion for a new trial, and gave notice of its intention to prosecute a bill of exceptions upon all its exceptions in the case. Within the time and in accordance with the procedure required by statute, the defendant presented its bill of exceptions and the transcript of the testimony, which were severally allowed by the justice presiding. The case is now before this court on said bill of exceptions.

The exceptions are as follows: The first exception is to the admission by the court of questions Nos. 59 and 60 and the answers thereto of the witness George B. Capron, found on page 44 of the transcript of testimony. The second exception is to the admission by the court of question No. 61 and the answers thereto of the witness George B. Capron, all as found on pages 44, 45 and 46 of the transcript of testimony. We will consider these exceptions together. On page 39 of the transcript objection was made to the following question:

"42 Q. While Mr. Champlin was there, or while they were picking him up, did you hear anything said by the motorman?"

The witness was then questioned by counsel for both plaintiff and defendant as to how long after the accident the statement inquired about was made. The witness stated that after seeing the collision he started immediately, and got to the place in possibly three minutes, and that he had been there "probably two or

blind, to run over a child like that?" and replied, "I didn't see the child, I was looking at the car coming east," is inadmissible. *Koenig v. Union Depot Ry. Co.*, 173 Mo. 698, 73 S. W. 637. Where the driver of a wagon was killed by a street car running into the rear of the wagon it was held not proper to prove that four or five seconds after the collision the motorman said, "He bothered me all across the bridge." *Brauer v. New York City Interborough Co.*, 131 N. Y. App. Div. 682, 116 N. Y. Supp. 59. A declaration of a motorman "almost immediately" after an accident that he "lost control of the car" is not part of the *res gestæ* but is no more than an explanation or narrative of a past occurrence. *Norris v. Interurban St. Ry. Co.*, 90 N. Y. Supp. 460. Where the plaintiff was struck by a street car, and about fifteen minutes was occupied in extricating and caring for him at the place of the accident, evidence that the motorman then stated that he saw the plaintiff but thought he would get across the track is inadmissible, not being a part of the *res gestæ*. *Citizens St. R. Co. v. Howard*, 102 Tenn. 474, 52 S. W. 864.

In other States a more liberal rule prevails, and statements of a motorman relative to an action are admissible as *res gestæ*, though made subsequent to the action, where they are practically contemporaneous, and are of such a nature as to be deemed prompted by the event and not the result of deliberation. Thus, in an action for running over a boy, statements of the driver just

three, three or four, minutes" when he heard the statement. On page 43 the court overruled the objection, and defendant's counsel excepted.

"59 Q. (by Mr. Crafts). Well, what was the whole conversation with the motorman? A. Well, the motorman stood in the front of the car putting on his gloves, as I remember it, and there was some gentleman at the side of me, and he looked up at the car and he says — The Court: No, the question is what the motorman said, not what the other man said. 60 Q. State what the motorman said. A. The motorman said, 'There hasn't any one denied it.'"

Questions and answers 59 and 60 are the ones covered by the first exception. We think these questions were properly admitted. On page 44:

"61 Q. What did the man say? A. The man said, 'The railroad company was to blame.' Mr. Perkins: Now, I object to any statement by a bystander. The Court: Well, the statement by a bystander is necessary to understand the motorman's statement. (Exception taken by Mr. Perkins.) Witness: This gentleman stood in front of the car with me, and he said, 'The railroad company is to blame for this,' and the motorman said, 'There has no one denied it, has there?'"

Mr. Perkins moved to strike out the answer. After further discussion, on page 46, Mr. Perkins said:

"Well, I think I will withdraw my motion, because it applies only to the part of the — possibly the motion would apply only to that part. The Court:

after the car stopped, and while the boy was under it, are part of the *res gestæ*. Quincy Horse Railway Co. v. Gnuse, 137 Ill. 264, 27 N. E. 190. A declaration by a motorman made while the car was still on the body of the one it had run down that the reason he did not stop the car was because he could not reverse it, is admissible. Springfield Consol. Ry. Co. v. Welsh, 155 Ill. 511, 40 N. E. 1034. Where a car collided with a pedestrian, evidence of a witness of a conversation with the motorman while the injured was lying on the ground as to how the accident happened is admissible. Kern v. Des Moines City Ry. Co., 141 Iowa 620, 118 S. W. 451. A statement of a motorman of a car killing a person on the track, made immediately after the accident, when he had reached the body of the deceased, that, "Well, I seen the man, I seen his fate and all, and tried to make the stop, but couldn't make it," is admissible. Louisville Ry. Co. v. Johnson's Admr., 7 St. Ry. Rep. 706, 131 Ky. 277, 116 S. W. 207, 20 L. R. A. (N. S.) 133. A declaration of a motorman at the place of a collision a few minutes after it occurred, relative to the accident, is part of the *res gestæ*. Floyd v. Paducah, etc., Light Co., 23 Ky. L. Rep. 1077, 64 S. W. 653. A statement of the motorman of a car that the reason he did not sound the gong or stop the car was because the gong and brake were out of repair, when made immediately after the accident and before he had time to manufacture a false statement with regard to the

You withdraw the motion, I understand? Mr. Perkins: I withdrew the motion to strike it out, and stand on the objection originally to the question. The Court: Very well, we will go on."

The exception on page 44, therefore, was to the question, "What did the man say?" The court had ruled that the statement of the bystander was necessary to understand the motorman's statement, and the exception was to this ruling. We cannot see how the court could have ruled differently, as the statement of the motorman was entirely unintelligible by itself. The question, therefore, was proper.

Questions 59 and 60 and 61 were all inquiries permissible for bringing out the *res gestae*. The question, as we have said, was proper, and we think counsel should have insisted upon his motion to strike out, if he did not want the answer to stand. Was the answer such that the court should have ordered it stricken out, regardless of the withdrawal of the motion to strike out? The answer could injure the defendant only when taken in connection with the statement of the motorman, viz., "There has no one denied it, has there?" Possibly this might be regarded as a statement by the motorman that he was to blame for the accident. As a participant in the transaction, would not his statement to that effect, made six or seven minutes after the accident, when the car was at a standstill by reason of the accident, and the plaintiff was just being picked up, or had just been picked up, be admissible as a part of the *res gestae*? We think it would. In *State v.*

cause of the accident, is admissible. *Lexington St. Ry. v. Strader*, 28 Ky. L. Rep. 157, 89 S. W. 158. In an action for injuries where the plaintiff claimed that the car slacked up for him to alight and just as he was about to alight suddenly started forward, evidence is admissible that the motorman, immediately after the accident, stated that he was under the impression that the plaintiff had alighted. *McDonough v. Boston Elev. Ry. Co.*, 5 St. Ry. Rep. 375, 191 Mass. 509, 78 N. E. 141. In an action for the death of a cow struck by a car it is proper to permit a witness to testify that when the car struck the cow, the motorman, while he was getting out of the car, said, "There, that is running without a headlight." *Ensley v. Detroit United Ry. Co.*, 1 St. Ry. Rep. 380, 134 Mich. 195, 96 N. W. 34. In an action for the death of a man struck by a car, it is proper to admit as part of the *res gestae* a statement of the motorman, made within two minutes of the accident, and while he and the employees of the company were in charge of the body of the deceased, that he could have stopped the car in time, but supposed that a lineman who had jumped from the car and run ahead would remove the deceased from the track before the car would reach him. *Call v. Easton Transit Co.*, 180 Pa. St. 618, 37 Atl. 89. A statement by a motorman of a car which run over a child,

Murphy, 16 R. I. 530, 17 Atl. 998, Stiness, J., in considering the question of the admissibility of statements made after the happening of the transaction, said:

"The principle upon which the admission of such evidence rests is that declarations after an act may, nevertheless, spring so naturally and involuntarily from the thing done as to reveal its character, and thus belong to it and be a part of it; also to rebut all inference of calculation in making the declarations, and thus to entitle them to credit and weight as evidence of the transaction itself."

In that case the statements admitted in evidence as part of the *res gestae* were made about ten or fifteen minutes after the deadly assault in question, and by the person who was assaulted. In *Graves v. People*, 18 Colo. 170, 32 Pac. 63, cited in *Havens v. R. I. Suburban Ry. Co.*, 26 R. I. 48, 58 Atl. 247, 3 Ann. Cas. 617, Hayt, C. J., adopted Mr. Wharton's definition of *res gestae*, as follows:

"*Res gestae* are events speaking for themselves, through the instinctive words and acts of participants, not the words and acts of participants when narrating the events. What is done or said by participants, under the immediate spur of a transaction, becomes thus part of the transaction, because it is then the transaction that thus speaks. In such cases it is not necessary to examine as witnesses the persons who, as participators in the transaction, thus instinctively spoke or acted. What they did or said is not hearsay. It is part of the transaction itself."

made while the car was still on the body of the child, "I saw the child but thought I could pass it," or, "This is a terrible thing, I saw the child, but thought I could run past it," is admissible. *Sample v. Consol., etc., Ry. Co.*, 50 W. Va., 472, 40 S. E. 597, 57 L. R. A. 186. In an action by a passenger for injuries received in falling from a car while attempting to alight therefrom, it is proper to show that the motorman, after stopping the car and coming back to where the passenger was lying, asked her why she got off before the car stopped, or while the car was going, and why she didn't ring the bell. *Cohodes v. Menominee, etc., Tract. Co.*, 149 Wis. 308, 135 N. W. 879.

Where a passenger was injured while attempting to get on a car, a subsequent conversation, after the plaintiff had gone into the car, between a witness and the motorman, as to why he started the car, is not admissible. *Blue Ridge L. & P. Co. v. Price*, 108 Va. 652, 62 S. E. 938. Testimony that after a car had struck a child and a crowd had gathered about the conductor and motorman, and had assaulted them and was threatening further violence, the motorman said, "Gentlemen, it is my fault," is inadmissible, not being voluntary or spontaneous. *Feldman v. Detroit United Ry.*, 162 Mich. 486, 127 N. W. 687, 17 Det. L. N. 707.

The third exception is to the admission by the court of question No. 19 and the answer thereto of the witness Justice C. Haven, as found on page 56 of the transcript of testimony: "19 Q. Was there room for two teams to meet and pass? A. No, sir; not without going on the sidewalk." The exception was taken after the question had been answered. We think the admission was correct, for the reason given by the court —

"that the witness might not know the exact measurement, and yet have sufficient information, from seeing teams pass there, or attempting to pass, to know there was not room enough for two teams to pass between the car and the sidewalk."

The witness had testified that the traveled road for carts and teams between the rail and the sidewalk was narrow. He could answer the question as he did, without knowing the exact measurement, if he had knowledge of the fact as to the possibility of two teams passing each other at the place in question.

The fourth exception is to the admission by the court of questions 54 and 55, and the answers thereto of the witness Richard Slaughter, as found on page 71 of the transcript of testimony:

"54 Q. Now, what was it the motorman said about the accident? Mr. Perkins: Now, just a minute. Mr. Crafts: If you will come up here, I will call the attention of the court to what I expect to prove by him. (Counsel confer with the court.)"

The objection was overruled, and an exception taken.

"55 Q. At the time to which you just referred, what was it the motorman said? A. He thought he could pass him without hitting him."

The witness had testified that he heard the motorman say something, and had fixed the time as three or four minutes after the accident. We think the testimony was admissible as part of the *res gestae*.

* * * * *

The sixth exception is to the admission by the court of question No. 16 and the answer thereto in the deposition of the witness William Adams, as found on page 87 of the transcript of testimony:

"16 Q. Was there room at that place, where he met the automobile, for an automobile and a team to pass in the traveled part of the road?"

* Paragraph not material to street railway law omitted.

The question was proper.

The seventh exception is to the admission by the court of question numbered 78 and the answer thereto in the deposition of the witness William Adams, as found on page 96 of the transcript of testimony:

"78 Q. Did you hear the motorman or conductor say anything after the accident? A. No, sir; only I heard the motorman say that he was sure he was going to miss him; that is why he did not stop. He was sure he was going to miss him; that is why he kept on going."

The exception is without merit. The question was a proper inquiry as to the *res gestae*.

The eighth exception is to the admission by the court of question No. 80 and the answer thereto in the deposition of the witness William Adams, as found on page 97 of the transcript of testimony: "80 Q. What did they say?" The question immediately preceding was: "Did you hear anybody say anything to the motorman about his being to blame for it?" The answer to question 80 was:

"Told him there was no need of that accident to be done; if he had given the man two minutes time he would have got out of the way. I did not know the gentleman who was talking. He was in an automobile."

Question 82 was: "When he told the motorman that, what did he say?" Answer: "I did not know it was going to be, because I made sure I would miss him; that is why I did not stop." The exception is without merit.

The ninth exception is to the admission by the court of the questions and answers thereto of the plaintiff George E. Champ-
lin, showing the wages and the work done by the plaintiff in his regular occupation of teamster and livery stable keeper in the questions and answers beginning with question 7 on page 101 and extending to question 18 on page 105 of the transcript of testimony. The plaintiff had testified that he was working for the town at the time of the accident. "7 Q. What wages did you get from the town?" Objection was made to the question on the ground that there was no allegation in the declaration of special damages. The court had the allegation of the declaration read that the plaintiff was permanently injured,

"and he has been hitherto, and will be for the rest of his life, wholly incapacitated from working and earning the wages and acquiring the income which, but for said injuries, he would have earned and acquired."

The objection was overruled, and defendant excepted. An exception was noted to this class of testimony on page 104 of the transcript. The plaintiff then testified as to the work performed by him in answer to questions relative thereto, up to and including question 18 on page 105. The testimony was admissible. The exception is without merit.

The tenth exception is to the admission by the court of questions Nos. 91 and 92 and the answers thereto of the plaintiff George E. Champlin, as found on pages 115 and 116 of the transcript of testimony:

"91 Q. Was there anything that you can think of you could have done to have got out of the way faster than you did?"

"92 Q. Was there anything you could have done there that you didn't do to get out of the way sooner than you did?"

The questions were properly admitted.

The eleventh exception is to the refusal by said justice to direct a verdict for the defendant, as appears on page 243 of the transcript of testimony. This will be considered later.

The twelfth exception is to the refusal by the justice at said trial to instruct the jury as requested by the defendant in its eighth request, as found on page 261 of the record, viz.:

"If the jury reach the question of damages, they should not consider, and the plaintiff is not entitled to recover, any damages which may have resulted from his loss of earnings, income, or profits in his business as a teamster and keeper of a livery stable, because such damages are consequential and special, and are not alleged in his declaration."

No evidence was submitted as to plaintiff's profits or loss of profits, income or earnings in his business of teaming, or in the business of keeping a stable. Evidence was submitted as to his labor and the wages he received as a teamster, and as to his labor in his stable. The request was properly refused.

The thirteenth exception was disallowed by the justice presiding, and, as the defendant did not proceed to establish the truth of the same under chapter 298, § 21, Gen. Laws 1909, is not before this court.

The fourteenth exception to the charge of the court to the jury is as follows, as found on pages 247 and 249 of the charge to the jury:

"Was the defendant guilty of negligence which caused this accident? Because the defendant is not liable in this case unless it was guilty of some

negligent act which resulted in this injury. You will have before you the declaration in your jury room. You can read it for yourselves. You will find that the count sets out, or the declaration sets out, that the plaintiff bases his right to recover on the negligence of the defendant company, and if the plaintiff fails to satisfy your minds that the defendant was guilty of negligence, then your verdict should be for the defendant. In other words, the plaintiff must satisfy your minds of two propositions: First, that he was guilty of no negligence himself which contributed to the injury; second, that the defendant was guilty of negligence which caused the injury. * * * So here, if you find that this accident was caused to the plaintiff by reason of the negligence of the motorman, or of the conductor, or of both, in that case the defendant is liable to the same extent that it would be if the defendant was an individual, and had been there himself, instead of by his servant, and had caused the injury."

The exception is without merit.

The fifteenth exception is to the charge of the court to the jury, as follows, as found on page 250:

"In this case, if this motorman, and it is claimed that such is the fact, was on the front part of the car, had charge of the motions of the car, and saw with an unobstructed view the plaintiff with his team upon this highway, saw that the plaintiff was cramped in a narrow place in the highway, and forced near the track by reason of an automobile, which was upon the other side of the highway opposite the plaintiff, if the motorman saw that, and saw that by continuing with the motion of his car he would be likely to strike the wagon in which the plaintiff was riding, and thus injuring him, he had no right to go in there and speculate upon his chances of possibly getting through without injury to the plaintiff."

The exception is without merit.

The sixteenth exception is to the charge of the court to the jury, as follows, as found on page 251:

"There is another rule of law which may be applicable in some phases of this case, depending somewhat on the view you may take upon the facts, and that is this: That, even if the plaintiff by some negligent act of his did put himself into a place of danger by his own negligence, still if, after he was in a place of danger through his negligence, he was guilty of no further negligence, but did all that he could to save himself, all that he might be reasonably expected to do to avert the accident, and the motorman, if such be the case, saw the plaintiff, and appreciated the peril in which he was placed in time to avert the accident, it was the duty of the motorman to avert such an accident, and his failure to do so would become the proximate cause of the injury, and the defendant would be liable in the case, notwithstanding the original negligence on the part of the plaintiff. The rule of law as applicable to such a case I will give you in the following form: Even if the plaintiff was guilty of negligence in driving too close to the track, still if, after having done so, he was guilty of no further negligence and did all he could reason-

ably be expected to do to avert the accident, it was the duty of the driver of the car, if he saw and appreciated the peril in which the plaintiff was placed in time to slacken the speed of the car, or stop it, and avert the accident, to do so, and neglect on his part to do so under those circumstances becomes the proximate cause of the injury and renders the company liable. The party who last has a clear opportunity to avoid the accident, notwithstanding the neglect of his opponent, is considered solely responsible."

The instruction was correct.

The seventeenth exception is to the charge of the court to the jury, as follows, as found on page 253:

"And if you find that he has lost anything by reason of this accident from the fact that he has not been able to perform his usual vocation, which is that of a stable keeper, as he told you, and also as a teamster, then to the extent that he has already suffered pecuniary loss in this respect this will constitute an element of damages."

As we said in considering the twelfth exception, no evidence was submitted as to the plaintiff's profits or loss of profits in his business of teaming, or in the business of keeping a stable. Evidence was submitted as to his labor and the wages he received as a teamster, and as to his labor in his stable. The instruction was given upon the evidence introduced, and could not apply to, or cause the jury to consider, possible losses of the business of teaming, or the business of keeping a stable, matters upon which no evidence whatever had been submitted. This exception is without merit, for the same reasons as the twelfth exception.

* * * * *

The other exceptions to the decision denying the defendant's petition for a new trial are:

"(18) To the denial by the court of defendant's motion for a new trial because said verdict for the plaintiff on the question of liability was manifestly and palpably against the evidence and against the weight of the evidence. (19) To the denial by the court of defendant's motion for a new trial because the verdict for the plaintiff therein was and is, on the evidence in said case, contrary to the law as given to the jury by the court. (20) To the denial by the court of defendant's motion for a new trial on the ground that the verdict rendered therein for the plaintiff for \$15,000 damages was grossly excessive, and against the evidence and the weight of evidence on the question of damages."

On the question of liability the verdict is amply supported by the evidence. The plaintiff was fifty years old. He was able to

* Paragraphs not material to street railways omitted.

do very heavy work, and continued to do a great deal of it, up to the accident.

The evidence shows very serious injuries; that the pelvis was crushed, fractured front and back; that he has suffered great pain, and will suffer pain in the future; that the injuries are permanent, and that he will be incapacitated for labor during life. The justice presiding at the trial, who equally with the jury saw the witnesses and heard them testify, has refused to disturb the verdict. The evidence in our opinion amply sustains his decision. The damages are not so large as to indicate passion or prejudice on the part of the jury, or to shock the conscience of the court.

The defendant's motion for the direction of a verdict was properly denied.

The defendant's exceptions are severally overruled, and the case is remitted to the Superior Court for Washington county, with direction to enter judgment for the plaintiff upon the verdict.

McFadden v. Metropolitan St. Ry. Co.

(Missouri — Kansas City Court of Appeals.)

1. **COLLISION WITH AUTOMOBILE; ACTION BY PASSENGER OF AUTOMOBILE AGAINST JOINT DEFENDANTS; PETITION.** — In an action by the passenger of an automobile company to recover for injuries sustained from a collision with a street car, a petition which alleges that an employee of defendant automobile company so carelessly and negligently operated an automobile that it was struck and overturned by a street car, and that the motorman in charge of said street car negligently allowed the same to collide with the automobile, states a cause of action against the automobile company, for the cause of action inuring to plaintiff was joint and several.
2. **DUTY OF MOTORMAN; NEGLIGENCE; EVIDENCE.** — It is the duty of a motorman to keep a close lookout while passing over a busy crossing in a business district of a city.

Evidence examined and held that a motorman was negligent in failing to prevent a collision with an automobile at a street crossing.

Imputation of Negligence of Driver of Automobile to Passenger Therein. — For a discussion of the question whether the negligence of the driver of an automobile may be imputed to a passenger therein, see the note in this volume to *Kneeshaw v. Detroit United Railway Co.*, p. 615. See, also, *Huddy on Automobiles* (3d Ed.), §§ 113 and 114.

3. **USE OF STREETS; STREET CAR HAS NO RIGHT OF WAY OVER AUTOMOBILE.** — A street car has no paramount right of way over an automobile. It is the duty of the operator of each vehicle to run it in a way not to endanger the safety of others rightfully using the public streets.
4. **IMPUTED NEGLIGENCE; NEGLIGENCE OF CHAUFFEUR; COLLISION WITH STREET CAR; LIABILITY OF RAILWAY COMPANY.** — A passenger in a sightseeing automobile is not bound by the negligence of the chauffeur, and where the negligence of a motorman co-operates with that of the chauffeur in causing a collision, the passenger has a cause of action against the railway company.
5. **LAST CLEAR CHANCE.** — Where a motorman by the exercise of reasonable care might have prevented a collision with an automobile, his failure to exercise such care constitutes negligence, which, under the last chance rule, entitles a passenger in the automobile to recover damages, even should the negligence of the chauffeur be imputed to him.
6. **DUTY OF CHAUFFEUR; NEGLIGENCE.** — A chauffeur owes his passengers the highest degree of care, and is guilty of negligence if he places his passengers within striking distance of a street car running wild.
7. **WITNESSES; PREJUDICE; EVIDENCE.** — In an action to recover damages from a street railway company, evidence that a former motorman of the defendant, called as an expert witness, had said in reference to his testimony in another case that he "would burn up the company," is admissible to show the prejudice of the witness.
8. **PASSENGERS; EXTENT OF LIABILITY OF COMPANY FOR NEGLIGENCE; PROXIMATE CAUSE.** — A passenger's right to recover against a street railway company for personal injuries should be restricted to the negligence of the company which operated as a proximate cause of the injury.

DEFENDANT'S appeal from a judgment for the plaintiff. Reported 143 S. W. 884.

John H. Lucas and Clarence S. Palmer, for appellant Metropolitan St. Ry. Co.

Haff, Meservey, German & Michaels, for appellant Frank E. Lott.

Kirkpatrick & Schwind, for respondent.

Opinion by JOHNSON, J.:

Plaintiff was a passenger of defendant Lott, who operated an automobile for hire, and was injured in a collision between that vehicle and an electric car, operated by the defendant street railway company on the Troost avenue line of its street railway system in Kansas City. Both Lott and the street railway company were made defendants, on the theory that negligence of each concurred in causing the injury. The petition alleges that

"said defendant Frank E. Lott * * * was a common carrier of passengers for hire, operating a line of automobiles, and particularly the automobile hereinafter specifically mentioned. * * * and while said automobile, carrying plaintiff and other passengers, was moving north on Walnut street and approaching Tenth street the employee of defendant operating said automobile carelessly and negligently permitted the same to be struck and overturned by one of the street cars then and there being operated by the defendant street railway company."

The averments of negligence on the part of the street railway company appear in the following extract from the petition:

"That the motorman in charge of said street car of defendant Metropolitan Street Railway Company was negligent, in this: That he negligently failed and omitted to sound any signal or warning while approaching said Walnut street, or while crossing the same. That he negligently started said street car, after momentarily stopping the same at or about the time he entered upon said crossing, without sounding any bell or other signal. That he negligently started said street car, after momentarily stopping the same at or about the time he entered upon said crossing, without giving reasonable or sufficient opportunity for vehicles or persons who might attempt to cross the track ahead of said car in safety. That he negligently failed to keep a vigilant and reasonable lookout ahead of said car while starting to cross and while crossing said street. That he negligently failed to keep said street car under reasonable control while crossing said Walnut street, so as to be able to stop said car and avoid colliding with vehicles which might be attempting to pass along said Walnut street and across said track ahead of said car. That he could have stopped said car or slackened its speed, consistent with the safety of the passengers on said car, in time to avoid a collision with the said automobile, after he saw, or in the exercise of reasonable care could have seen, said automobile approaching and starting to cross the track on which said street car was moving, and after he realized, or in the exercise of reasonable care should have realized, that a collision would result if he did not stop or slacken the speed of said street car, and that he negligently failed to do so."

Defendant Lott urges an objection, made at the time of the trial, that the petition does not state a cause of action against him. The theory of the objection is that the defendants are sued as joint tortfeasors; but the facts alleged conclusively negative the charge that the injury was the result of any joint action. This theory is founded on a misconception of the nature of the pleaded cause. Each defendant is charged with negligence that became an active agency in the production of the injury. It is true each defendant acted independently of the other, so far as purpose or intention was concerned. Necessarily the doer of a negligent deed must act independently in that sense; but it could be true, and the petition alleges the fact to be, that, while the negligence of each

defendant was a proximate cause of the injury, each of said negligent acts concurred and co-operated with the other in the production of a single injurious result. The cause of action inuring to plaintiff from such result was joint and several. He might sue one or both wrongdoers, and his allegation that their negligence was concurrent would not preclude his recovery against either defendant, on proof that the negligence of that defendant alone caused the injury. There is an essential difference in principle between torts committed in pursuance of a conspiracy, understanding or mutual purpose among the tortfeasors and torts, not so characterized, which commingle and co-operate in the production of a single result. The court properly overruled the objection to the petition.

The injury occurred on the morning of September 2, 1905, at the intersection of Tenth and Walnut streets in Kansas City. Defendant operates a double-track street railway on Walnut street, which runs east and west, and a single-track line on Tenth street. Plaintiff lived in Minneapolis, Minn., and, together with members of his family, visited Kansas City, and during the visit took a pleasure ride in a "sight-seeing" automobile, operated by defendant Lott. While the automobile was proceeding north along the east side of Walnut street, and was crossing Tenth street, a Troost avenue street car, east-bound on Tenth, collided with and overturned it. Plaintiff, who attempted to escape injury by jumping, was caught by the top of the vehicle as it capsized, thrown down, and pinned to the pavement.

The testimony of plaintiff, relating to the facts of the injury, thus may be stated: The street car, which, in approaching Walnut street, had come up a steep grade, was compelled to stop at the west line of Walnut street by the passage over the crossing of a heavy truck, which was going south on the west side of Walnut street. A one-horse laundry wagon, following in the wake of the truck, crowded in front of the street car, to the keen displeasure of the motorman, who engaged in a wordy altercation with the laundryman. After the wagon had crossed the track and the motorman had started forward, he continued the quarrel, and, instead of looking ahead, turned his face in the direction of the retreating laundryman, and vigorously maintained his side of a pungent verbal controversy. The street car traveled approximately forty feet before it reached the place of the collision, and the motorman did not look ahead until it was about to strike the

automobile, when, realizing the peril, he tried to stop by reversing the current. His car was running only four or five miles per hour; but it was too close to the automobile to be stopped in time to avoid a collision. The automobile, which was twenty or twenty-five feet long, and which was running slowly, though a little faster than the street car, almost cleared the crossing, but was struck on the rear wheel so lightly that, though overturned, it was only slightly damaged. There was a north-bound Walnut car standing near the south line of Tenth street, and the automobile passed east of that car; but there was no obstruction to prevent the motorman of the Troost car and the chauffeur from seeing each other in ample time for either to have avoided the collision. To sum up the testimony of the plaintiff without reciting its details, it tends to inculcate both motorman and chauffeur. If the motorman had been attending to his proper business, which required him to keep a close lookout while passing over a busy crossing in the business district of the city, he would have seen that the chauffeur purposed crossing ahead of the car and would reach the crossing first, and easily could have stopped his car and prevented the collision, had he reasonably exerted himself. The street car had no paramount right to the crossing, no right of way over the automobile; nor did the latter conveyance have a superior right to that of the street car. It was the duty of the operator of each vehicle to run it in a way not to endanger the safety of others rightfully using the public streets.

Concede that the chauffeur was negligent, the testimony of plaintiff still accuses the motorman of negligence, both of the kind known as "ordinary negligence" and that falling under the rules of the humanitarian doctrine, and as to neither class of negligence would that of the chauffeur defeat plaintiff's action against the defendant street railway company. Being a mere passenger in the automobile, and in a position where he could exercise no control over the chauffeur, plaintiff was not bound by the negligence of the chauffeur, since, under no rule of law, might such negligence be imputed to him. Consequently the negligence of the motorman that co-operated with that of the chauffeur in creating the perilous situation of plaintiff affords plaintiff a cause of action against the defendant railway company. And if it be true, as the testimony of plaintiff tends to show, that the motorman, had he been in the exercise of reasonable care, would have discovered the perilous position of plaintiff and prevented the injury, his

failure to exercise such care would constitute negligence which, under the last-chance rule, would entitle plaintiff to recover his damages, even should the negligence of the chauffeur be imputed to him.

Of the negligence of the chauffeur, there can be no question. He owed his passengers the highest degree of care, and plaintiff's evidence tends to show he failed to measure to the standard of ordinary care. If he looked in the direction of the street car, he must have observed the negligence of the motorman, and a reasonably prudent person in his situation would have realized the danger of placing his passengers within striking range of a car that, for all practical purposes, was running wild. The court did not err in overruling the demurrers to the evidence offered by the respective defendants.

The facts we have stated are drawn from the evidence most favorable to plaintiff. The evidence introduced by the defendants tended to convict each other of negligence, and to exonerate the party offering the evidence. Taken as a whole, the evidence presents several credible hypotheses of fact, viz.: First, the one to which we have referred, that the motorman and chauffeur were both remiss, and that their negligent acts concurred in causing the injury; second, that while the motorman was proceeding over the crossing, at two or three miles per hour, the automobile came up at twenty or twenty-five miles per hour and unexpectedly ran in front of the car, depriving the motorman of any opportunity of avoiding the collision; third, that the chauffeur gained the crossing without any indication on the part of the street car that his use of it would be contested; and, fourth, the further inference is deducible from the evidence that both street car and automobile were running at low speed, and that the motorman had no reasonable cause to think the chauffeur would go on the crossing until it was too late for the street car to be stopped in time to avoid the collision. Witnesses differed about the rates of speed of the two cars and about the distance in which each could be stopped at a given speed.

Plaintiff introduced as an expert witness a motorman formerly in the employment of the street railway company who testified that the street car could have been stopped, at the speed given in the testimony of plaintiff, in from four to eight feet. The fact was elicited on cross-examination that the witness had been called as an expert in a number of other cases against the company, and

was asked if he had not made the statement, with reference to another case, that in the testimony he would give therein he "would burn up the company." He denied making such statement, and afterward the defendant called to the stand the person to whom the statement was alleged to have been made, and asked him:

"During the course of that conversation, I will ask if he stated, in effect, that he was going to be a witness against the Metropolitan and would 'burn it up?'"

The witness answered: "He did; yes, sir." On motion of plaintiff this question and answer were stricken out, and defendant company excepted. The ruling of the court was erroneous. The rule thus is stated in 1 Greenleaf on Evidence (16th Ed.), § 450:

"The partiality of a witness for one party or side, or his prejudice against the other side, is always regarded as bearing on the trustworthiness of his testimony. One way of showing the existence of such bias is his prior expression of such feelings. Thus it is always allowable to inquire of the witness for the prosecution, in cross-examination, whether he has not expressed feelings of hostility towards the prisoner. The like inquiry may be made in a civil action; and if the witness denies the fact he may be contradicted by other witnesses."

There is abundant authority supporting the rule. 2 Encyc. of Ev. 408; *Newton v. Harris*, 6 N. Y. 345; *Starks v. People*, 5 Denio (N. Y.) 106; *Starkie on Ev.* (10th Ed.) 202; 3 Jones on Ev., § 829; *Abbott's Trial Brief*, Civil Jury Trials (2d Ed.), p. 192; 2 Wigmore on Evidence, § 978; *Schultz v. Railway*, 89 N. Y. 242; *Waddingham v. Hulett*, 92 Mo. 528, 5 S. W. 27.

Evidently the court overlooked the difference between evidence of statements of a witness tending to show bias or prejudice and evidence merely tending to disprove a statement of the witness relative to a collateral issue or fact. The only negligence of the defendant railway company submitted in plaintiff's instructions was negligence under the last-chance rule, and, considering the sharp conflict in the evidence and the various inferences of fact offered by it to the jury, the testimony of the witness attacked was highly important and the suppression of evidence tending to show his prejudice cannot be otherwise regarded than as highly prejudicial.

The objection of defendant Lott to plaintiff's instruction No. 2

is sufficiently answered by the decisions of the Supreme Court in *Logan v. Railway*, 3 St. Ry. Rep. 564, 183 Mo., loc. cit. 582, 82 S. W. 126, and *Furnish v. Railroad*, 102 Mo. 438, 13 S. W. 1044, 22 Am. St. Rep. 781, and by this court in *McRae v. Railway*, 5 St. Ry. Rep. 636, 125 Mo. App. 562, 102 S. W. 1032.

Instruction No. 7, given at the request of plaintiff, was erroneous in failing to restrict a passenger's right to recover against the carrier for personal injuries to negligence of the carrier which operated as a proximate cause of the injury. This instruction deals only with abstract propositions of law, and should not have been given.

Instruction K, asked by defendant Lott, was properly refused, since it assumed as proved a fact about which the evidence presented a substantial controversy.

The instruction on the measure of damages also is erroneous in allowing a larger assessment for medical expenses, etc., than the evidence warranted. This last error could be cured by a remittitur; but the other errors we have noticed were prejudicial and compel a new trial of the cause.

Accordingly the judgment is reversed and the cause remanded. All concur.

Jones v. Rapid Transit Ry. Co.

(Texas — Court of Civil Appeals.)

COLLISION WITH VEHICLE; FAILURE TO LOOK AND LISTEN. — Action to recover for personal injuries received and for the value of plaintiff's horses and wagon destroyed in a collision with one of the defendant's cars. Evidence examined and held that the plaintiff failed to look or listen for cars as he drove on the crossing, and failed to exercise any care for his own safety.

Although the mere failure of a person, approaching a railway crossing, to look and listen for cars is not negligence *per se*, one in approaching such a crossing must exercise ordinary care in going upon the track to see that he may do so with safety.

PLAINTIFF appeals from judgment for defendant. Reported 146 S. W. 618.

Duty to Look and Listen. — For a discussion of the duty imposed upon a traveler to look and listen for approaching cars before crossing a street railway track, see the note to *Wilson v. St. Louis Transit Co.*, 7 St. Ry. Rep. 1.

M. L. Dye and W. L. Crawford, both of Dallas, for appellant.

Baker, Botts, Parker & Garwood, of Houston, and *Spence, Knight, Baker & Harris*, of Dallas, for appellees.

Opinion by TALBOT, J.:

On March 2, 1912, the judgment from which this appeal is prosecuted was reversed, and the cause remanded for a new trial. Further consideration of the case, however, on appellees' motion for a rehearing, has convinced us that the conclusions reached, upon which that action was taken, as expressed in the opinion heretofore handed down, were erroneous, and that opinion will be withdrawn and this opinion filed instead thereof.

The suit is one instituted by the appellant, C. L. Jones, against the appellees for damages for personal injuries received, and for the value of appellant's horses and wagon, destroyed in a collision with one of the appellee's cars on or about November 16, 1907.

It is alleged, and appellant testified in substance, that on or about 8 o'clock of the night of the 16th of November, 1907, while the night was dark, and while it was raining, plaintiff was driving his team, attached to a wagon loaded with wood, on and along Pearl street, in the city of Dallas, going in a southern direction, where said street crosses Commerce street, which runs in an easterly direction and about at right angles with said Pearl street; that at a point about the center of the intersection of said streets there was a large electric arc lamp or light overhanging said streets at their said intersection, emitting a dazzling and bright light over and about said street crossing; that as plaintiff was in the act of crossing said Commerce street on said Pearl street, and after he had crossed said defendant's north track on said Commerce street, and about the time his team entered, or was entering upon, said south track, plaintiff discovered defendant's electric car approaching from the west on said south track, and going at a rapid rate of speed of twenty miles an hour on a downgrade; that at the time he discovered the car it was about seventy-five or eighty yards from him; that plaintiff, immediately on the discovery of said car, applied the whip to his team and made every possible effort to get off of said track, but about the time his team had cleared said track, and the middle of his wagon had reached the middle of said south track, said approaching car struck and ran over said wagon, dividing it into parts, and hurling plaintiff from the top of said

load of wood violently down against the bois d'arc pavement, whereby he was seriously and permanently injured. The case was tried before the court and a jury, and trial resulted in a verdict and judgment for the defendants, and plaintiff appealed.

The court charged the jury, at the request of the defendants, as follows:

"You are instructed that plaintiff, in approaching a street railway crossing, must exercise ordinary prudence in going upon the track to see that he may do so with safety. He cannot excuse absence of care by showing that those in charge of the train have also been guilty of negligence. While persons using a street railway crossing have a right to expect the laws governing their operation will be obeyed, this is no substitute for the duty of exercising care for themselves; and they are not excused from that duty by the fault of the other party. You are therefore instructed that, if you should find and believe from the evidence that plaintiff, as he approached the scene of the accident complained of, did not look or listen for the approach of defendant's car, and exercised no care to discover the approach of same and avoid a collision therewith, he would be guilty of contributory negligence as a matter of law."

That portion of the charge quoted, which reads,

"You are therefore instructed that, if you should find and believe from the evidence that plaintiff, as he approached the scene of the accident, did not look or listen for the approach of defendant's car, and exercised no care to discover the approach of same and avoid a collision therewith, he would be guilty of contributory negligence as a matter of law,"

is complained of by the appellant and made the basis of his fifth assignment of error. We heretofore held that this assignment was well taken, upon the ground that there was no evidence in the record that the plaintiff, in the exercise of ordinary care for his own safety, could have done anything, other than to look or listen for the approach of defendant's car; and therefore the effect of the charge was to tell the jury that, if plaintiff, as he approached the Commerce street crossing, failed to look or listen for the approach of the car that struck his wagon, he was guilty of negligence *per se*, and could not recover. As indicated in a former part of this opinion, we now think these conclusions are incorrect.

Plainly the charge under consideration, by its terms, not only required the jury to find, before they were authorized to return a verdict in favor of the appellee, on the ground that the appellant was guilty of contributory negligence, that appellant not only failed to look or listen for the approach of the car in question, but

that he exercised no care to discover the approach of said car, and to avoid a collision therewith; and, upon a more thorough examination and consideration of the evidence, we think it sufficient to justify the finding, necessarily embraced in the jury's verdict, that appellant exercised no care whatever to discover the approach of appellee's car and avoid the accident resulting in the injuries of which he complains. It is true he testifies himself that, as he approached the crossing, he looked and listened for the approach of cars, and neither saw nor heard the car that struck his wagon until it was too late to avoid the collision; but the jury, in view of other testimony and the undisputed physical facts, were not compelled to believe this statement. From a consideration of all the facts and circumstances of the case, they were authorized to find, as they evidently did, that appellant failed to look or listen for cars as he drove on the crossing, and failed to exercise any care for his own safety. The testimony and map introduced in evidence very clearly show that, as the appellant approached the Commerce street crossing from the north on Pearl street, and at a distance of sixty feet north of the curb line on Commerce street, he could, had he been looking, have seen the defendant's approaching car at a distance of between 200 and 300 feet; that on Pearl street, at a distance of twenty feet, or even forty feet, north of Commerce street, he could have seen the approaching car, had he then been looking, at a distance from the crossing of at least 470 feet, and probably at a greater distance. The plaintiff, among other things, testified:

"Just before I got into Commerce street, I commenced looking and listening for cars. Just as my horses got on to the south track, I discovered the car coming. It was about 75 or 80 yards from me. My horses were just going on to the south track when I discovered the car; that would make my wagon between the two tracks. I saw the car about 70 or 80 steps from me. It was somewhere in the middle of the block when I saw it."

Plaintiff further testified: "I suppose there was a headlight on the car." The testimony was conflicting as to the rate of speed the car was running. Some one or more of the appellant's witnesses testified that it was running about twenty or twenty-five miles an hour; while the appellee's motorman, operating the car, said, "I was running at the rate of about six or seven miles an hour." This witness further testified that the headlight of the car was burning, and that he rang the bell in the usual way as he

neared the crossing. C. R. Brown, appellee's engineer, testified: "The block between Pearl and Harwood street is 470 feet long."

From the testimony, above quoted, of the appellant himself, the jury was authorized to conclude that he discovered the approaching car when it was 240 feet distant from the crossing, and, from the testimony of appellee's motorman, that it was moving at no greater rate of speed than seven miles an hour. From the testimony as a whole, they could have concluded, as urged by appellee, that the appellant, after he discovered the car 240 feet away, with his horses just entering upon the track upon which the car was being operated, and his wagon to the north of the track, could have avoided the collision by merely turning his horses, either to the right or to the left, permitting his wagon to remain stationary. That, indeed, he could have driven across the track in time to avoid the accident, had he taken proper steps to do so, there being evidence from which the jury could have found that he only had to travel twenty feet, while the car was traveling 240 feet. In other words, the jury was authorized to find from the evidence that, if appellant had driven his team along, after he discovered the car approaching, at the rate of three miles an hour, he could have crossed the track before the car, going at the rate of six or seven miles an hour, could have traveled 240 feet. The jury, in the state of the evidence as disclosed by the record, did not have to believe either the appellant's statement that he looked and listened for the approach of the car, or his statement that, after discovering the car, he whipped his horses up in an effort to get over the crossing before the car reached him; or, if they believed that the car was 240 feet away when he discovered it, and he had only gotten his wagon in the center of the south track, after whipping up his horses, when the wagon was hit, the jury could have found that he discovered the car when his horses were a few feet north of the track the car was on, and therefore could have found that by then stopping he could have avoided the accident, and that in failing to do so he was guilty of negligence which contributed to his injuries.

It is well settled by the decisions of this State that the mere failure of a person, approaching a railway crossing, to look and listen for cars is not negligence *per se*. But it is also well-settled law of this State that one, in approaching such a crossing,

"must exercise ordinary care in going upon the track to see that he may do so with safety. He cannot excuse the absence of all care by showing that those in charge of a train have also been guilty of negligence."

Railway v. Edwards, 100 Tex. 22, 93 S. W. 106. The testimony in the instant case was sufficient to justify a finding, not only that the appellant failed to look and listen for cars as he approached the crossing where the accident complained of occurred, but also that he failed to exercise any care whatever to ascertain that he might go upon and over said crossing with safety. It was shown, practically without dispute, that the headlight of appellee's car was burning, and that this light must have been in plain view of appellant for a distance of at least four or five hundred feet from the crossing.

"And where a person knowingly about to cross a railroad track may have an unobstructed view of the railroad, so as to know of the approach of a train a sufficient time to clearly avoid any injury, he cannot recover as a matter of law, although the company may have been negligent or neglected to perform a statutory requirement."

Railway v. Kutac, 72 Tex. 643, 11 S. W. 127. Under the charge in question, the jury must have concluded that the appellant exercised no care for his own safety; and, the evidence warranting such conclusion, their verdict should not be disturbed.

Appellant's other assignments present no new or novel question, and need not be discussed. It is sufficient to say that they have been carefully considered, and that, in the opinion of this court, they disclose no reversible error.

The appellee's motion for a rehearing is granted; and the judgment of the District Court is affirmed.

East St. Louis & Suburban Ry. Co. v. City of Belleville.

(Illinois — U. S. District Court.)

REGULATION OF FARES; DUE PROCESS OF LAW; REASONABLENESS OF FARES.

— The State cannot by any of its agencies, legislative, executive, judicial, or municipal, so regulate fares to be charged by street railway companies, as to withhold from the owners thereof just compensation for its use. That would be a deprivation of property without due process of law.

Regulation of Fare as a Deprivation of Property Without Due Process of Law. — In *Nellis on Street Railways* (2d Ed.), § 137, it is said: "Neither the Legislature nor any commission acting under the authority of

A five-cent fare is unreasonable where it will only yield an annual return of \$3,503.15 upon property valued at \$650,000.

Bill in equity by the plaintiff company against the city of Belleville. Reported 193 Fed. 95.

M. W. Schaefer, C. L. McKeehan and J. S. Clark, for complainant.

A. H. Baer and J. M. Hamill, for defendant.

Opinion by WRIGHT, D. J.:

Succinctly stated the point for determination in this case is whether a five-cent fare extended from the old limits of the city of Belleville along the line of complainant's road through the annexed strip of territory to Edgemont, will afford to the complainant a just and reasonable return for the use of its property. By his findings and conclusions the master has determined the above question in the affirmative, and has reported his recommendations to the court that complainant's bill be dismissed for want of equity, to which report and conclusions the complainant has excepted. I am unable to agree with the conclusions of the master, and shall briefly state my reasons for the determination I have reached.

The rule of the law by which we should be guided in a case like this may be stated thus: The State cannot by any of its agencies, legislative, executive, judicial, or municipal, withhold from owners of property just compensation for its use. That would be a deprivation of property without due process of law. The law thus briefly stated is so elementary that authorities are unnecessary to be cited.

In a case like this, it is first necessary to ascertain the present going value of the property involved in order to have a proper basis upon which to compute the value of its use. The master by his findings has endeavored to do this, and it is upon such find-

the Legislature can establish, arbitrarily and without regard to justice and right, a tariff of rates for fares and transportation which is so unreasonable as to practically destroy the value of property of persons engaged in the carrying business, on the one hand, nor so exorbitant and extravagant as to be in utter disregard of the rights of the public for the use of such transportation, on the other. The question of reasonableness is always a judicial one. * * * But the power of a municipality to fix rates does not authorize it to prescribe unreasonable rates which will deprive the company of property rights by preventing reasonable compensation for its service, and thus amount to a taking of property without due process of law in violation of the Constitution of the United States."

ings that exceptions are elaborately argued by counsel for both sides. I have examined and considered the whole evidence upon this point in the light of the master's findings and the very able arguments of counsel for both parties, and the printed briefs and arguments filed in the case, and have reached a conclusion as to the present going value of the property different from the master. I do not deem it necessary to go into the various details by which I reach this conclusion, because all the evidence is in the record and different minds might reach a greater valuation and others a less valuation than I have done. It is a question of fact to be determined upon a fair and impartial consideration of the evidence as a whole, disregarding none, rejecting none, but endeavoring to reconcile and give to every part of it the weight which it is fairly entitled to receive, and also without going outside of the evidence to hunt up supposititious situations having no support upon the evidence in the record. After such a consideration of the evidence, I am convinced the master has reached a less valuation than that warranted and required by the evidence, and while I have not determined, and it is not my intention to determine, the precise valuation to be adopted, inasmuch as that is unnecessary, having no power or authority to fix rates, I am satisfied that a fair valuation of the property concerned in this case should not be less than \$650,000, and I may say that I would be better satisfied with a somewhat larger valuation.

Having reached a conclusion upon the present going valuation of the property concerned, we now give attention to the earnings from the operation of the property concerned under the five-cent fare regulation imposed by the ordinance in question. While Mr. Ludlam's evidence as contained in Exhibit 26 may or may not be subject to some doubt as to certain items being strictly operating expenses, or something else, they have gone into the record as evidence of operating expenses, and so far as I have discovered are not disputed by other expert testimony. Under all the circumstances of this case, I do not think it consistent with the fair justice of the case to refuse to apply to the consideration of the evidence the rule that every fair intendment may be indulged from facts directly or actually proved. I believe in fairness this statement of the witness Ludlam should be accepted as true, inasmuch as it seems undisputed, unless we shall enter into it and discredit it inherently, and this I feel would be an injustice unwarranted by all the circumstances of the case. Accepting, therefore, this

statement as true, we have average yearly receipts from the operation of the property concerned, under the regulation for a five-cent fare, of \$122,313.86, and the operating expenses \$99,310.73, leaving a net return of \$23,003.13, for depreciation and a fair return to the complainant on the value of its property. According to the evidence, depreciation will vary from two and one-half to five per cent. If three per cent. is allowed here for depreciation, and it seems certain the evidence will warrant that or more, we have \$3,503.15, remaining to be applied as an annual return upon property valued at \$650,000. If the court is correct in this conclusion, and I am satisfied it is justified in reaching it, is any argument needed to prove that the State, by its municipality, by its ordinance imposing the regulation of a five-cent fare into the annexed strip of territory, is withholding from the complainant, the owner of this private property, just compensation for its use, and thereby depriving it of its property without due process of law? Surely no such argument is needful, for the very statement of it proves the case beyond the possibility of refutation.

I ought to say in conclusion that if the natural growth of the city of Belleville required the extension of its limits in a reasonable manner, no doubt exists in the mind of the court that a five-cent fare, as is usual in almost every city, so as to become, as was said in the argument, conventional, would have been sufficient because of such natural growth in business and population. No such natural growth is apparent in this case, and while it is conceded that the city had the naked legal right to annex this long, narrow strip of territory, containing complainant's road, still there was no overruling necessity, public or otherwise, for such annexation, and as was said by the Supreme Court of Illinois in *City of Belleville v. St. Clair Turnpike Company*, 234 Ill. 428, 84 N. E. 1049, 17 L. R. A. (N. S.) 1071:

"The means employed bear no real substantial relations to public objects. They are manifestly arbitrary and unreasonable beyond the necessities of the case. It is the duty of the court, therefore, to disregard mere forms and interfere for the protection of rights injuriously affected. Under the pretense of regulation appellee attempted to take from appellant essential rights and privileges conferred by its charter."

I have thus quoted from the Supreme Court of Illinois to show that this annexation had no real or substantial relation to public objects in its opinion. If that is true, as that court has said, then

the public, the citizens of Belleville, had no great interest in the extension of the five-cent fare of the railroad into the Edgemont strip, and it was not for their benefit it was made, but more particularly would the outside traffic be benefited. This aspect of the case is alluded to at the close of these reasons, not as an excuse for the conclusion the court has already given, but as a further duty of the court in addition as the court believes, to the natural equities of the case, to disregard mere forms and interfere for the protection of rights injuriously affected.

The exceptions of the complainant to the findings and conclusions of the master will be sustained, and a general finding of the equities of the cause may be entered for the complainant, and a decree may be prepared for the complainant as prayed in the bill of complaint.

Niehaus v. United Rys. Co. of St. Louis.

(Missouri—St. Louis Court of Appeals.)

1. COLLISION WITH VEHICLE; EXCESSIVE SPEED; QUESTION FOR JURY.—

Where in an action for injuries to an occupant of a vehicle from a collision with a street car alleged to have been running at an excessive rate of speed, the question whether the accident was caused by the excessive speed was under the evidence properly submitted to the jury.

2. SAME; EVIDENCE; OPINION AS TO SPEED OF CAR.—The rate of speed of moving cars may be shown by the opinion of a witness who saw the cars in motion.

Such a witness may testify "that the car was going faster than the ordinary."

3. SAME; NEGLIGENCE; PROOF.—Where in an action to recover for the death of an occupant of a vehicle colliding with a street car, it is alleged that

Opinion as to Speed of Car.—In Chamberlayne's Modern Law of Evidence, § 2088, it is said: "A witness qualified to speak may not state what is the specific speed of a railroad train or trolley car in distance traversed during a particular period. He may declare himself in some more general form of expression. Thus, he may give his opinion regarding a train or single car that it was going 'fast,' or very fast, although he cannot say rapidly. Applying the standard of safety, he may speak of a given rate of motion as 'dangerous,' 'high,' or even 'reckless.' Certain characterizations of speed, although general in form, have been held to involve so large an element of special knowledge or so great a proportion of reasoning as to require the technical training of a skilled witness. Thus, only such an observer can state that a moving object was going 'as fast as it could.'"

the motorman was "running said car at said time and place at a high and dangerous rate of speed, to wit, at a speed of more than fifteen miles per hour," it is unnecessary to prove that the car was running more than fifteen miles per hour.

4. **SAME; DAMAGES; INSTRUCTIONS.** — Instructions as to damages in an action by the administratrix of an unmarried woman to recover for her death, that if the jury find for the plaintiff they shall return a verdict not less than \$2,000, and not exceeding \$10,000, as a penalty for the unlawful act complained of are proper.

DEFENDANT appeals from judgment for plaintiff. Reported 148 S. W. 389.

STATEMENT OF FACTS BY THE COURT.

Plaintiff brought this suit under the second section of the damage act (section 5425 of the Revised Statutes of Missouri 1909) to recover \$10,000 damages for the negligent killing of his intestate, Annette E. Niehaus. The plaintiff had verdict and judgment against the defendant for \$5,000, and the defendant has appealed.

Miss Niehaus was killed in a collision between one of the defendant's street cars and a runabout in which she was riding; the collision occurring on Sunday afternoon, July 11, 1909, at the intersection of Shenandoah avenue and Lawrence street, in the city of St. Louis. Plaintiff charges that her death was caused by the negligence of defendant's motorman in charge of the street car as follows:

1. "In running said car at said time and place at a high and dangerous rate of speed, to wit, at a speed of more than fifteen miles per hour;"
2. "In running said car at said time and place at a greater rate of speed than fifteen miles per hour,"

contrary to ordinance, pleading such ordinance. There were two other specifications of negligence, but they need not be noticed as they were not submitted to the jury. The defendant offered no evidence. The evidence on behalf of the plaintiff discloses that Shenandoah avenue and Lawrence street are open public streets in the city of St. Louis; the former running east and west and the latter north and south. Defendant operated a double-track street railroad line on Shenandoah avenue, crossing Lawrence street at right angles. Lawrence street leads to and from a large public park, is much traveled, especially on Sunday afternoons, by people visiting the park. On a Sunday afternoon, July 11, 1909, Miss Niehaus was riding south along Lawrence street in an ordinary

runabout, pulled by a small horse, driven by her adult married sister, Mrs. Ruwe. She held a baby in her lap. The runabout with its occupants approached Shenandoah avenue, the horse going at a moderate trot. For a considerable distance, some three blocks, Shenandoah avenue inclined sharply downward toward and past the point where it crossed Lawrence street. West-bound cars came down this incline. The driver in the runabout, Mrs. Ruwe, could not look eastwardly along and up this incline until she had reached about the front building line of a row of houses which fronted south on Shenandoah avenue. Then she looked, and could see eastwardly past a hedge to a point in the west-bound track 160 feet east of the center line of Lawrence street along which the runabout was traveling. She saw nothing to indicate the approach of a car, and drove on, remembering nothing more. As the horse and runabout with its occupants approached the track, a car belonging to the defendant came down the incline on the west-bound track at a "terrible" speed, which in the opinion of one witness was at the rate of twenty-five miles per hour. When this witness first noticed the car and its speed, it was at the third or fourth house east of the corner house, a point which we calculate from measurements on a plat introduced in evidence is from 105 to 130 feet from the point of collision. From that point the car, according to this witness, ran to the point of collision without any perceptible slackening of speed. A man who sat on the sand box by the motorman testified that the car was "coasting" — that is, running down the hill without brake or power — that he first noticed the runabout when the car was about seventy-five feet from the crossing, and at that time the head of the horse was about ten feet from the track. The car ran about 125 feet beyond the point of collision before stopping. It had struck the horse and runabout about midway; that is, so as to strike about the hind part of the horse and the front part of the runabout, and had passed through, separating the horse from the runabout. When the car stopped, the horse was lying dead on the south side of the car and ten or fifteen feet back of it. The runabout was on the north side and near the front of the car, with one of its wheels broken off. The baby was caught and held on the front window of the car. Miss Niehaus was lying under the air tank on the north side of the car suffering from injuries from which she died. Mrs. Ruwe was also found on the ground badly injured. It was shown that Miss Niehaus was an adult person, and had neither husband nor

child, natural born or adopted. No evidence was offered tending to show her earning capacity or expectancy of life. As some point is made on the testimony of two of the witnesses who testified as to the speed of the car, we will mention such testimony more particularly. A. W. Gohausen testified that he was seventeen years of age and had lived in the city of St. Louis and been riding in street cars all his life; had ridden in the Shenandoah avenue cars up and down Shenandoah avenue. He observed the speed of this car from the sidewalk. On direct examination he was permitted to state over the objection of the defendant, in substance, that the car was running faster than cars ordinarily ran down this particular incline past Lawrence street. On cross-examination he stated that cars ordinarily traveled fast down that hill on Shenandoah avenue, and that this car traveled faster than they ordinarily did. The direct examination of George Kletzker, the man on the sand box, proceeded in part as follows: He first stated: That for two months he had been a guide for the Auto Sight Seeing Company, and that the automobiles he had ridden on in such employment usually went at the rate of fifteen to twenty miles an hour. That he had lived in St. Louis all his life, and had noticed the speed of street cars and had ridden on them as well as railroad trains.

"Q. Do you know enough about the speed from riding on automobiles and street cars to give us some idea about how fast that car was going? A. Well, I would say it was going faster than they generally run. Mr. Francis: I move that be stricken out. The Court: That is not responsive. That will be stricken out for the present. By Mr. Johnson: Compare it with your automobile when you were going fifteen to twenty miles an hour, how was this car going? A. It was going much faster. (Defendant's counsel moves to strike out the answer as being a conclusion; objection overruled; defendant at the time duly excepts.)"

The plaintiff also introduced the speed ordinance of the city of St. Louis which was pleaded. It prohibited cars being run at the point where this collision occurred at a speed greater than at the rate of fifteen miles per hour.

At the instance of the plaintiff the court gave three instructions. The first instruction hypothesized the facts necessary to be found in order to plaintiff's recovery under the first charge of negligence, viz., that the

"said collision and injuries to the said Annette E. Niehaus which caused her death were directly caused by the negligence of defendant's motorman in charge

of said car in running said car at said time and place at a high and dangerous rate of speed, to wit, at a speed of more than fifteen miles per hour."

By this instruction the trial court did not require the jury to find that the car was being run at a rate of speed in excess of fifteen miles an hour, but permitted them to find for the plaintiff if they believed it was being negligently run at what was a dangerous rate of speed under the facts and circumstances. The second instruction dealt with the charge that the car was being run at a greater rate of speed than was allowed under the city ordinance, viz., fifteen miles per hour. The third instruction gave the usual definitions of "ordinary care" and "negligence."

The court gave eight instructions at the instance of the defendant. It is unnecessary to set them forth. Of its own motion the court gave instruction No. 12, as follows:

"The court further instructs the jury that, if under the other instructions, you find for the plaintiff, you will return a verdict in his favor in such sum, not less than \$2,000, and not exceeding \$10,000, as in your discretion should be awarded to him and inflicted upon the defendant as a penalty for the unlawful act complained of, taking into consideration all of the facts and circumstances in evidence before you. * * * If, on the other hand, you decide under the evidence and the law as declared in the other instructions given you to find for the defendant, your verdict need merely state that you find in favor of the defendant."

Boyle & Priest and *T. E. Francis*, of St. Louis, for appellant.

Johnson, Houts, Marlatt & Hawes, of St. Louis, for respondent.

Opinion by CAULFIELD, J.:

1. The defendant first contends that the court erred in refusing to direct a verdict for the defendant, because

"there was no showing that the collision would not have occurred had the car been running at fifteen miles per hour, and therefore no causal connection was established between the alleged operation of the car at a negligent rate of speed and the injury to decedent."

We do not agree with defendant's premise, and therefore cannot accept the conclusion based thereon. It appears from the evidence that the vehicle in which the plaintiff was riding was an ordinary runabout, pulled by a small horse. The horse approached the track and was crossing over it at an ordinary trot, when the car bore down upon it, running twenty-five miles an hour. The

car apparently struck at a point near the rear of the horse and the front of the body of the runabout. It had maintained this high rate of speed for at least 105 feet. It would have taken it two seconds longer to run that 105 feet and reach the point of collision if it had been going only fifteen miles an hour. The jury may well have found that during that extra two seconds the horse and runabout, going at an ordinary trot, say six miles an hour, could have passed off the track and escaped. Under these circumstances, the question of causal connection was properly submitted to the jury. See *Stotler v. Railroad*, 200 Mo. 107, 98 S. W. 509; *Powers v. Transit Co.*, 5 St. Ry. Rep. 663, 202 Mo. 267, 100 S. W. 655; *Schmidt v. Translt Co.*, 140 Mo. App. 182, 120 S. W. 96; *Connor v. Wabash Railroad*, 149 Mo. App. 675, 129 S. W. 777; *Strauchon v. Met. Street Ry. Co.*, 7 St. Ry. Rep. 50, 232 Mo. 587, 596, 135 S. W. 14.

2. There was no error in the admission of the testimony of witness Gohausen "that the car was going faster than the ordinary." His other testimony disclosed that he meant that the car was going faster than they ordinarily traveled down the hill on Shenandoah avenue to the point where the collision occurred. On cross-examination he testified, in effect, that the cars usually traveled fast down that hill, but that "this car traveled faster than they ordinarily do." The rule is well settled in this State

"that the rate of speed of moving cars may be shown by the opinion of a witness who saw the cars in motion,"

and that

"one who sees a moving train and possesses a knowledge of time and distance is competent to express an opinion as to the rate of speed at which the train is moving."

Walsh v. Railroad, 102 Mo. 582, 586, 14 S. W. 873, 15 S. W. 757. This evidence then was not incompetent for the purpose of proving the speed of the car. Was it relevant? We think it was. One of the allegations of negligence was that the car was run "at said time and place at a high and dangerous rate of speed;" another that the speed of the car was in excess of the maximum rate prescribed by ordinance. One of the witnesses testified that the car was running at the rate of twenty-five miles an hour. The evidence that the car was running faster than cars usually ran at that place had a tendency to prove that the speed was negligent,

for the fact that the speed was different than ordinary, different in such a way as to be more dangerous to travelers on the highway, was a circumstance proper to be taken into consideration by the jury in determining whether the speed was negligent. Moreover, this testimony that, though cars usually ran fast down this incline, this car was running still faster, had a tendency to corroborate the testimony of the witness who testified with exactness to a high rate of speed, just as testimony that it was going very slow would have had a tendency to refute it. The tendency might be slight, but it exists nevertheless. In *Kansas City, etc., Ry. Co. v. Crocker*, 95 Ala. 412, 11 South. 262, a witness was asked about how fast the car was going "compared to a man running," and the witness answered, "Well, sir; it was running faster than a man could run." In holding this question and answer to be proper the Supreme Court of Alabama made the following observations which we deem pertinent here:

"That the witness is unable to state that the object in question was moving at the rate of a certain number of miles in an hour would not necessarily render his opinion useless as an aid to the jury. Assistance in coming to a conclusion on such a question may be derived from a statement that the object was going slowly, or at a snail's pace, or no faster than a man walks, or faster than a man could run. The opinions are admitted to enable the jury to realize, as far as possible, the impression as to speed made by the moving object upon the mind of one who saw it. It would be more satisfactory if the admissibility of such opinions could be made to depend upon their conformity to some definite standard of clearness or accuracy in their formation and expression. It is not practicable, however, to fix any such standard. The vagueness of the opinion would only go to the weight of the testimony, and not to its admissibility."

To the same effect is *I. C. R. R. Co. v. Ashline*, 171 Ill. 313, 49 N. E. 521, where it was held proper to permit a witness to testify that the train was running "fast." See also *Guggenheim v. L. S. & M. S. Ry. Co.*, 66 Mich. 150, 155, 33 N. W. 161. So we are of the opinion here that, while the testimony complained of was perhaps of little weight, still it was competent and relevant, and its weight was a matter for the triers of the facts, to be considered by them in connection with the other testimony as to speed. What we have said and quoted applies with at least equal force to the testimony of witness Kletzker that the car was going much faster than an automobile going fifteen to twenty miles an hour.

3. Defendant contends that the first instruction given at the instance of the plaintiff was erroneous, in that it broadened the

issues made by the pleadings. In this respect defendant assumes that even under the first charge of negligence the plaintiff must prove that the car was running more than fifteen miles an hour. This assumption and the conclusion based thereon is erroneous. The first charge is that the motorman was

"running said car at said time and place at a high and dangerous rate of speed, to wit, at a speed of more than fifteen miles per hour."

It is clear from a reading of the entire petition that this was a charge of common-law negligence, the gravamen of which was that the car was being run at too great a rate of speed under the circumstances, not that it was being run at a rate of speed in excess of fifteen miles an hour. It was sufficient to prove such gravamen and unnecessary to prove that the car was running more than fifteen miles an hour. By this instruction or the part complained of the trial court so informed the jury. In doing so it did not broaden the issues or commit any error.

4. Defendant contends that "instruction No. 12, defining the measure of damages, is erroneous":

- (a) "Because it permitted an award of compensatory damages;"
- (b) "because it permitted an award of compensatory damages without any foundation having been laid by the evidence;"
- (c) "because it assumes that defendant's alleged negligent acts were unlawful, and because it singles out and comments on such alleged negligence by characterizing it as unlawful."

The first two points made against the instruction are without merit, as the instruction contemplates the infliction of a penalty as distinguished from award of compensatory damages. We may say, however, though it is not germane to any point involved, that, if there had been anything in the case to justify it, then, under the last decision of our Supreme Court in *Boyd v. Mo. Pac. Ry. Co.*, 236 Mo. 54, 139 S. W. 561, the question of pecuniary loss might properly have been submitted to the jury to be considered by them in determining the amount of their verdict along with the facts bearing on the penal phase of the case. But it was not necessary, under that decision, that such pecuniary loss be shown in order that plaintiff might be permitted to recover at all. In the absence of pecuniary loss, the plaintiff would have a right to recover on the penal phase of the case alone, as was done here. As to the third point made against this instruction, we see no error

in the use of the word "unlawful" as it occurs therein, though it might have been better to omit it. The instruction does not assume that defendant was guilty of a negligent act which caused the death of Miss Niehaus. It merely describes such act as "unlawful" if committed under the circumstances hypothesized in other instructions. This was not incorrect, for the act was undoubtedly "unlawful" if committed under those circumstances. It was unlawful whatever the degree of culpability involved, and to so designate it did not express or suggest any degree of culpability or indicate any bias or opinion on the part of the judge in that respect. The court described it, not by way of epithet or denunciation or showing of bias or opinion, but solely in order to make clear that the jury were to inflict a penalty instead of awarding damages. It could not properly have been understood otherwise, or have had any prejudicial effect on the amount of the verdict.

The judgment is affirmed.

REYNOLDS, P. J., and NORTON, J., concur.

Winn v. Union R. Co.

(Rhode Island — Supreme Court.)

LAST CLEAR CHANCE DOCTRINE; DUTY OF MOTORMAN TO STOP CAR. — Where a driver of a coal wagon, having an unobstructed view of the surroundings, attempts to cross in front of an approaching car, the last clear chance doctrine does not require the motorman to attempt to stop the car, and thus save the driver from the results of his own negligence, until he has reason to believe that the driver is about to place himself in a position of danger.

DEFENDANT excepts to denial of motion for new trial after verdict for plaintiff.

Reported 82 Atl. 81.

J. C. Quinn, for plaintiff.

Joseph C. Sweeney and *Alonzo R. Williams*, for defendant.

Opinion *Per Curiam*.

Just previous to the accident the defendant's car was proceeding downgrade on Wickenden street, approaching Brook

Collision with Vehicle. — For the discussion of the liability of a street railway company for a collision with a vehicle crossing the track, see *Nellis on Street Railways* (2d Ed.), §§ 400-402, 414-416.

street, at moderate speed, as appears from the testimony. The justice of the Superior court in his rescript finds that the testimony of the motorman on the car as to the location of the car when the plaintiff drove out of Brook street onto Wickenden street is entitled to greater weight than that of any other witness. The justice accepts as true the motorman's statement that the car was 100 feet up Wickenden, east of its intersection with Brook, when he saw the plaintiff's horses emerging from Brook street. The plaintiff, as the event demonstrates, did not have the right of way, and should have stopped and waited until the car passed. The justice finds that the plaintiff was guilty of negligence in attempting to cross the track as he did, but approves the verdict of the jury on the ground that it was warranted under the rule of the last clear chance. He bases his conclusion as to the duty of the motorman upon the facts stated by that witness and quoted in the rescript of the justice. According to that testimony the car was 100 feet away from Brook street when the horses of the coal wagon first appeared in the motorman's sight, coming out of Brook street. The motorman then held the car under control, rang the bell, and applied the brakes. When the car had proceeded fifty feet nearer Brook street he attempted to bring the car to a standstill as quickly as it could be done at that time. The justice holds that, under the doctrine of the last clear chance, it was the motorman's duty, when he first saw the horses coming out of Brook street, to make the same effort to stop the car that he made a few seconds later, and that if he had done so he would have averted the accident. We cannot agree with this interpretation of the rule of the last clear chance and its application to the facts of this case. The plaintiff was sitting on top of a high coal wagon, with an unobstructed view of the surroundings, and with the car in plain sight. The motorman had the right to assume that the plaintiff would have a care for his own safety, and as he did not have the right of way would not negligently drive upon the track. The doctrine of the last clear chance would not require the motorman to attempt to stop the car, and thus save the plaintiff from the results of his own negligence, until he had reason to think that the plaintiff was about to put himself in a place of danger. In the circumstances of the case, as testified to by the motorman and taken as true by the justice, the motorman was not under the legal duty to stop his car as soon as he saw the plaintiff coming out of Brook street.

As the justice approves the verdict upon what appears to us to be an erroneous view of the law applicable to the facts of the case, the jury's finding receives no added force by reason of that approval. After an examination of the testimony in the case, the verdict does not appear to us to do justice between the parties, and we are of the opinion that there should be another trial of the case. The defendant's exception to the decision of the justice on the motion for a new trial is sustained.

We find no merit in the other exceptions of the defendant. The case is remitted to the Superior Court for a new trial.

Moore v. Rochester Railway Company.

STREET CROSSINGS; RELATIVE RIGHTS OF STREET CARS AND VEHICLES AT SUCH CROSSINGS.—At street crossings a street car has not the paramount right of way over a vehicle. Neither has a right superior to the other. The same rule applies where a side street runs into but not across the street occupied by the tracks, in case the vehicle is compelled to cross the tracks in order to obey the law of the road.

DEFENDANT appeals from judgment for plaintiff. Reported 97 N. E. 714.

W. F. Strang and *W. A. Matson*, for appellant.

James M. E. O'Grady, for respondent.

Opinion by VANN, J.:

Marietta street, running east and west in the city of Rochester, enters but does not cross St. Paul street, running north and south.

Right of Way at Street Crossings.—In *Nellis on Street Railways* (2d Ed.), § 388, it is said: "A street car has no paramount right of way over other vehicles and pedestrians at the intersection of streets where the car tracks cross other streets than the one they run along. The preference or right of way accorded to street cars upon city streets, especially between street crossings, and in respect to vehicles passing in the same or opposite directions to the cars, within the space embraced within their tracks, does not apply at street crossings, and their rights to the use of the streets at crossings are precisely the same as those of pedestrians and other vehicles crossing their tracks there. Neither has a superior right to the other. The car has the right to cross, and must cross, the street; and a vehicle or pedestrian has the right to cross, and must cross, the railroad track. The right of each must be exercised with due regard to the right of the other, in a reasonable and careful manner, and so as not unreasonably to abridge or interfere with the rights of the other."

At this point St. Paul street is forty feet wide from curb to curb and is occupied in part by the two tracks of the defendant's street surface railroad. The south-bound trolley cars use the west track, or the one farthest from the point where Marietta street enters St. Paul.

On the 14th of March, 1908, at about half-past five in the afternoon the plaintiff was driving west on Marietta street with an ordinary express wagon about ten feet long drawn by one horse. As he approached St. Paul street from the east his duties required him to turn to the south on that street and in order to do so the law of the road as well as an ordinance of the city required him to cross the street so as to keep on the right-hand side thereof. As he drove out of Marietta into St. Paul street on a slow trot, looking toward the north, he saw a car of the defendant coming south about 200 feet away, as he estimated the distance. He went on and was nearly across the tracks when, looking north again, he saw the car very near him. He hurried his horse forward, but before he could get out of the way the car struck the rear part of the wagon, whirled it around and dragged it with the horse and himself for 100 feet or more. In this action, brought to recover damages for the injuries sustained by him, we need not state the facts in greater detail, because the usual questions relating to the alleged negligence of the respective parties are removed from review in this court by the concurrent and unanimous action of the courts below.

The only question requiring discussion is presented by an exception taken by the counsel for the defendant to the refusal of the court to charge his request

"that the defendant had the paramount right of way passing Marietta street at the time of the accident."

Mr. Justice Williams, writing for all the justices of the Appellate Division, held that the reason for the rule at street crossings

"that the vehicle has the right to cross, and must cross the tracks, is equally applicable to a vehicle coming out of a street which runs to but does not cross the street, provided it is necessary to cross the tracks in order to proceed along the side the rule of the road requires."

The Appellate Division of the second department took the opposite view in two cases, holding that the rule governing the right of way at street crossings does not apply where

"one street bisects but does not intersect another upon which a street surface railroad is operated."

Hewlett v. Brooklyn Heights R. R. Co., 63 App. Div. 423; *Rutz v. New York City Ry. Co.*, 4 St. Ry. Rep. 869, 107 App. Div. 568.

Both parties to this appeal rely upon a well-known case and each makes the same quotation from the excellent opinion of Judge Earl therein, as follows:

"As the cars must run upon the tracks and cannot turn out for vehicles drawn by horses, they must have the preference and such vehicles must, as they can, in a reasonable manner, keep off from the railroad tracks so as to permit the free and unobstructed passage of the cars. In no other way can street railways be operated. As to such vehicles the railways have the paramount right to be exercised in a reasonable and prudent manner. But a railway crossing a street stands upon a different footing. The car has the right to cross and must cross the street, and the vehicle has the right to cross and must cross the railroad track. Neither has a superior right to the other. The right of each must be exercised with due regard to the right of the other, and the right of each must be exercised in a reasonable and careful manner, so as not unreasonably to abridge or interfere with the right of the other."

O'Neil v. Dry Dock, E. B. & B. R. R. Co., 129 N. Y. 125, 130.

The rule governing the subject at street crossings differs from the rule that applies between blocks, and each rests on its own peculiar reason. Between blocks there is no traffic across the street. While people sometimes walk across and occasionally drive across from the driveways leading to their dwellings, walking across is unnecessary and driving across is infrequent. Hence the law gives the street cars the paramount right of way between blocks, although it is to be exercised in a reasonable and prudent manner.

On the other hand, at street crossings traffic is necessary and continuous. Vehicles must cross the street and hence must cross the tracks, or they cannot use the highways provided for travel. This necessity takes from the cars at street crossings the paramount right they enjoy between blocks and places them on an equality with vehicles. At such points as Judge Earl announced "neither has a right superior to the other," for the reason that "the vehicle has the right to cross and must cross the railroad track."

We think the same reason applies to the situation presented by the case now before us, where the side street ran to but not across the street occupied by the tracks, yet the vehicle was compelled to

cross the tracks in order to obey the rule of the road. The necessity created by law in the one case is as imperative as that created by the physical situation in the other, and owing to such necessity the rule should be the same as at street crossings proper. While the necessity is not created by precisely the same situation in both cases, it exists with the same force in each and rests on the same reason.

In view of the opinion below we regard further discussion as unnecessary. The judgment appealed from should be affirmed, with costs.

CULLEN, Ch. J., GRAY, HAIGHT, WERNER, HISCOCK and COLLIN, JJ., concur.

Judgment affirmed.

Commonwealth v. Boston & N. St. Ry. Co.

(Massachusetts — Supreme Judicial Court.)

CONSTITUTIONAL LAW; STATUTE PROVIDING RATES FOR PUPILS; POLICE POWER.

— St. 1910, chap. 567, providing that the rates of fare charged by street railways for "transportation of pupils of the public day schools or public evening schools or industrial day or evening schools * * * or private schools" in traveling for attendance between home and school "shall not exceed one-half the regular fare charged" for the transportation of other passengers between the same points, is constitutional and a valid exercise of the police power.

DEFENDANT excepts from rulings in favor of the plaintiff. Reported 98 N. E. 1075.

H. C. Attwill, of Lynn, Dist. Atty., for the Commonwealth.

B. W. Warren, *C. R. Lamson* and *W. H. Stone*, all of Boston, for defendant.

Opinion by RUGG, C. J.:

The only question is whether St. 1910, c. 567, is constitutional as applied to the facts of this case. This statute provides that the rates of fare charged by street railways for

Regulation of Rate of Fare. — As to the regulation of the rate of fare chargeable by a street railway company, see *Nellis on Street Railways* (2d Ed.), §§ 137, 138.

"transportation of pupils of the public day schools or public evening schools or industrial day or evening schools * * * or private schools"

in traveling for attendance between home and school "shall not exceed one-half the regular fare charged" for the transportation of other passengers between the same points. The constitutionality of R. L., c. 112, § 72, which made similar requirements as to pupils in public schools alone was upheld in *Commonwealth v. Interstate Con. St. Ry.*, 3 St. Ry. Rep. 351, 187 Mass. 436, 73 N. E. 530, 11 L. R. A. (N. S.) 973, 2 Ann. Cas. 419; s. c., 207 U. S. 79, 28 Sup. Ct. 26, 52 L. Ed. 111, 12 Ann. Cas. 555. This section as amended by St. 1906, c. 479, so as to include pupils in private schools was considered in *Commonwealth v. Conn. Valley St. Ry.*, 196 Mass. 309, 82 N. E. 19. It was held there that the intention of the Legislature as manifested by the act was to include only pupils of the public schools required by R. L., c. 42, §§ 1 and 2, for the education of children and youth, and in private schools of a like kind, and to exclude pupils of industrial and evening schools, and other private and public schools. The present act includes, by express words, those who attend industrial and evening schools maintained by the public.

The constitutionality of the statute is concluded by these decisions so far as objections rest on a denial of equal protection of the laws to the defendant because of exemption of the Boston Elevated Railway Company from the requirement of the statute, and on a denial of equal protection of the laws to members of the traveling public not included in its provisions. The circumstance that a larger number of persons are now within the scope of the statute makes no material difference. The class is now as before confined to those who are attending institutions for education chiefly provided at public expense. The factors of youth and size of pupils and hours of travel being when other travel was lighter, and probability of far greater travel at the less rate because of the financial limitations of scholars in schools were alluded to in 187 Mass. 440, 73 N. E. 530, 11 L. R. A. (N. S.) 973, 2 Ann. Cas. 419, but they were not treated as determinative. The pivotal consideration was whether the grouping of pupils in schools as a class entitled to special consideration in matter of fares was reasonable or arbitrary, and that was decided in favor of the statute. The other considerations are not rendered inapplicable because by reason of the greater age of some who go to industrial

schools the proportion of children in the favored class may be less.

The defendant has complied with the earlier fare statutes, but this complaint relates to a refusal to sell tickets, as required by it, to a boy fifteen years old, who was a pupil pursuing the regular course in mechanic arts in a public industrial school in Lawrence.

The statute does not impair, in contravention of article 1, section 10, of the Constitution of the United States, the obligation of the contract set forth in the charter of the Lynn & Boston Railroad Co. (St. 1859, c. 202, § 4), to which it is said the defendant has succeeded. That charter when granted was liable by general law to alteration or repeal (Rev. St. 1836, c. 44, § 23, R. L., c. 109 § 3), and was, therefore, taken by consent subject to this condition, of which it cannot now be heard to complain. *Parker v. Met. R. R. Co.*, 109 Mass. 506; *Clinton v. Wor. Con. St. Ry.*, 199 Mass. 279, 85 N. E. 507. This reserved power of amendment is not exceeded, so long as the object of the grant is not defeated or essentially impaired and property and rights acquired upon the faith of the charter are not taken away. The charter right to fix fares is subject to amendment within this limitation. Moreover, no charter contract can prevent the Legislature from a valid exercise of the police power. *Texas & New Orleans R. R. v. Miller*, 221 U. S. 408-414, 31 Sup. Ct. 534, 55 L. Ed. 789.

The defendant's chief ground of attack is that the agreed facts show that the statute in its practical operation fails to protect it in the enjoyment of its property and deprives it of its property without due process of law, contrary to the Constitution of this commonwealth and of the United States. The governing principle of law in its general statement is well settled. The legislative rate must be so small as to occasion a loss to the carrier if it performs the service required for the price permitted before it can be held unconstitutional provided the total net earnings are such as to yield a reasonable return upon the value of the corporation as a whole, having regard to the fact that this is a burden imposed by a police regulation in the interest of education. It may be that a particular rate for a given carriage taken by itself would yield little or no profit, but taken in conjunction with the entire transportation, it would not be unreasonable. The circumstance that the defendant has earned and paid reasonable dividends (5 per cent. per annum since 1905 as stated by the defendant in its brief), while of weight is by no means decisive. It is not a question which commonly can be solved as a mathematical problem.

It depends upon the consideration of several elements. It is a mixed question of law and fact. It must be determined solely as one of legislative power and not as one of expediency or wisdom.

This case does not involve a general scheme of rates, but only that for a particular service. The inquiry is confined to the point whether a performance of a specified duty at the rate fixed is so inherently unjust and unreasonable as to amount to the deprivation of property without due process of law. It is not enough to show that no profit may come from the particular service, it must appear that in conjunction with all the service of the corporation the rate is unreasonable and is equivalent to spoliation. The presumption is that the rate fixed by the Legislature is reasonable. The onus rests on the carrier to show the contrary. Every proper assumption must be made in favor of the constitutionality of the statute, and it is not to be declared beyond the power of the Legislature unless it is free from all fair doubt. The case must be a very clear one before the courts will interfere with a legislative determination of rates. *Minneapolis & St. L. R. Co. v. Minn.*, 186 U. S. 257, 264, 22 Sup. Ct. 900, 46 L. Ed. 1151; *Knoxville v. Knoxville Water Co.*, 212 U. S. 1-18, 29 Sup. Ct. 148, 53 L. Ed. 371; *Lincoln Gas Co. v. Lincoln*, 223 U. S. 349, 357, 32 S. Ct. 271; *Willcox v. Consolidated Gas Co.*, 212 U. S. 19-41, 29 Sup. Ct. 192, 53 L. Ed. 382, 15 Ann. Cas. 1034; *Interstate Com. Com. v. Union Pacific R. R. Co.*, 222 U. S. 541, 32 Sup. Ct. 108; *Atlantic Coast Line v. North Carolina Corp. Com.*, 206 U. S. 1-26, 27 Sup. Ct. 585, 51 L. Ed. 933, 11 Ann. Cas. 398; *Com. v. People's Five Cent Sav. Bank*, 5 Allen 428, 431, 432. As applied to this particular kind of case it was said in 187 Mass. at 439, 73 N. E. 532, 11 L. R. A. (N. S.) 973, 2 Ann. Cas. 419, that such a classification of passengers and regulation of their fares in the general interest of education might go to the extent of requiring the particular service to be done without profit, but it could not go so far as to impose expense

"upon the street railways companies or upon that part of the public which pays fares to street railway companies."

The precise point is whether the agreed facts show that there is required of the defendant an expense for complying with the statute so clearly as not to warrant an opposite finding by the jury. It must be assumed that accurate instructions were given to the jury. Do the facts agreed with the proper inferences which the

jury could have drawn warrant a general verdict of guilty? *Com. v. Gordon*, 159 Mass. 8, 33 N. E. 709.

The facts upon which the defendant relies are that by dividing the total number of passengers carried for a definite period of nine months or a year into the operating expenses and fixed charges for the same period, it appears that the average cost of carrying each passenger is about four and one-half cents, and that as its reasonable regular fare is five cents the result follows that to carry pupils at half fare or two and one-half cents results in a loss of two cents for each pupil. Even if this was all there was to be regarded, it would not follow that compliance with the statute would cause the defendant a loss. It might still be that the number of pupils who ride at the reduced fare as compared with those who would not become passengers at the full fare, coupled with the preponderance of small children and the greater carrying capacity of each car for such passengers and the well-known fact that the hours of attendance at school are not the rush hours of travel do not cause an actual loss. But these are not all the elements which must be considered. The jury were entitled to use their common knowledge. The agreed facts state that reference may be had to the reports of the Massachusetts Board of Railroad Commissioners and to the annual returns of street railway companies as printed by the commission, which includes the return of the defendant. From these sources it appears that the defendant gained substantial revenue from operation from other sources than fares. The letting of advertising space in cars, presumably including those in which school pupils are carried, and the carrying of mails, which may have been on the same cars, both yielded material amounts. It is obvious that average expense to the company of carrying each passenger in terms of operating expenses and fixed charges, which includes as appears from the returns large sums for maintenance of roadway, buildings and equipment, or in other words in terms of total expense to company, outside of additions to permanent assets, when compared with the rate for a single fare is not the test whether business is conducted at a loss. Other sources of revenue must be regarded than the rate of a single fare and the total revenue therefrom. In addition to the sources mentioned directly attributable to the cars in which passengers are carried is interest on deposits which is also an income in most part from fares. There are also rentals, tolls and miscellaneous earnings from operation. Moreover, operating expenses and fixed charges,

which yield other revenue than fares from passengers, cannot properly be charged wholly to the cost of carrying passengers. The agreed facts contain other computations as to cost of passenger transportation in terms of operating expenses alone, and those plus certain items of fixed charges. But it is not necessary to examine them in detail. Hence, it is manifest from these considerations that the basis upon which the defendant asked a verdict of not guilty is indecisive. It is not plain that the rate is confiscatory or that the defendant may not be in better condition by complying with the statute than if it does not. It may be noted in passing that similar obligations respecting fares have been voluntarily accepted by street railway companies, whose conditions as to population served and length of line were probably not more favorable than those of the defendant. *Clinton v. Wor. Con. Street Railway Co.*, 199 Mass. 279, 85 N. E. 507.

The conclusion is that this statute is an exercise of the police power which does not transcend the right of the Legislature, and the requests for rulings were refused rightly.

Exceptions overruled.

Norfolk & Atlantic Terminal Co. v. Rotolo.

(U. S. Circuit Court of Appeals — Fourth Circuit.)

1. **PASSENGER WHILE STANDING ON STEPS OF CAR IN BOARDING SAME STRUCK BY ANOTHER CAR; EVIDENCE.** — Where in an action by a passenger to recover for injuries sustained while standing on the steps of a car in the act of boarding the same by being struck by another car, one of the negli-

Contributory Negligence of Passenger on Steps. — For a discussion of the contributory negligence of a passenger riding on the steps of a street car, see the note to *Trussell v. Morris County Traction Co.*, 7 St. Ry. Rep. 542.

Judicial Notice of Custom. — In Chamberlayne's "Modern Law of Evidence," § 758, in discussing whether judicial notice will be taken of local customs, it is said: "A custom observed among a few persons, confined to a particular locality or not generally established and known, must be proved. A custom, though in a sense local will be noticed if it affects the public at large and is generally known and observed throughout a particular locality, such as certain colonies, a given port, city, or the like; but it is otherwise with customs where both observance and operation are confined to a limited locality. Therefore, municipal customs as to the improvement of streets, the use of their premises by individual owners, or of the tribal laws or customs of the Indians will not be commonly, i. e., 'judicially' known."

gent acts charged to the plaintiff was that he attempted to board the car while it was in motion at a place where there was no stop, testimony to prove that it was the custom or habit of defendant's cars to stop at that point, to open gates to the cars and receive and discharge passengers was relevant as bearing on plaintiff's conduct at the time, although not sufficient to prove that the car stopped.

2. **SAME; CUSTOM OF CARS TO STOP AT PARTICULAR PLACE; NOTICE TO PUBLIC.** — The custom or habit of railway trains or cars to stop at a particular place to receive and discharge passengers is notice to the public to go to that place for the purpose of taking passage on such trains or cars.
3. **SAME; LAST CLEAR CHANCE.** — Where a passenger negligently puts himself in peril by getting upon the steps of a moving car when the gates were closed, the last clear chance doctrine applies if the passenger's peril was seen, or could, by the exercise of reasonable care, have been seen, and the injury could have been avoided by the use of such care on the part of the company.
4. **SAME; NEGLIGENCE.** — Where a person goes to a place where cars are accustomed to stop and take on and discharge passengers, and while on the lower step following others into the car the company negligently runs another car against him, the company is guilty of negligence causing the injury.

DEFENDANT brings error from judgment for plaintiff. Reported 195 Fed. 231.

STATEMENT OF FACTS BY THE COURT.

This is the third time this case has been before the court here. The first time several points arising upon the pleadings and in the trial of the cause were passed upon by this court. See *Norfolk & Atlantic Terminal Company, Plaintiff in Error, v. Rotolo, Defendant in Error*, 179 Fed. 639, 103 C. C. A. 197. Then came the case of *Norfolk & Atlantic Terminal Company, Plaintiff in Error, v. Rotolo, Defendant in Error*, and the decision of the court in that instance is reported in 191 Fed. 4. The following is a succinct statement of the facts:

The plaintiff in error, defendant below, hereinafter called the defendant, is a Virginia corporation, and operates a line of electric street railway in the city of Norfolk, Va., and had a portion of its tracks laid in City Hall avenue and Monticello avenue in said city. Frank Rotolo, the defendant in error, who was the plaintiff below, hereinafter called the plaintiff, is a subject of the king of Italy, and was temporarily residing in Norfolk at the time of the injury, which was the cause of this action. The tracks of the defendant's railway run parallel along Monticello avenue in the city of Norfolk north and south, and at a point about opposite

the Monticello Hotel corner, where City Hall avenue intersects with Monticello avenue, and about midway between that corner on the west, and market corner on the east the tracks diverge, the one curving sharply to the right, or southwest, and the other curving sharply to the left, or southeast. The plaintiff, as before stated, was temporarily residing in Norfolk, and was employed as a workman at the Jamestown Exposition. On the 1st day of April, 1907, between 6 and 7 o'clock in the morning, the plaintiff, intending to go to the exposition grounds, attempted to board one of defendant's cars which had come in from Pine Beach, and was bound south, and was due to turn the curve in the railway, above described, to the southwest, and whilst attempting to board the said car, and when on the steps of the rear platform on the side next to the other track, he was struck by another car either standing on the curve which turned to the southeast, or moving along around said curve toward the north, and so injured that his left leg had to be amputated. Plaintiff brought this action against defendant in the Circuit Court of the United States for the eastern district of Virginia, at Norfolk, to recover damages for the injury on the ground that it was the result of defendant's negligence, and in the last trial was awarded \$4,000 with interest from November 22, 1911, for which amount judgment was rendered in his favor against defendant. The case is here by writ of error sued out by the defendant.

W. H. Venable and Eppa Hunton, Jr. (Henry W. Anderson, on the brief), for plaintiff in error.

J. L. Jeffries (Jeffries, Wolcott, Wolcott & Lankford, on the brief), for defendant in error.

Before GOFF and PRITCHARD, Circuit Judges, and BOYD, District Judge.

Opinion by BOYD, D. J.:

The assignments of error relied on by the plaintiff in error, who will hereafter for convenience be called the defendant, in the case before us now are two in number. The one is based on exception to the admission of testimony, the other on exception to the action of the trial court in submitting to the jury upon all of the testimony the question of the last clear chance.

As to the first proposition, the defendant in error here, who will

be referred to as the plaintiff, in the course of the trial, over the objection of the defendant, was permitted by the court to testify that the defendant's cars coming south from Pine Beach were in the habit of stopping at the point where he (the plaintiff) attempted to go aboard at the time of the injury, and that the gates on both sides of the cars when stopped at this point were opened and passengers were permitted to dismount from the cars, and also to go aboard on both sides. Other witnesses for the plaintiff, over the objection of the defendant, made substantially the same statement. The ground of the objection to this testimony, as stated in the bill of exceptions, is as follows:

"* * * For the reason that the testimony was irrelevant and immaterial to the issue in this case, and for the reason that it was improper to prove any custom as evidence that the defendant stopped its car at the point claimed in the declaration, and that the gates on both sides of cars were customarily opened by the defendant, and for the reason that the evidence was not limited to a car coming from the car barn without passengers to discharge, but only to receive passengers for the exposition."

In the argument the counsel insists that this testimony was inadmissible to prove the fact that the car, on the step of which the plaintiff was standing when he was injured, stopped at the point referred to at the particular time in question. We readily concede that standing alone testimony that it was the custom or habit of defendant to stop its cars and discharge and take on passengers at the point where plaintiff attempted to go aboard was insufficient to prove the fact that the car stopped on the occasion of the injury, but plaintiff testified that the car did stop at the point and at the time in question, and that the gates were opened and passengers dismounted and others went aboard. Other witnesses for the plaintiff testified to the same effect. On the other hand, a number of witnesses for the defendant testified that the car did not stop, and thus there was a direct irreconcilable conflict of testimony as to the fact. Under these circumstances, in our opinion, testimony that it was the custom of defendant to stop its cars at this point was not only relevant, but it tended to throw light upon the controverted fact and to sustain plaintiff's contention.

The text-writers and the courts have provided us with much learning and numerous decisions relative to the admissibility, the relevancy and probative value of testimony in regard to habit or custom as showing the doing, or not doing, of a particular thing on a specific occasion. Wigmore, in his treatise on Evidence (vol.

1, § 92), cites the case of *Walker v. Barron*, 6 Minn. 508-512 (Gil. 353), in which it is said:

"Customs may, like other facts or circumstances, be shown when their existence will increase or diminish the probabilities of an act having been done, or not done, which act is the subject of contest."

And, also in the case of *State v. Railroad*, 52 N. H. 528, in which it is held:

"It would seem to be axiomatic that a man is likely to do, or not to do, a thing, or do it or not do it in a particular way (according) as he is in the habit of doing it, or not doing it."

The same doctrine is laid down in the case of *Parrott v. Railroad*, 140 N. C. 546, 53 S. E. 432.

In *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 24 Sup. Ct. 563, 48 L. Ed. 860, Mr. Justice Day, in delivering the opinion of the court, used this language:

"* * * As we have said, the question concerns the relevancy of proof, and not whether it finally establishes the issue made, one way or the other. Relevancy does not depend upon the conclusiveness of the testimony offered, but upon its legitimate tendency to establish a controverted fact. Relevancy is that 'quality of evidence which renders it properly applicable in determining the truth or falsity of the matter in issue between the parties to a suit.' 1 Bouvier, Law Dic. Rawle's Revision, 866."

In *Holmes v. Goldsmith*, 147 U. S. 150, on page 164, 13 Sup. Ct. 288, on page 292 (37 L. Ed. 118), Mr. Justice Shiras, in delivering the opinion of the court, adopts the following from the case of *Stevenson v. Stewart*, 11 Pa. 307:

"The competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inferences it may afford in reference to the litigated fact. It is enough if these may tend, even in a slight degree, to elucidate the inquiry, or to assist, though remotely, to a determination probably founded in truth."

Our views, as will be seen, are in harmony with the principles annunciated in these cases. But, aside from this, if the testimony objected to was relevant to any material issue in the case, it was not error to admit it. Defendant insisted that the injury was the result of plaintiff's negligence, and one of the negligent acts charged to him was that he had crossed the parallel track and had attempted to board the car whilst it was in motion at a place where

there was no stop. We think, under the circumstances, that it was plaintiff's right to introduce testimony to prove that it was the custom or habit of defendant's cars to stop at that point, to open gates to the cars, and there receive and discharge passengers; not that this testimony alone, as before stated, was sufficient to prove the fact that the car stopped on the occasion when plaintiff was injured, but it was relevant, in our opinion, as bearing upon plaintiff's conduct at the time, and in explanation of his presence at the place where he undertook to go aboard. The custom or habit of railway trains or cars to stop at a particular place to receive and discharge passengers is notice to the public to go to that place for the purpose of taking passage on such trains or cars. Our conclusion, therefore, is that there was no error in the admission of the testimony embraced within this exception.

On the remaining question presented for our consideration the counsel for the defendant takes the position that (we quote from the brief):

"The doctrine of the last clear chance has no application in this case, but that it is in the view most favorable to the plaintiff a case of concurrent negligence in which there can be no recovery."

There is nothing in the record to advise us that the jury based the verdict in this case upon the doctrine of the last clear chance, although we think that upon the evidence for the plaintiff, and that of the defendant, this principle might properly have been invoked.

If the jury found that the plaintiff negligently put himself in peril by going upon the steps of the car whilst it was moving, and when the gate was closed, yet the duty devolved upon the defendant if the plaintiff's situation of peril was seen, or could, by the exercise of reasonable care, have been seen, and the injury could have been avoided by the use of such care on the part of the defendant, then the last clear chance proposition could be applied.

On the other hand, if plaintiff's version was accepted by the jury, and there was testimony to support it, that plaintiff went to the place where the cars of defendant were accustomed to stop and take on and discharge passengers, that the car plaintiff undertook to board did stop, that passengers were admitted from both sides, that plaintiff was on the lower step following others into the car, and in this position the defendant injured him by negligently running another car upon him, as we say, if the jury found from the

evidence that such were the facts, then the doctrine of the last clear chance was not involved, but the injury would be accredited directly to the negligence of the defendant when the plaintiff was not in the wrong.

However, as we have stated, the testimony in this case was peculiarly contradictory, and it was the province of the jury to determine what the truth of the transaction was. The counsel voluntarily abandoned an exception which had been taken to the refusal of the court to direct a verdict for the defendant upon all the testimony. This seems to us an admission that there was sufficient evidence to go to the jury to authorize a recovery in favor of the plaintiff in some view of the case.

We think the judgment of the Circuit Court should be affirmed.
Affirmed.

South Covington & C. R. Co. v. City of Covington.

(Kentucky — Court of Appeals.)

ORDINANCES; REGULATION OF MAINTENANCE AND OPERATION OF CARS; RATE OF FARE; SCHEDULES; CROWDING OF CARS; FUMIGATION; INTERSTATE COMMERCE. — The overcrowding of street cars, with the troubles which naturally ensue, the providing for clean, sanitary and comfortable cars, and the requiring of a reasonably efficient service, are matters that a city may properly regulate under the police power, and under the statutes of Kentucky.

The enactment of an ordinance governing the rate of fare and the schedule of cars and providing that it should not be construed to be a surrender or waiver of the rights of either the city or railway company, does not prevent a city from enacting subsequent ordinances as conditions change.

Such an ordinance regulating the carriage of passengers by a State corporation to the State line where they were received by a foreign corporation does not interfere with interstate commerce.

Municipal Ordinances Regulating Operation of Cars. — For a discussion of municipal ordinances regulating the operation of street railway cars, see the note to *Memphis St. Ry. Co. v. Haynes*, 3 St. Ry. Rep. 810.

Regulation as to Rate of Fare. — As regulation by municipal ordinance of the rate of fare to be charged upon street railway cars, see the note to *People v. Detroit United Ry. Co.*, 2 St. Ry. Rep. 460, 468.

Regulation as to Service and Accommodation of Passengers. — As to regulation of service and accommodation of passengers, see note to *City of Chicago v. Chicago City Ry. Co.*, 5 St. Ry. Rep. 156.

It is a reasonable requirement that the number of passengers which shall be permitted to ride within a car shall not be more than one-third greater than the seating capacity of the car.

The fumigation of cars once a week and the keeping them at a temperature of not less than 50 degrees Fahrenheit are not unreasonable requirements.

A requirement that cars be operated in sufficient numbers at all times to reasonably accommodate the public is not unreasonable when read in connection with the common-law rule that a carrier must provide reasonable accommodations for such a number of passengers as in the exercise of ordinary care he has reason to anticipate will demand to be carried.

PLAINTIFF appeals from a judgment for defendant. Reported 143 S. W. 28.

Ernst, Cassatt & Cottle, for appellant.

Jno. E. Shepard and Stephens L. Blakely, for appellee.

Opinion by HOBSON, C. J.:

The general council of the city of Covington passed the following ordinance, which was duly approved by the mayor on October 24, 1910:

"An ordinance to further regulate the operation of street cars and street car lines in the city of Covington, and providing for the health, comfort and safety of passengers using said cars and providing penalties for the violation thereof.

"Be it ordained by the general council of the city of Covington:

"Section 1. That it shall be unlawful for any person, corporation or company owning or operating street cars for the carriage of passengers for hire in or through or over the public streets of the city of Covington, to permit more than one-third greater in number of passengers to ride or to be transported within such cars over and above the number for which seats are provided in the same, provided that this section shall not apply to or be enforced on the days celebrated as Fourth of July, Decoration Day or Labor Day.

"Sec. 2. No such person, company or corporation shall suffer or permit any passenger or person to ride upon the rear platform of any such car unless the same be provided with a suitable rail or barrier so arranged as to provide an open space reasonably sufficient for egress and ingress of passengers to and from such car, and no one shall be permitted to stand in such place so provided for such ingress and egress, but the same shall at all times be kept clear, free and open. Any person refusing to vacate such open space provided for egress and ingress upon request of the conductor in charge of said car shall be guilty of a misdemeanor and be subject to a fine of not less than five dollars nor more than fifty dollars, recoverable in the police court of said city.

"Sec. 3. No such person, company or corporation shall suffer or permit any person or passenger to ride upon the front platform of any such car unless a

rail or barrier be provided, separating the motorman from the balance of said front platform, said space allowed for the motorman shall in all cases be sufficient to permit him to properly and conveniently operate the mechanism controlling said car without interfering or crowding from the other person upon said platform, if any, and no person or passengers shall ever be permitted to stand by or remain within the enclosure thus provided for the motorman.

"Sec. 4. It shall be the duty of every such person, company or corporation to at all times keep its cars thoroughly cleaned and ventilated, and shall at least once a week fumigate the inside of said cars with efficient disinfectant, and the board of health of the city of Covington shall have power and authority to prescribe reasonable rules providing for the cleanliness, ventilation and fumigation of such cars, and all such persons, companies or corporations shall comply with such reasonable rules.

"Sec. 5. The temperature of such cars shall never be permitted to be below 50 degrees Fahrenheit.

"Sec. 6. It is hereby made the duty of every company, person or corporation, operating street cars and the street car lines within the corporate limits of the city of Covington, to run and operate cars in sufficient numbers at all times to reasonably accommodate the public within the limits of this ordinance as to the number of passengers permitted to be carried, and the general council of the city of Covington may by resolution at any time direct that the number of cars operated upon any line or route be increased to a sufficient number to so accommodate the public, if there is a failure in that respect. Any such person, company or corporation failing or refusing to run or operate sufficient cars as by this section provided shall be subject to the penalties provided by section 2 hereof.

"Sec. 7. Any person, company or corporation violating either of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than fifty nor more than one hundred dollars for each offense, recoverable in the police court of the city of Covington, and each car operated in violation of this ordinance shall constitute a separate offense for each day it is so operated, and it is hereby made the duty of all police officers of such city and others exercising police power to see to the enforcement of this ordinance, and to arrest or to cause the arrest of all persons guilty of its infraction. And the chief of police is hereby directed to assign at least one police officer to the special enforcement of this ordinance. It shall be the duty of such officer to examine and observe street cars in operation and to make arrests and cause proper prosecutions to be started against offenders violating this ordinance.

"Sec. 8. Nothing contained in this ordinance shall be held or construed to be or to effect a renewal or an extension or enlargement of the right of any person, company or corporation to use or occupy the streets and highways of the city of Covington for street railway purposes.

"Sec. 9. This ordinance shall take effect thirty days from and after its passage and approval by the mayor."

On November 22, 1910, the South Covington & Cincinnati Street Railway Company brought this suit against the city and its

authorities to enjoin the enforcement of the ordinance on several grounds. The Circuit Court on final hearing dismissed the action. The railway company appeals.

1. It is insisted that the city is without power to pass the ordinance. The statute regulating cities of the second class, including Covington, contains, among other things, this provision:

"The general council shall have power by ordinance * * * to license, tax and regulate * * * street railway companies or corporations."

Section 3058, Ky. St., subsec. 2 (Russell's St., § 1042, subsec. 2).

"To pass all such ordinances, not inconsistent with the provisions of this act or the laws of the State, as may be expedient in maintaining the peace, good government, health and welfare of the city, its trade, commerce and manufactures, and to enforce the same by fines and penalties; and any enumeration of subjects and matters herein to be regulated shall not be construed as a limitation upon this general power."

Section 3058, Ky. St., subsec. 25. We have in the Kentucky Statutes a number of provisions regulating railways providing as to the maintenance of waiting rooms, the keeping open of ticket offices, the posting of tariffs and a number of other regulations of a similar character. That the Legislature in the exercise of its police power may enact such regulations is not now seriously disputed; and we think it evident that the General Assembly has conferred upon the municipality similar power as to street railways within the city. These are matters concerning primarily the citizens of the city, and may be better regulated by the local authorities who are cognizant of the local situation than by general laws passed by the General Assembly. The overcrowding of street cars with the troubles which naturally ensue, the providing for clean, sanitary and comfortable cars, and the requiring of a reasonably efficient service are matters that the city may properly regulate under the police power.

2. It is insisted that the subject is covered by contract, and may not be controlled by the municipality. In October, 1892, an ordinance was passed by the city of Covington which provided a number of things that the street car company was to do. Among other things, it was provided by ordinance that the street car company should charge a five-cent fare, and that it should run its cars during certain hours at intervals not to exceed seven minutes. This ordinance was accepted and agreed to by the rail-

way company, but it is manifest from the ordinance as a whole that it was not contemplated by either of the parties that it should tie the hands of the city for all time or prevent it from requiring what was reasonable and necessary when conditions changed. The city of Covington has doubled in size since that ordinance was passed, conditions are entirely different, and it is perfectly evident from the ordinance that the council was only dealing with the situation then before it. It did not attempt to contract away the power of the council to deal with other and different conditions as changes might come in the future. Among other things the ordinance contains this express language:

"It is further distinctly understood and agreed by said city and said company that nothing in this ordinance contained shall be held or construed to be any surrender or waiver of the rights of either said city or said company."

The city could not contract away its governmental power, and it manifestly did not attempt to do so. *Lexington Turnpike Co. v. Croxton*, 98 Ky. 739, 34 S. W. 518; *Commonwealth v. Covington & Cinn. Bridge Co.*, 21 S. W. 1042, 14 Ky. Law Rep. 836; *Georgia R. Co. v. Smith*, 128 U. S. 174, 9 Sup. Ct. 47, 32 L. Ed. 377; *Chicago, etc., R. Co. v. Ill.*, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. Ed. 596.

3. It is insisted that the ordinance interferes with interstate commerce. The railway company is a Kentucky corporation. It has no franchise or property except in Kentucky. While its cars run into Cincinnati, when they pass the State line, they are operated by an Ohio corporation. The Kentucky corporation is not engaged in interstate commerce. It simply carries the passengers to the State line. The Ohio corporation there receives them and carries them on to their destination in Cincinnati. We are utterly unable to see that there is any question of interstate commerce in the case. The ordinance is only in force in the city of Covington, and certainly the State of Kentucky may regulate a common carrier doing no business except in the State of Kentucky, and having no property except here. *Missouri Pac. R. R. Co. v. Kansas*, 216 U. S. 262, 30 Sup. Ct. 330, 54 L. Ed. 472.

4. Lastly, it is insisted that the ordinance is unreasonable, arbitrary and impracticable. Covington and Newport are on the south side of the Ohio river opposite Cincinnati. Newport is separated from Covington by the Licking river. The two cities have a population of something over 75,000. The Newport cars pass

through Covington in going to and from Cincinnati. In addition to this, there are Latonia, Ludlow, South Covington and several smaller places near by, the cars from which pass through Covington. A large part of the male population in these cities work in Cincinnati. The result is that in the morning hours, when the workers are going out to work, and in the evening hours, when they are returning from work, there is great congestion on the cars, by reason of which the passengers are subjected to dangers and are sometimes delayed in getting to and from their work, and are made more or less uncomfortable during the journey. Especially is this true of ladies on the very crowded cars. The ordinance was enacted to remedy this situation. It is insisted that the cars are capable of carrying without danger to person or health a greater number of passengers than permitted by the ordinance; that some cars have a greater capacity than others in the matter of standing passengers on the rear platform; that the ordinance limits the number of passengers permitted to stand within the cars, but places no limit on the number which may be permitted to stand on the back platform, and that the company will be without power to prevent these passengers from going into the car at pleasure, as the conductor will be engaged in taking up his fares; that the ordinance provides for no fine against the passengers violating its provisions; that the company cannot prevent people from getting on the cars in greater numbers than the ordinance permits; that the requirement of fumigation of each car once a week is unnecessary and unreasonable; and, that owing to the facilities which the company has in Cincinnati, it will be impracticable for it to run cars at less intervals than it now runs them. We are unable to see that the ordinance is invalid for any of these reasons. It is a reasonable requirement that the number of passengers which shall be permitted to ride within the car shall not be more than one-third greater than the seating capacity of the car. When a greater number of people are permitted to be in a car, there is certainly a more or less tendency to create disorders, and to bring about conditions not favorable to the health or comfort of the passengers. If the conductor is engaged in taking up his fares, some arrangement can be made to keep passengers out of the car, or an extra man may be employed for this purpose. The company has charge of its car, and it can refuse to take on other passengers, and, if a passenger is allowed to get on the rear platform when there is no room in the car, he may be prevented

from entering the car. If the company cannot provide the necessary accommodations for the traveling public on the cars it has, it must provide itself with more cars. It is a public servant created for a public purpose, and while it enjoys its franchise, it must discharge the duties imposed upon it by the franchise. If it cannot run its cars singly, and carry the crowd, it must run trailers, or it must use larger cars. The cars it uses were adequate when the population of these cities was half what it is now, but, if larger cars are required by the increased population, then larger cars must be provided or the smaller cars must be run as trailers.

We do not see that sections 4 or 5 are arbitrary or unreasonable. As shown by modern science, a large percentage of disease is communicated by germs, and, when many people are carried in cars, these germs are liable to find lodgment there. We cannot say that the fumigation of a car once a week is an unreasonable requirement, or that it is unreasonable to require the cars to be kept at a temperature of not less than 50 degrees Fahrenheit.

The rule at common law is that a carrier must provide reasonable accommodations for such a number of passengers as in the exercise of ordinary care he has reason to anticipate will demand to be carried. This rule of the common law is to be read into section 6 of the ordinance. It is the duty of the defendant under the ordinance to run and operate cars in sufficient numbers at all times to reasonably accommodate the public as there provided, in so far as in the exercise of ordinary care it has reason to anticipate that such an amount of accommodation will be necessary. When section 6 is thus read, it is not unreasonable or arbitrary or impracticable of enforcement. The company will not be responsible for not furnishing a sufficient accommodation to accommodate a crowd which it has not reason in the exercise of ordinary care to anticipate. But it should exercise ordinary care to provide cars that will reasonably accommodate the passengers which may reasonably be anticipated.

Judgment affirmed.

Ahern v. Boston Elevated Ry. Co.

(Massachusetts — Supreme Judicial Court.)

1. **POLICE OFFICER INJURED BOARDING CAR; QUESTION FOR JURY.** — A police officer, while in the exercise of his duty in regulating the movement of cars at intersecting streets, was obliged for his own safety to get upon the front step of a car; this car, by reason of the negligence of the operator, collided with another car, throwing the officer to the ground. The motor-man of the car knew of the officer's danger, and refused to permit him to enter the car. *Held*, that in an action by the policeman the company was not entitled to a verdict as a matter of law.
2. **RIGHT OF POLICEMAN TO BOARD CAR.** — A police officer charged with the duty of regulating traffic at intersecting streets may board a part of a car where he may be exposed to injury and where passengers are not expected to ride.

DEFENDANT brings exceptions from verdict for plaintiff. Reported 97 N. E. 72.

STATEMENT OF FACTS.

Action of tort to recover for injuries alleged to have been sustained by plaintiff through the negligence of defendant in the operation of a street car or cars. The count of the declaration on which the action was tried alleged that plaintiff was a police officer in the city of Boston, stationed at or about the corner of designated streets, as a guardian of crosswalks and intersecting tracks, and while so acting he was rightfully on the

Injury to Workman in Street. — For a discussion of the liability of a street railway company for injuries to a workman in a street, see the note to *Gleason v. Worcester Consolidated St. Ry. Co.*, 2 St. Ry. Rep. 422.

Collision with Workman in Street. — In *Nellis on Street Railways* (2d Ed.), § 407, it is said: "A street railway company is required to use such reasonable precautions to prevent accidents or injuries to municipal or other employees engaged in work on the public streets on or near their tracks as would ordinarily be adopted by careful and prudent persons under like circumstances. Although the care and prudence employed should be reasonably commensurate with the danger to be encountered, the servants of the company have the right to assume that a workman upon the street will exercise ordinary care to note the coming of the car and get out of the way in time to avoid danger. But, while they have the right to assume this, the servants of the company are not free from negligence in running their cars without having them under their control so that they can be readily stopped, or without giving ample warning of their approach when such notice is reasonable and prudent under the circumstances."

track of defendant, and while standing on the track a car was so negligently operated as to place him in a position of great danger; and that to remove himself from danger it becomes necessary for him to place himself on a car of defendant while the car was in motion; and that the motorman or conductor of such car did not stop it and give him an opportunity to alight from the car, and remove himself from his dangerous position; and that while riding on the car there was a collision with another car in consequence of the carelessness of defendant, its servants and agents; and that, as a result of the collision, plaintiff was injured. The defendant requested the court to rule as follows:

"(1) Upon all the evidence, your verdict must be for the defendant upon all counts of the plaintiff's declaration.

"(2) Upon all the evidence, the plaintiff is not entitled to recover."

"(6) Upon the fourth count of the plaintiff's declaration, your verdict must be for the defendant."

"(9) The plaintiff, getting upon the left-hand front step of the car, assumed the risk of any injury that might happen to him while he was in that position, and cannot recover for such injury."

"(12) The plaintiff was not in the exercise of due care, if, as he stood in the street, he relied wholly upon others to see that he was not struck by a City Point car.

"(13) The evidence does not warrant a finding that the plaintiff was in the exercise of due care.

"(14) One who is injured by reason of his having assumed a dangerous position cannot justify his act in getting into such position by showing that he did so to escape from other danger, unless he shows affirmatively that his getting into the other danger was not due to his failure to exercise ordinary care for his own safety.

"(15) The evidence does not warrant a finding that the plaintiff was justified in getting upon the left-hand front step of the car.

"(16) The evidence does not warrant a finding that the plaintiff was justified in remaining upon the car of the defendant until he was struck.

"(17) A person getting upon the left-hand front step of a closed street car, with a vestibule platform and the left-hand door of the front vestibule closed, while the car is operating along double tracks, is a trespasser upon the car.

"(18) A police officer or patrolman has no more right than any private person to get upon a part of the car where he may be exposed to injury, and where passengers are not invited or expected to ride.

"(19) The plaintiff in this case was a trespasser upon the car of the defendant.

"(20) All that the defendant is required to do with regard to a trespasser is to abstain from wilfully, wantonly or recklessly exposing him to danger.

"(21) The defendant and its servants owed the plaintiff no duty, except to abstain from wilfully, wantonly or recklessly exposing him to danger.

"(22) There is no evidence warranting a finding that the defendant was guilty of wilful, wanton or reckless negligence."

Chas. W. Bartlett, Jos. W. Bartlett, Fredk. E. Jennings and Arthur T. Smith, for plaintiff.

Arthur A. Ballantine, for defendant.

Opinion by SHELDON, J.:

The jury could find that the plaintiff while in the exercise of his duty in regulating the movement of cars and other vehicles at the corner of Charles and Cambridge streets, and while himself in the exercise of due care, standing at a place where at that time and under those circumstances he had a right to be, was approached by a car of the defendant driven in a manner which at that time and place could be found to have been negligent, and by reason of which he was obliged for his own safety to get upon the front step of the car; that this car then, going around the switch at an excessive and dangerous rate of speed, came by reason of this negligence in contact with another car going around the opposite switch, so as to break the step on which the plaintiff was standing and throw him to the ground. The defendant's motorman who was operating the car was, according to his own testimony, aware of the plaintiff's presence upon the step and saw the other car approaching the switch; there seems to have been no dispute, certainly there was evidence, that the plaintiff could not get upon the platform of the car or higher up than the step on which he was standing, because the vestibule door was closed; and it could have been found that the motorman ought to have seen that there was immediate risk of a collision, but disregarded the signals of the plaintiff to open the vestibule door. No doubt other findings might have been made; and it may be that a verdict for the defendant reasonably could have been expected. But it is plain that a verdict for the defendant could not have been ordered.

As it could be found that it was by reason of the original negligence of the defendant's motorman that the plaintiff was compelled to take his position on the car step and to remain there until the collision, it could not be said as matter of law, whatever the jury might have found, that he assumed the risks of his position. The jury could say that he was not there of his own choice. It follows that the defendant's first, second, sixth, ninth, thirteenth, fifteenth, sixteenth, seventeenth, nineteenth and twenty-first requests were rightly refused.

The twelfth and fourteenth requests were given in substance.

The eighteenth request could not be given as framed. A police officer charged with the duty which was imposed upon the plaintiff might very properly, in order to perform faithfully his whole duty, find himself compelled to get upon a part of a car where he might be exposed to injury and where passengers are not invited or expected to ride. This was claimed to be the case here, and it presented a question of fact for the jury.

As to the twentieth request, the jury were instructed that the plaintiff could not recover unless he was in the exercise of due care, and in substance that this would not be so unless his getting upon the step of the car was for the reason and under the necessity that he claimed. This was more favorable to the defendant than the instruction we are considering, and so the defendant has as to this no ground of complaint. For like reasons, it cannot complain of the failure to give its twenty-second request. As the case was left to the jury, nothing more than ordinary negligence on its part needed to be proved.

As the defendant's exceptions were merely to the refusal to give its requests, we need not consider whether everything which the judge said to the jury was technically correct.

Exceptions overruled.

Webber v. Old Colony St. Ry. Co.

(Massachusetts — Supreme Judicial Court.)

1. **INJURY TO PASSENGER FROM SUDDEN JOLT; PRESUMPTION OF NEGLIGENCE.** — A jolt, even if the car is not derailed, sufficient to lift a passenger from her seat and cause her to fall back with "a hard thump," is not an ordinary incident of travel, and if unexplained is presumptive proof of the carrier's negligence.
2. **SAME; BURDEN OF PROOF.** — But where the defendant introduces evidence to show that it was not negligent in causing the jolt, the plaintiff still has the burden of proof.
3. **DAMAGES; CONDITION OF PASSENGER.** — The fact that a passenger injured by the sudden jolt of a car was suffering from physical conditions making her more susceptible to the particular form of injury, does not deprive her of all damages.

PLAINTIFFS except to verdicts for defendant. Reported 97 N. E. 74.

Burden of Proof of Negligence. — The question of the burden of proof of negligence is discussed in *Nellis on Street Railways* (2d Ed.), §§ 499, 500. See also *Chamberlayne's Modern Law of Evidence*, chapter 11.

These are two actions of tort by husband and wife respectively, growing out of the personal injuries alleged to have been received by the female plaintiff while a passenger on one of the defendant's cars, caused by a jolt while the car was in motion and the other by her husband for expenses of her illness and loss of her consortium.

R. W. Nutter and C. C. King, for plaintiffs.

Asa P. French and James S. Allen, Jr., for defendants.

Opinion by BEALEY, J.:

The judge before whom these cases were tried without a jury having made certain findings of fact on which he ruled as matter of law that the plaintiffs could not recover, they seek to have the findings set aside with the exception of those numbered two, three and four, and the rulings reversed. It may be, as the plaintiffs contend, that by refined yet clear discriminations a substantial cause of action which they believed had been established by the evidence as stated in the first four findings was overthrown. But the adverse conclusion, that upon all the evidence the jolt which caused the forward part of the car during the transit to rise up on one side, lifting Mrs. Webber from her seat, and causing her to fall back with "a hard thump," was not attributable to a defective condition of the car, or of the roadbed and track, or to any negligence in operating the car, not having been unwarranted cannot be set aside. It is familiar law that the weight of testimony and the credibility of witnesses are not reviewable on exceptions. The plaintiff presented twelve requests for rulings which were refused. It is manifest that the first two were properly denied, and while the twelfth relating to the measure of damages became immaterial under the eighth finding that no liability of the defendant had been proved, the remaining requests, except the eleventh, directed the attention of the court to the rule, that the plaintiff's evidence, which the findings show the judge believed, was sufficient proof of its liability. If the defendant had offered no evidence the requests would have been applicable, but evidently upon the testimony of its motorman and conductor as stated in the fifth finding, the judge reached the conclusion as to the cause of the accident, which is set forth in the seventh finding. The determination of facts is, however, interwoven in the seventh and eighth findings

with the important ruling found in the sixth to which the plaintiffs excepted. The ruling if it rested only on the first four findings might be subject to the plaintiffs' criticism, that it went beyond the evidence. A jolt even if the car is not derailed, but which was sufficient to cause a passenger to pass through Mrs. Webber's experience, is not an ordinary incident of travel. *Work v. Boston Elev. Ry.*, 7 St. Ry. Rep. 937, 207 Mass. 447, 93 N. E. 693; *Nolan v. Newton St. Ry.*, 7 St. Ry. Rep. 215, 206 Mass. 384, 388, 92 N. E. 505. And its unexplained occurrence is presumptive proof of the carrier's negligence. *Egan v. Old Colony St. Ry.*, 5 St. Ry. Rep. 438, 195 Mass. 159, 161, 80 N. E. 696. But where as in the case at bar the defendant introduces evidence not perhaps to account for the accident, but to show that it had not been negligent, the plaintiffs still had the burden of proof, which the judge finally decided had not been sustained. *Carroll v. Boston Elev. Ry.*, 200 Mass. 527, 534, 535, 536, 86 N. E. 793, and cases cited. The ruling given in the ninth paragraph, that

"as matter of law * * * where a passenger in an action against the carrier relies upon a personal injury as the result of a jolt, it is not enough to prove a jolt from which the injury resulted in fact, even though the jolt can be described as unusual or extraordinary, but it is necessary to prove that the jolt was such that it would have caused, or was sufficient to cause, actionable injury to a passenger in normal health in the same situation"

was incorrect, and the plaintiffs' eleventh request in substance should have been given. The defendant was bound to exercise due care in the transportation of those who had been accepted as passengers, and if she was found to have been suffering from physical conditions making her more susceptible to the particular form of injury, shown by the evidence, this fact did not deprive her of all damages caused by the fall. *Coleman v. N. Y. & N. H. R. R.*, 106 Mass. 160; *Derry v. Flitner*, 118 Mass. 131; *Turner v. Boston & Maine R. R.*, 158 Mass. 261, 266, 33 N. E. 520; *Spade v. Lynn & Boston R. R.*, 172 Mass. 488, 491, 52 N. E. 747, 43 L. R. A. 832, 70 Am. St. Rep. 298; *Sullivan v. Marin*, 175 Mass. 422, 56 N. E. 600; *Steverman v. Boston Elevated Ry.*, 205 Mass. 508, 513, 91 N. E. 919; *Stynes v. Boston Elev. Ry.*, 206 Mass. 75, 91 N. E. 998, 30 L. R. A. (N. S.) 737; *Pearson v. Duane*, 4 Wall. 605, 18 L. Ed. 447; *Hannibal & St. Joseph R. R. v. Swift*, 12 Wall. 262, 20 L. Ed. 423; 13 Cyc. 31, and cases cited in note 78. See also *Connors v. Cunard Steamship Co.*, 204 Mass. 310, 90 N. E. 601,

26 L. R. A. (N. S.) 171, 134 Am. St. Rep. 662. But the plaintiffs were not harmed by this ruling as the previous findings and rulings were decisive of their right to recover. *American Malting Co. v. Souther Brewing Co.*, 194 Mass. 89, 97, 80 N. E. 526.

Exceptions overruled.

International Lumber Co. v. American Suburbs Co.

(Minnesota — Supreme Court.)

1. **CONSTRUCTION OF STREET RAILWAY; DAMAGES TO ADJOINING OWNER; INTERJUNCTION; EVIDENCE.** — In an action to restrain and enjoin the construction of a street railway, the findings of the trial court to the effect that plaintiffs would suffer a special injury, different in kind from that suffered by the general public, by the construction of defendants' line of railroad along and upon the public street and highway fronting their property, *held* sustained by the evidence.
2. **FRANCHISE; LAPSE OF; COMPLIANCE WITH CONDITIONS.** — Where the local municipal authorities grant to a street railway corporation the right to construct and operate a line of railroad upon and along the public streets of the municipality, conditioned upon the filing by the company of a written acceptance of the grant within a specified time, a compliance with the condition as to acceptance is essential to the vesting of the grant; and the grant will lapse and cease if the condition be not complied with.

The findings of the court in this case, that defendants failed to file the necessary acceptance, *held* sustained by the evidence.

3. **CORPORATIONS; AUTHORITY OF MUNICIPALITY TO ENLARGE POWERS OF; CONSTRUCTION AND OPERATION OF STREET RAILWAY.** — Corporations, whether public or private, are creatures of the State, deriving their power from statutes providing for their organization; and it is beyond the authority of

Acceptance of Franchise. — In *Nellis on Street Railways* (2d Ed.), § 57, it is said: "No formal resolution of acceptance by the street railroad company is required to be filed, or made, in any case unless written acceptance is required by statute, or is imposed as a condition of their consent by the local authorities; and where written consent is thus required and filed the force thereof is not diminished by a declaration in the instrument of consent that the company waives none of its vested rights under its charter. If the facts show an actual, practical acceptance by the company, or action which would be only explicable in case the franchise were accepted, it is sufficient. A previous request for an ordinance obviates the necessity of a subsequent acceptance. The acceptance of an ordinance extending the franchise of a street railroad company may be presumed from the fact that the amendment is beneficial to the corporation, especially when it proceeds to issue bonds falling due at the expiration of the enlarged franchise."

a local municipal board or council to enlarge the same by attempting to confer upon the corporation powers not possessed by its charter or articles of incorporation.

Power and authority to construct and operate a street railroad cannot be conferred by such local municipal board or council upon a private corporation organized for the purpose of dealing in real estate.

4. NUISANCE; INJUNCTION; ACTION BY ABUTTING OWNERS.— Abutting property owners suffering a special injury from obstructions or nuisances in the street fronting their property, distinct from that suffered by the general public, may maintain an action for an injunction restraining the nuisance.

If the nuisance be placed in the street by a corporation, the property owner so offended may challenge the authority of the corporation in the premises, and its right to exercise a street car franchise.

(Syllabus by the Court.)

DEFENDANTS appeal from a judgment for plaintiffs and from an order denying a new trial. Reported 137 N. W. 395.

W. V. Kane, of International Falls, and *Richard & Coe*, of Minneapolis, for appellants.

C. J. Rockwood, of Minneapolis, for respondents.

Opinion by BROWN, J.:

Action to restrain and enjoin the construction of a line of street railroad upon and along one of the streets of International Falls, and upon a public highway leading from said street to the village of Ranier. Plaintiffs had judgment, and defendants appealed therefrom, and also from an order denying a new trial.

The complaint alleges that plaintiffs are the owners and in possession of certain described real property fronting upon the street and highway in question; that they have constructed a large sawmill thereon, and are about to set the same in operation; that they have expended, in the construction and equipment of the mill, a sum exceeding \$75,000; and that the premises in question have been prepared solely for the operation of this plant. The complaint further alleges that the street in question furnishes the only means of access to the mill; and that the construction of the railroad track therein will substantially and greatly impair the usefulness of the mill and the operation thereof. It also alleges that the threatened acts of defendants are wrongful and unlawful; that they are without authority to enter upon the street or highway, for the purpose of constructing therein their railroad tracks; and the prayer is that they be restrained from so doing.

Defendants answered, alleging in justification of their asserted right to construct car tracks in the said street, certain ordinances and resolutions enacted and adopted by the municipalities having the control and authority of the street and highway, by which the right to lay the car tracks upon the same was granted. Plaintiffs, in reply, denied the validity of these enactments, and enlarged upon and made more specific the allegations of the complaint in reference to the alleged special injury to plaintiffs.

Upon the issues thus framed, the cause proceeded to trial, at the conclusion of which the court made full and complete findings of fact and conclusions of law, directing judgment for plaintiffs for the relief demanded in the complaint.

The principal contentions in support of the appeal are (1) that the complaint fails to state facts sufficient to constitute a cause of action; and (2) that the evidence wholly fails to show in plaintiffs a right to the relief demanded.

1. No objection to the complaint was made in the court below, and it is urged for the first time in this court. The pleading was not demurred to, nor objection made at the trial which called in question the sufficiency of its allegations. The rule controlling a situation of this kind is well settled by our decisions. An objection to the sufficiency of a pleading, made for the first time in this court, will be overruled if, by any fair construction of intentment, a cause of action or defense may be spelled out of the allegations. *Dunnell's Digest*, 7726. The precise objection is that the complaint fails to allege facts showing any special injury or damage to plaintiffs, different in kind from that suffered by the public at large, invoking the general rule that a private action will not lie for an obstruction of a public street, however wrongful or unlawful, unless the complaining party shows some special injury not common to the general public. It must be conceded that the complaint is not as complete in this respect as the facts disclosed by the record would have warranted, and a seasonable objection thereto would probably have been sustained. But in respect to this feature of the case the complaint is enlarged and the allegations thereof fortified by the allegations of the reply, and, construed together, we find the essential fact, namely, plaintiffs' special injury, sufficiently alleged. We do not stop to consider to what extent the allegations of the complaint may be added and fortified in a reply; there being no departure from the cause of action pleaded in the complaint. *Bishop v. Travis*, 51 Minn. 183,

53 N. W. 461; 2 Dunnell's Dig. 7629. No objection was made to the reply in the case at bar; and the trial below proceeded on the theory that proper and sufficient allegations were contained in the pleadings. The objections now made must therefore be overruled.

2. Defendants' proposed line of railroad extends from within the city of International Falls to the village of Ranier, a distance of three or four miles, to be constructed upon a highway as it extends across section 35, in which, and abutting upon the highway, plaintiffs own certain lands. The trial court found that the construction of the road, not only upon the street of the city, but upon the highway across section 35, beyond the city limits, would specially and peculiarly affect plaintiffs in the enjoyment of their property, and of these findings defendants complain as not supported by the evidence. It appears that the street in question has been graded and graveled in the center to a width of twelve feet; that from this graveled way the street slopes to the gutters on each side, and, because of the nature of the soil, the street is, in times of wet weather, impassable for loaded teams outside the graveled way. It further appears that plaintiffs, to reach the market with their products, will be required to make almost constant use of the street with heavily loaded vehicles. Defendants propose to take exclusive possession of the graveled way, leaving plaintiffs to drive over and across their tracks, or upon the sloping sides of the street. The trial court found, in this connection, as follows:

"It will not be practicable to haul such loads along or across defendant's tracks in the condition in which defendant intends to maintain them; and the existence of defendant's tracks in said street * * * will cause great and actual damage to plaintiffs' mill and property, and will cause plaintiff lumber company great and actual injury and damage in the operation of its sawmill and the conduct of its business connected therewith."

The court also found, with reference to the construction of the railroad upon the highway over section 35, as follows:

"The defendants, prior to the commencement of the action, began grading for tracks across section 35, between the graded roadway and the ditch on the south side, and intend to place a railroad track upon such grade, constructed of ties about eight feet in length, and T rails thereon about three and one-half inches high, and with gravel ballast between and under the ties, in the usual and ordinary manner of railroad construction. When completed, the earth embankment between the ties will be at some points a foot or so below the center of the graded highway, and at other points a foot or so higher than the center of the graded highway. The defendants have placed at a number of

points shallow drainage across their grading leading to the ditch; but the relative levels of the public highway and of the defendants' embankment and the manner of construction are such that the drainage of the public road will be seriously impaired and the road seriously damaged, and the plaintiff's access to its lands seriously interfered with and disturbed."

Aside from the point urged by counsel for plaintiffs, that the construction of the railroad upon the highway would constitute an additional servitude, entitling plaintiffs to an injunction until their compensation is ascertained and paid, we hold that a special injury is sufficiently shown by the findings to entitle them to the relief granted, and we have only to determine whether the findings are sustained by the evidence. The suggestion of counsel for defendants that the findings are mere conclusions of law, and not matters of fact, is without force. The findings, though expressed in the abstract, are nevertheless conclusions of fact and not of law.

We have examined the record with care, and find therein sufficient competent evidence tending reasonably to the conclusion that the acts of defendants, of which complaint is made, will, if consummated, specially affect plaintiffs in their rights of property and access thereto in a manner different from the injury to the general public, and therefore sustain the findings. A discussion of the evidence would serve no useful purpose. The substance thereof is expressed in the findings.

The case is brought within the rule laid down in *Aldrich v. Wetmore*, 52 Minn. 164, 53 N. W. 1072. It appeared in that case that plaintiff owned and operated a barber shop on the ground floor of his building, fronting on a public street in the city of Minneapolis. The defendant owned the adjoining lot, and in the improvement of his property took up the sidewalk in front of it, and excavated a cellar on his lot and under the sidewalk, throwing the earth and material into the street in front of both his lot and plaintiff's shop, thereby obstructing travel upon the sidewalk and impairing access to plaintiff's property. The action was for damages resulting from the nuisance, and the court held that it could be maintained; that it was not necessary to the maintenance of a private action for obstructing a public street that all access to plaintiff's property be shown; and that it is sufficient, in such a case, that the use of adjacent property is substantially and materially impaired. The rule there laid down has been followed and applied in subsequent cases. *Fitzer v. Railway Co.*, 105 Minn. 221, 117 N. W. 434, 18 L. R. A. (N. S.) 268, 127 Am.

St. Rep. 557; *Hruska v. Railway Co.*, 107 Minn. 98, 119 N. W. 491. See also *Railway Co. v. Moran*, 151 Ala. 187, 44 South. 152, 125 Am. St. Rep. 21; *Long v. Wilson*, 119 Iowa 267, 93 N. W. 282, 60 L. R. A. 720, 97 Am. St. Rep. 315; *State v. Godwin*, 145 N. C. 461, 59 S. E. 132, 122 Am. St. Rep. 467; *Smith v. Mitchell*, 21 Wash. 536, 58 Pac. 667, 75 Am. St. Rep. 858; *Cushing v. Gray*, 152 Cal. 118, 92 Pac. 70, 125 Am. St. Rep. 47; 11 Ann. Cas. 287, note; *Schuster v. Railway Co.*, 142 Wis. 578, 126 N. W. 26. The facts presented in *Guilford v. Railway Co.*, 94 Minn. 108, 102 N. W. 365, and in other cases cited by defendants are essentially different from those here presented, and they are not in point. Plaintiffs' injury is of a special and peculiar nature, distinct from that suffered by the public at large — a fact not appearing in those cases.

The mere fact, however, that plaintiffs are specially damaged is not alone sufficient to sustain their right to an injunction. It must further appear that defendants are without authority to lay their railroad in the street and highway in question. If defendants have been legally and properly vested with this authority, then plaintiffs are not entitled to an injunction, though they might have an action for damages. We come, then, to that question.

3. Defendant American Tramways Company is a street railway corporation, organized and existing under the laws of the State of South Dakota. Defendant American Suburbs Company is a corporation, organized under the laws of this State for the purpose of dealing in real estate. The authority relied upon as vesting in the Tramways Company the right to lay its car tracks upon the street in question, within the corporate limits of the city of International Falls, is founded in an ordinance of the village council, predecessor of the city, by which the right was granted to that company, upon the terms and conditions therein prescribed. The line of road to be constructed by that company connects with the line to be constructed by the Suburbs Company at a point within the city; and the authority of the Suburbs Company is based upon an ordinance of the village and certain resolutions of the board of supervisors of the town through which the road extends, and the board of county commissioners. The Tramways Company claims no rights beyond the boundaries of the municipality, and the Suburbs Company claims no rights within the same, save to a limited extent, namely, from the station building of the *Minnesota & International Railroad Company*, as the same

is located adjacent to the street in question. We dispose of the question of the rights of the companies separately.

4. The ordinance of the village council, granting the right to the Tramways Company to occupy this street and other streets of the village, expressly granted the right upon certain specified conditions, one of which was that the company should, within sixty days after the passage of the ordinance, file with the village recorder an acceptance thereof, signed by the president and secretary of the company; and that the grant should not become operative, or vest in the company any rights or privileges whatsoever, unless so accepted. The trial court found that the grant was not accepted by the company; and, therefore that it never took effect. If this finding is sustained, it is necessarily fatal to the asserted grant now insisted upon by defendants. The ordinance imposed numerous conditions upon the company, and reserved in the village council certain rights of control in the matter of the operation of the road when constructed, an assent to which by the company was essential to the creation of the privilege and franchise thereby intended to be granted. In other words, the ordinance amounted to nothing more than a proposal, and no vested rights were granted the company until acceptance, until the contract was completed in the manner by the ordinance provided, until which time it remained without force or effect, except as an offer to grant the use of the streets of the village, provided the company consented in writing to the conditions imposed. That formal acceptance or waiver thereof was necessary to the consummation of the transaction is clear under the authorities. *Joyce on Franchises*, 348.

Counsel for defendants insist, however, that a proper acceptance of the ordinance was duly signed and filed as thereby required; and that the trial court erred in finding to the contrary. If it be conceded that the question whether the findings of the court are sustained by the evidence on this subject is before the court by proper assignment of error, we have only to add that an examination of the record does not bring to light evidence of a character to justify the conclusion that the findings are clearly and palpably against the evidence. The evidence fairly shows that an acceptance was prepared and signed soon after the passage of the ordinance; but it does not show that the document found permanent lodgment in the city clerk's office until some time in July, 1910, over a year after the ordinance was passed, and a few days prior to the trial of the action. The city recorder testified that a paper,

which, at the time of the trial, he thought was an acceptance of the ordinance, was handed to him for filing soon after the ordinance was passed, and which he subsequently returned to the secretary of the Tramways Company; but he was unable to say that the document on file at the time of the trial was the same paper. He could not identify it as the same; and, so far as the record before us shows, the paper on file in July bears no marks, by indorsement or otherwise, that it had previously been on file in the recorder's office. The evidence is too uncertain to justify us in overturning the findings upon this question, and we sustain them. It follows that, since the Tramways Company failed to accept the ordinance within the time fixed therefor, the ordinance lapsed, became inoperative, and the Tramways Company can predicate no rights thereunder. In view of this conclusion, we pass, without consideration, several other objections to the validity of the ordinance, the determination of which is unnecessary to a decision of the case. The point made in defendants' brief, that the acceptance was waived by the subsequent acquiescence of the public authorities, is not presented by the record, and is not considered. The court made no findings upon the question; nor was there any request for additional findings covering the point. The question is not, therefore, before us upon this record.

5. The Suburbs Company was organized as a real estate corporation. Its articles of incorporation recite that

"the general nature of its business shall be the buying, selling, owning, leasing, erecting, constructing, repairing and maintaining buildings of all kinds and character as owner, agent or otherwise; the buying, selling, leasing, owning and controlling real estate as owner, agent or otherwise; * * * the organizing and operation of such enterprises as may be necessary in the development of such properties and the doing of all acts incidental thereto; * * * and to transact all other lawful business."

The contention of plaintiffs is that, since the Suburbs Company was and is a purely private corporation, organized and created for a specific private purpose, it could not lawfully be clothed with a public franchise of the nature of that here involved; and that the ordinance of the village and the resolutions of the town and county boards were wholly ineffectual. We sustain this contention. It may be conceded, for the purposes of the case, that a franchise to construct and operate a street railroad, granted by a municipal corporation, is not necessarily a corporate franchise, and that it may

lawfully be granted to either an individual or a corporation. It is not essential to the existence of a corporation, but is a power conferred subsequent to its creation. Joyce on Franchises, § 30. Although our statutes provide that the right to construct street railways upon the public streets or highways may be granted by local authorities, including the town and county boards, to persons or corporations (sections 434, subd. 11, and 745, Rev. Laws 1905), it is clear that, when granted to a corporation, the corporation must of necessity be one capable of its acceptance, and one which it may exercise under its charter powers.

It is elementary that corporations can exercise no power or authority except such as is expressly conferred upon them by law or by their articles of association, and such as are incidental to the exercise of the powers expressly granted. When a corporation exceeds these limits, its acts are wholly *ultra vires*, and subjects its charter to forfeiture at the suit of the State. Suburbs Company had no authority, under its articles of incorporation, to enter upon the business of operating railroads; and it is obvious that local municipal councils and boards could not lawfully confer that power upon it. The creation of corporations rests with the State, and the authority conferred by statute upon municipalities to grant to street railroad corporations the right to use the public streets must be confined to corporations authorized to engage in such an enterprise. The authority of the Suburbs Company cannot be enlarged by intendment, and the general clause of its articles of association, authorizing the transaction of any lawful business, must be limited to such matters and transactions as have some relation to the general business of the company. The powers of the company could not be enlarged by the local authorities. Nellis on Street Railways, § 10; *Oregon Ry. Co. v. Railway Co.*, 130 U. S. 1, 9 Sup. Ct. 409, 32 L. Ed. 837; *Farrell v. Railway Co.*, 61 Conn. 127, 23 Atl. 757. If the franchise may lawfully be granted to a private real estate corporation, it might, with equal propriety, be granted to a life or fire insurance company, or to a religious or banking corporation. Clearly the Legislature never so intended. It follows that, since the Legislature has not authorized the grant of such power to the private corporation, organized for a specific private purpose, the attempt of the local authorities to vest the Suburbs Company with the power was a nullity. We so hold.

This covers all that is necessary to a decision of the case. We

have considered all the assignments, and discover no sufficient reason for reversing the order denying a new trial.

Judgment affirmed.

Michael v. Kansas City Western Ry. Co.

(Missouri — Kansas City Court of Appeals.)

1. **COLLISION WITH HOSE WAGON; NEGLIGENCE OF MOTORMAN; BURDEN OF PROOF; CONTRIBUTORY NEGLIGENCE; QUESTION FOR JURY.** — In an action by a fireman to recover for personal injuries received in a collision between a hose wagon on which he was riding and an electric street car, the burden is on the plaintiff to establish the fact, if it be a fact, that his injuries were directly caused by negligence of the motorman in the operation of the car.

If plaintiff's evidence discloses that unquestionably he was guilty of contributory negligence, he has no cause of action.

The question of the contributory negligence of the plaintiff or the driver was for the jury.

2. **USE OF STREETS; RIGHTS OF FIREMEN; DUTY OF MOTORMAN.** — Firemen going to a fire have a superior right to the use of the streets, and persons in charge of street cars must exercise due care to avoid collisions with them.

A motorman hearing a fire alarm and knowing that he is about to pass an engine house is bound to stop or bring his car under such control that it can be stopped instantly. It is his duty to give a fire wagon ample room and not impede or endanger its progress.

3. **DUTY OF PERSONS CROSSING STREET CAR TRACKS.** — It is the duty of persons crossing street car tracks to employ their senses for their own protection, and this duty continues until an attempted crossing has been safely made.
4. **LAW OF PLACE OF ACCIDENT GOVERNS.** — In an action brought in another State to recover for personal injuries, the law of the State where the injuries were received governs.

DEFENDANT appeals from judgment for plaintiff. Reported 143 S. W. 67.

Scarritt, Scarritt & Jones, for appellant.

Reed, Yates, Mastin & Harvey, for respondent.

Collision with Fire Apparatus. — For a discussion of the liability of a street railway company for a collision with fire apparatus, see 1 St. Ry. Rep. 581; 5 St. Ry. Rep. 296; 6 St. Ry. Rep. 290.

Relative Rights of Street Railway Company and Fireman. — For a discussion of the relative rights and duties of firemen on their way to a fire and the persons in control of street cars, see the note to *Dole v. New Orleans, etc., Light Co.*, 6 St. Ry. Rep. 290.

Opinion by JOHNSON, J.:

Plaintiff, a fireman employed in the fire department of the city of Leavenworth, Kan., received personal injuries in a collision between a combined hose and chemical wagon on which he was riding and an electric street car operated by defendant, and, claiming that his injuries were caused by the negligence of defendant, instituted this suit to recover the damages he suffered in consequence of his injuries. The answer includes a general denial, a plea of contributory negligence, and a further plea that laws of the State of Kansas preclude a recovery in all cases of personal injury where negligence of the plaintiff contributed to the injury, regardless of the nature of the negligence of the defendant. Doubtless the purpose of this last plea was to interpose a special defense to negligence pleaded in the petition under what is known in this State as the "last chance doctrine," but since the issue of such negligence was abandoned at the trial, and was not submitted to the jury, it will not be necessary to bestow further attention upon it. A trial to a jury resulted in a verdict and judgment for plaintiff in the sum of \$5,000, and the cause is here on the appeal of defendant.

The injury occurred in the afternoon of June 13, 1908, on Fifth street between Seneca and Shawnee streets, in Leavenworth. Fifth street runs north and south, and is intersected at right angles by the other two mentioned streets. An east and west alley fourteen feet wide bisects the block, and just south of this alley and on the east side of Fifth street is the engine house of the fire department where plaintiff was employed. The house had three large entrances and its front wall was sixteen feet from the curb line on the east side of Fifth street. The wagon on which plaintiff was riding emerged from the north door, which was five feet south of the alley. The pavement of Fifth street is forty feet wide and defendant operated a single-track street railway along its center. Consequently the distance between the doorway of the firehouse and the east rail of the track was between thirty-three and thirty-four feet. It was about 200 feet from the doorway to the north line of Seneca street. Fifth street was paved with brick, and the sidewalk space in front of the firehouse was paved with asphalt, and sloped from the building to the street gutter. Plaintiff was 31 years old, and had been employed by the fire department thirteen days before the injury. He was being taught the duties of a driver, but had not completed his period of instruction, and

was not allowed to drive to a fire. An alarm of fire came in, and plaintiff assisted in hitching the horses to the hose and chemical wagon and jumped on the running board, putting on his coat as the team dashed forward. His foreman did the driving, but sat on the left side of the driver's seat. As soon as plaintiff put on his coat, he seated himself next the driver. The team plunged out of the house on a gallop, and, on account of the narrowness of the street, the slope of the asphalt pavement, and the presence of some vehicles on the east side of the street, the driver, whose course required him to drive north, pointed the team due northwest, intending to cross the street car track to the west side of the street. According to the evidence of plaintiff, a large bell on the fire-house sounded the fire alarm before the wagon emerged from the building, and, as soon as they could see north on Fifth street, both plaintiff and the driver looked and saw a south-bound street car at the north side of Seneca street, or just in that street. This evidence places the front end of the street car about 200 feet from a point on the track directly in front of the north door of the fire-house, and, as the team took a northwest course, about 155 feet from the place of collision. At this time the front end of the wagon where plaintiff was seated was approximately forty-five or fifty feet from the place of collision. Neither plaintiff nor the driver looked again towards the street car until the team reached the track, when, looking, they discovered that a collision was imminent. An instant later the car struck the front end of the wagon, and plaintiff and the driver were thrown forward out of their seats. Plaintiff fell across the tongue of the wagon, and sustained serious injuries. There is evidence tending to show that the street car was running at the rate of twenty or twenty-five miles per hour, and that the motorman made no effort to stop or reduce speed, though he was at his post looking ahead, and must have seen the team come out of the building and rush across the track, and must have heard the clamor of the fire bell. Further the evidence tends to show that the motorman easily could have stopped the car after he saw and heard these things, and thereby have prevented a collision.

The evidence of defendant contradicts that of plaintiff in several vital particulars. It tends to show that the fire alarm was not sounded until after the wagon came out of the doorway; that the street car then was south of Seneca street, was running slowly, and that the occupants of the driver's seat on the wagon, seeming-

ly confused and unsettled in their positions, did not look in the direction of the car, but drove right into it.

Passing to the law of the case, our first consideration shall be the demurrer to the evidence, which defendant argues should have been given, and in our discussion of the questions thus raised we shall look at the facts of the case only from the viewpoint of the evidence of plaintiff.

The burden is on plaintiff to establish the fact, if it be a fact, that his injuries were directly caused by negligence of the motorman in the operation of the car.

If his evidence fails to accuse the motorman of such negligence, or if it does thus accuse him, but further discloses that unquestionably plaintiff was guilty of contributory negligence, plaintiff has no cause of action, and must fail in his suit. The argument of counsel for defendant may be resolved into the following propositions: First, there is no evidence that negligence of the motorman caused the injury; second, the evidence conclusively shows that plaintiff himself was guilty of negligence in entering the path of danger when by the exercise of ordinary care he might have discovered the danger and given timely warning to the driver; and, third, the driver was negligent in plunging headlong and blindly across the track, and that his negligence should be imputed to plaintiff.

In the discussion of these propositions, counsel rightly assume that they are to be determined in the light of the Kansas law, and that, if plaintiff has no cause of action under the law of the State where he was injured, he can have none in the courts of this State. *Chandler v. Railroad*, 127 Mo. App. 34, 106 S. W. 553. Defendant offered in evidence and relies in its brief upon the following decisions of the Supreme Court of Kansas as supporting its contention that plaintiff should have been nonsuited: *Bush v. Railroad*, 62 Kan. 709, 64 Pac. 624; *Railroad v. Bussey*, 66 Kan. 735, 71 Pac. 261; *Railroad v. Holland*, 60 Kan. 209, 56 Pac. 6; *Railway v. Adams*, 33 Kan. 427, 6 Pac. 529; *Railway v. Wheelbarger*, 75 Kan. 811, 88 Pac. 531; *Honick v. Railway*, 66 Kan. 124, 71 Pac. 265; *Dyerson v. Railroad*, 74 Kan. 528, 87 Pac. 680, 7 L. R. A. (N. S.) 132.

We find nothing in those cases at variance with the law of our own State. None of them deals with the subject of the rights and duties of firemen going to a fire. Ordinarily the law makes no distinction between the different classes of users of public thor-

oughfares. Pedestrians, drivers of horses, autoists, and street car motormen have equal rights to the use of the streets, and none will be allowed to assert superior rights over the others.

And it is the duty of persons crossing street car tracks to employ their senses for their own protection, and this duty continues until an attempted crossing has been safely made.

But the law wisely excepts firemen going to a fire from the operation of these almost universal rules. In some States the exception has received legislative recognition, but it needs no statutory aid to give it force and vitality. Fire is the best of servants and the most tyrannical of masters. When, escaping control, it breaks out in thickly populated places, its enormous capacity for evil and the rapidity of its expansion makes the performance of the task of regaining control over it one of general public concern and creates an imperative emergency that will brook no delay, however slight. Public servants employed to fight an enemy so dangerous, of necessity, must be accorded a right of way over the public streets superior to that enjoyed by the different classes to which we have referred. The rule thus is stated in 36 Cyc. 1513:

"It is the duty of the motorman or other person in charge of a street car to give way to, and to use due precaution to avoid colliding with a fire engine, truck or wagon on its way to extinguish a fire and save property therefrom, and to hold himself in readiness to avoid such collision when he has reason to anticipate that such an engine, truck or wagon may appear, as when he is approaching and passing a house in which they are kept. The exercise of such precaution may be and sometimes is required by a rule or regulation of the street railroad company, or by ordinance or statute."

Under this rule, the evidence of plaintiff clearly discloses negligence on the part of defendant's motorman. Hearing the alarm and knowing that he was about to pass an engine house, it was his duty to stop or bring his car under such control that it could be stopped instantly. Seeing the hose wagon dash out of the house, he had no right to assume, especially in the face of contrary appearances, that it would turn sharply to the right and avoid crossing the car track. It was his duty to give the wagon ample room, and not impede or endanger its progress. Of the negligence of the motorman there can be no question, if the facts disclosed by the evidence of plaintiff are the true facts of the case.

As to the issues relating to the alleged negligence of plaintiff and the driver, we would not be justified in declaring as a matter of law that either was negligent. Here, again, ordinary rules

must give way to necessity. Extreme haste and some initial confusion necessarily characterize the response firemen must give to an alarm. They must observe the care that an ordinarily careful and prudent person in their situation and circumstances would observe, but we would do wrong to hold that notwithstanding they had the right of way, and were tensely occupied with the duties and dangers of a breakneck race, they should continue to observe the street car, and could not count on their right of way being respected by the motorman. The issues under consideration are presented by all the evidence as issues of fact for the jury to solve. The demurrer to the evidence was properly overruled.

Counsel for defendant object to instruction No. 1, given at the request of plaintiff. We find the rules of law stated in the instruction have the express approval of the Supreme Court in *Moore v. Transit Co.*, 126 Mo. 265, 29 S. W. 9, and in *Heinze v. Railway*, 182 Mo. 547, 81 S. W. 848, and of this court in *Moxley v. Railway*, 5 St. Ry. Rep. 687, 123 Mo. App. 80, 99 S. W. 763. And we do not believe it fairly may be said that the instruction enlarged the scope of the pleaded cause of action or submitted questions of law for decision by the jury.

The instructions must be read as a whole, and, thus reading them, we find the issues of fact clearly and accurately defined.

The point made in the briefs of defendant that the verdict was excessive has no merit, and will not be discussed.

The judgment is affirmed. All concur.

Morris v. Seattle R. & S. Ry. Co.

(Washington — Supreme Court.)

1. **COLLISION WITH VEHICLE AT CROSSING; CONTRIBUTORY NEGLIGENCE; FAILURE TO LOOK AND LISTEN; EVIDENCE; MECHANICAL EXPERTS; CONDITION OF PLAINTIFF WHEN TESTIFYING.** — Where, in an action for personal injuries sustained from the collision of a street car with a vehicle, it is claimed that plaintiff's evidence shows that he was guilty of contributory negligence in failing to look and listen, the trial court, in passing upon a

Duty to Look and Listen. — For a discussion of the duty of a pedestrian to look and listen for approaching cars before crossing a street railway track, see the note to *Wilson v. St. Louis Transit Co.*, 7 St. Ry. Rep. 1.

Last Clear Chance. — The "last clear chance" doctrine is discussed in *Nellis on Street Railways* (2d Ed.), §§ 462, 463.

motion for nonsuit, may consider evidence of medical experts as to the clouded mentality of the plaintiff when he testified.

2. **FAILURE TO LOOK AND LISTEN; NOT NEGLIGENCE PER SE; QUESTION FOR JURY; WHEN WILL NOT PRECLUDE RECOVERY; PROXIMATE CAUSE.** — The failure to look and listen before attempting to cross an electric street railway track at a regular street crossing in a city is not negligence *per se*.

Where the evidence shows that if a car had been running at a usual rate of speed the plaintiff would have had plenty of time to cross, the question as to whether he was negligent in failing to look before starting to cross the track was for the jury.

Negligence as a matter of law in failing to look before crossing a street car track will not preclude a recovery unless it was the proximate or efficient cause of the injury.

3. **DUTY OF MOTORMAN TO AVOID DANGER; PROXIMATE CAUSE.** — Where a motorman could have seen the danger of a driver of a vehicle in time to stop the car, it was his duty to do so, regardless of any negligence of the plaintiff, and the failure to do so was the proximate cause of the injury.

DEFENDANT appeals from a judgment for the plaintiff. Reported 120 Pac. 534.

Will H. Thompson and *Morris B. Sachs*, for appellant.

Frank E. Green, for respondent.

Opinion by ELLIS, J.:

Action by respondent against appellant for damages for personal injuries suffered by reason of a car of appellant being run against respondent's wagon on Rainier boulevard at its intersection with Norman street in the city of Seattle. It is claimed that appellant was negligent in running the car at a dangerous speed, and in not giving timely warning of its approach to the crossing. The trial was to a jury. At the close of respondent's evidence appellant moved for a nonsuit, which was denied. Evidence for appellant was introduced, the cause submitted to the jury, and a verdict was returned in favor of respondent for \$1,000. Appellant's motion for a new trial was overruled and judgment was entered against appellant upon the verdict. This appeal was taken, and there are assigned as errors (1) the court's refusal to grant a nonsuit; (2) the court's refusal to grant a new trial.

Touching the first assignment of error, appellant's sole contention is based upon a claim that the respondent was guilty of contributory negligence in failing to look for the car before driving upon the track. Rainier boulevard runs practically north and south, and Norman street east and west. They intersect at right

angles. The appellant was operating a double-tracked street car line on the boulevard. There was a straight stretch of track from the Norman street crossing for about a quarter of a mile to the north from which direction the car came, and along which the view from the crossing was practically unobstructed. The respondent, a man 70 years old, an expressman, was driving home late in the afternoon of May 18, 1910, along the west side of the boulevard. He stopped and watered his horse at a watering trough at the intersection of Norman street with the boulevard. He then turned and started to drive across the street car tracks, and, when almost across the first track upon which ran the south-bound cars, the back part of one of the rear wheels of his wagon was struck by a car, turning the wagon over, throwing the respondent out, rendering him insensible, and inflicting the injuries complained of.

The respondent's testimony as to what occurred at the time was vague, confused, and contradictory. It does not, however, evince a disingenuous attitude on his part, but rather a vague memory or a confused mind. His testimony as to the occurrence eliminating much confused matter was as follows:

"And I see no car coming until I was on the track, and then I see a car coming at a fearful rate of speed, and I tried to get the horse ahead, but it was too late. * * * Q. After your horse was up on the track as you say, and the fore part of the wagon, and you saw the car coming, about how far was the car off then when you first saw it? A. Well, it was about three-quarters of a block. Q. And are those short blocks or long blocks, down there? A. They are pretty long blocks. Q. What did you do then, when you saw the car first? A. Well, I tried my best to get the horse to get over quick. I thought I had plenty of time anyway, when I saw them coming at such a rate of speed. Q. Was it possible for you to back up then? A. No; that was impossible. Q. Would it have taken longer for you to back up than to go ahead? A. Yes; I don't think I could ever do it hardly. Horse fall down on the track doing that. I couldn't possibly do it. That is all. Q. You drove on ahead. Did you urge your horse in any way to hurry? A. Yes, sir. I had not a whip in my hand, but I just took the reins this way [illustrating] and slapped him up, tried to get him to go ahead. Too late. Q. Did the horse go ahead? A. Yes; he was going ahead. Q. What happened? A. Well, just as I got clear of the further rail, the east rail, they hit the back of my wagon and broke the end all off of the wagon, and knocked me over towards the store about fifty feet or more, I guess, and I was right under the wagon. I didn't know any more. That is all."

On cross-examination, he stated many times that he did not look up the track for the car until he was on the track, and once he said:

"Why, no; I don't remember that I did." On redirect examination he said: "Why, yes; I looked that way, I thought." And on recross he said: "I took a look around of course before I went on the track." And when questioned again: "No, I didn't." From his whole testimony on the subject it was manifest that he had no distinct memory of looking up the track in the direction from which the car came until he was on or nearly on the track. As to respondents mental condition at the time of the trial, he testified when asked as to the condition of his head since the accident:

"Well, it is not the same as it was before. I feel kind of pain very often in my head, and sleep—my sleep is not right, kind of dazed, something, I don't know."

A Mrs. Donovan, at whose house he had lived for about two years and who nursed him at the time of the injury, testified:

"Well, as far as I can explain, when he goes to talk to you about anything he seems to do it as if his mind is away off from just what he wants to talk, and he seems to forget himself."

Dr. De Soto, who had attended him regularly since the injury, testified:

"A. Well, getting worse and worse all the time; that is about it, seems to be getting weaker in both mind and body. I found that his head is affected through the injury which he received there, which is probably, of course, the contusion which was back here which affects the nerve— Q. [Interrupting] Back of the right ear? A. Back of the right ear; yes. Q. And what is the effect of that blow and contusion? A. Well, the only effect which I know now, from what I have treated him, would be a loss of hearing, but it may also mean that he will lose his mentality. Treatment does not seem to do him any good. Q. He may lose his mind? A. Yes."

Dr. Silliman, who had examined respondent several times in consultation with Dr. De Soto, testified to practically the same condition.

In passing upon the motion for nonsuit the trial court was justified in taking into consideration this evidence of a clouded mentality of the respondent when he testified. That court could not say, nor can we, that the minds of reasonable men might not differ as to whether respondent's testimony showed conclusively that he failed to look before driving upon the track.

One C. D. Gaylor, an eyewitness, testified as follows:

"A. I just spoke to him, I says — he just watered his horse, and turned away from the watering trough. I says, 'Hello, Bill.' I have known him for a long time. He says, 'I am going home;' and whirled around to cross the track. There is a little raise at the track, I should say six or eight inches, maybe, from the planking up across the track. I looks up, and here was car up I should say two or three blocks away from there, and I looked up and saw the car coming. It was coming [illustrating] — all you could hear, whirling right through, and Bill turned his head that way, and he commenced hitting the horse with the lines to get across. The car came and took the back end of the wagon and over it went. He didn't have time. If they had slacked up at all he would have got off."

He further testified that the car was going at the rate of twenty-five or thirty miles an hour; that it did not slacken its speed before it struck the wagon; that it went thirty or forty feet before stopping after striking the wagon; that no bell was rung nor whistle sounded nor warning of any kind given. On cross-examination he testified:

"Q. Did you warn Mr. Morris? A. No; there was no time to. He was going across. I thought he had plenty of time to get across the track when he started to cross. When I saw him, I thought he had plenty of time to get across the track."

Mrs. Katherine Dawson, another eyewitness, testified that the horse was just getting up on to the track when she first noticed it, and the car was then a good way up the track, and was running faster than usual; that it did not slacken its speed before it struck the wagon; that it pushed the wagon along "quite a piece" and passed on some distance before it stopped; that she did not hear any bell nor whistle nor any alarm before the car struck the wagon.

C. Vietro, another eyewitness, testified that, when he first saw the respondent, the head of the horse was just going onto the track; that he saw the car at that time between 50 and 100 yards away; that the car was going faster than usual, about twenty-five or thirty miles an hour; that it did not slacken speed before it struck the wagon; that it passed on twenty-five or thirty feet after it struck the wagon before it stopped, and that he did not hear any bell nor any whistle nor any alarm of any kind.

One Frank Worth, a passenger on the car testified: That the car was

"going very fast, very fast, not less than twenty miles an hour. * * * I had never ridden at that speed, to my knowledge, on a street car before."

That the brake was applied so suddenly that it threw him over against the next passenger. That the collision occurred almost immediately on the application of the brake. That just before the brake was applied the motorman was holding conversation with a gentleman standing beside him. That after the car struck the wagon it went thirty or forty, perhaps fifty feet before it was brought to a stop.

This court, in common with other courts, has held that the failure to look and listen before attempting to cross an electric street railway track at a regular street crossing in a city is not negligence *per se*. Assuming that respondent failed to look as soon as he might, still, under the circumstances shown by the evidence, the question of contributory negligence was one for the jury. *Roberts v. Spokane Street Ry. Co.*, 23 Wash. 325, 63 Pac. 506, 54 L. R. A. 184; *Burian v. Seattle Electric Co.*, 26 Wash. 606-613, 67 Pac. 214; *Traver v. Spokane Street Ry. Co.*, 25 Wash. 225-237, 65 Pac. 284; *Chisholm v. Seattle Electric Co.*, 27 Wash. 237, 67 Pac. 601.

In *Shea v. St. Paul City Ry. Co.*, 50 Minn. 395, 398, 399, 52 N. W. 902, 903, the facts were almost identical with those here presented. The plaintiff's failure to look for the car till he was upon the track was urged as negligence *per se*. The court said:

"The fallacy in this, which runs all through counsel's argument, is in assuming that the degree of care required at the crossing of a highway and an ordinary steam railroad is the test of the care required in crossing the track of a street railroad on a public street. The two cases are not alike. In the first place, street cars do not, or at least ought not to, run at the same rate of speed, are not attended with the same danger, and are not so difficult to stop quickly, as those of an ordinary railroad. In the next place, the cars of a street railway have not the same right to the use of the track over which they travel. * * * It would be inexpedient to attempt any complete enumeration of the modifications of or exceptions to the general rules of equality of rights between street cars and other vehicles used on a street. But it is certain that there is no modification or exception that relieves a street railway company from exercising, at least, as much care to avoid collisions with other vehicles as the owners of the latter are required to exercise in order to avoid collisions with the cars."

The following cases are also closely analogous: *Robbins v. Springfield St. Ry. Co.*, 165 Mass. 30, 42 N. E. 334; *Lawler v. Hartford St. Ry. Co.*, 72 Conn. 74, 43 Atl. 545; *Springfield City Ry. Co. v. Clark*, 51 Ill. App. 626; *Dennis v. North Jersey St. Ry. Co.*, 64 N. J. Law 439, 45 Atl. 807; *Citizens' Rapid Transit*

Co. v. Seigrist, 96 Tenn. 119, 33 S. W. 920; *Memphis St. Ry. Co. v. Riddick*, 1 St. Ry. Rep. 769 110 Tenn. 227, 75 S. W. 924. It was immaterial whether he looked or not if he as a reasonably prudent man would have been justified in trying to cross, had he looked before starting to cross, and had he then seen the car where he and his other witnesses said it was even after he was partially on the track. All of these witnesses concur in saying that, had the car been running at a usual rate of speed, he would have had plenty of time to cross. Under the evidence the question as to whether he was negligent in failing to look before starting to cross the track was plainly one for the jury. *Burian v. Seattle Electric Co.*, *supra*; *Nappli v. Seattle, Renton & S. R. Co.*, 61 Wash. 171, 112 Pac. 89.

Moreover, even assuming that the respondent was negligent as a matter of law, that would not preclude his recovery unless that negligence was the proximate or efficient cause of the injury. On this straight stretch of track it is obvious that, if he could have seen the car in time to stop, the motorman on the car could have seen him in time to stop the car if it was going at a reasonable rate of speed.

If the testimony of the respondent and of the other witnesses to which we have referred was true, as must be assumed on motion for nonsuit, then the car was at least 150 or 200 feet away when respondent drove upon the track. To one watching him his intention to cross must have been apparent when the car was even farther away.

The appellant had no absolute right of way at the crossing. Its right was no greater than that of the respondent. Their rights and duties were reciprocal. Whether the motorman could have seen the respondent's danger in time to stop the car was a question of fact.

If he could, it was his duty to do so, regardless of any negligence of respondent, and the failure to do so was the proximate cause of the injury. These were questions for the jury. *Heinel v. People's Ry. Co.*, 6 Pennewill (Del.) 428, 67 Atl. 173; *Powers v. Des Moines City Ry. Co.*, (Iowa) 115 N. W. 494; *Atwood v. Bangor, etc., Ry. Co.*, 91 Me. 399, 40 Atl. 67; *Baltimore, etc., Ry. Co. v. Rifcowitz*, 89 Md. 338, 43 Atl. 762; *Weitzman v. Nassau Elec. R. Co.*, 33 App. Div. 585, 53 N. Y. Supp. 905. The motion for nonsuit was properly overruled. The case of *Fluhart v. Seattle Electric Co.*, 7 St. Ry. Rep. 763, 118 Pac. 51, is clearly dis-

tinguished from the case here upon the facts. There the accident was not at a street crossing. The plaintiff saw the car, and had ample time to stop. He was a pedestrian, and had no team to distract his attention.

The appellant's motion for a new trial was also properly denied. It is plain from our analysis of the evidence produced on respondent's part that it was ample to take the case to the jury on the question of appellant's negligence, both as to a negligently dangerous rate of speed and as to the failure to ring the bell or give other warning. It would be useless to review the appellant's evidence in detail. It positively contradicted the respondent's evidence on every material point. The appellant's contention is that a new trial should have been granted on the ground of insufficiency of the evidence to sustain the verdict. No question is raised on the court's instructions. The trial court had the right to and is presumed to have considered the weight of the evidence. He saw the witnesses and heard them testify. He has expressed no doubt as to the sufficiency of the evidence to sustain the verdict. The motion was necessarily addressed to his discretion. Where the evidence is so palpably conflicting as that here presented, the case is one for the jury. It was no abuse of discretion to refuse a new trial.

The judgment is affirmed.

DUNBAR, C. J., and CROW, CHADWICK and MORRIS, JJ., concur.

Altwein v. Metropolitan St. Ry. Co.

(Kansas — Supreme Court.)

INJURIES TO PASSENGER ALIGHTING FROM CAR; SUDDEN STARTING OF CAR BY MOTORMAN; EVIDENCE; CONTRIBUTORY NEGLIGENCE; NEGLIGENCE; BURDEN OF PROOF. — In the petition herein it is alleged that plaintiff was riding in defendant's street car; that the car came to a standstill at a crossing; that, as she was in the act of alighting, the car was negligently and violently started forward by the motorman with such force as to throw her off the car and down upon the pavement. *Held*, if it appears by the evidence that the car was not brought to a standstill, but was still slowly

Burden of Proof as to Contributory Negligence. — The question of the burden of proof of contributory negligence or freedom therefrom is discussed in *Nellis on Street Railways* (2d Ed.), § 501. See also *Chamberlayne's Modern Law of Evidence*, chapter 11.

moving at the time of the accident, this does not necessarily defeat the right of recovery.

In such case, to sustain the action, the evidence as a whole must show that the injury occurred substantially as alleged, and that the negligent act of defendant's employee was the proximate cause of the injury.

In such a case, where the answer is a general denial only, contributory negligence not being pleaded, the defendant may introduce any evidence which goes to controvert the facts which the plaintiff is bound to establish, in order to sustain the action.

Under such pleading, the plaintiff, in order to sustain the action, is not bound to prove that she did no act, or that she did not omit to do anything, which contributed to her injury. If, however, the plaintiff's evidence does show that she negligently did something, or negligently failed to exercise reasonable care for her own safety, which act or omission was the proximate cause of her injury, she may not recover therefor.

(Syllabus by the Court.)

DEFENDANT appeals from a judgment for plaintiff. Reported 120 Pac. 550.

O. L. Miller, C. A. Müller and Samuel Maher, for appellant.

William H. McCamish, for appellee.

Opinion by SMITH, J.:

This is an action to recover damages for personal injuries, alleged to have been suffered by the appellee while she was a passenger upon appellant's street car in Kansas City, Kan. In her petition she claims that, while she was a passenger upon such street car, the car approached the intersection of Eleventh street and Minnesota avenue, and came to a standstill; that thereupon she alighted therefrom, and as she stepped on the lower step of the car it was carelessly, negligently and violently started forward by the motorman in charge with such force as to throw her off the car and down upon the pavement. She further alleged specially the extent of her injuries and the effects thereof, and prayed for damages in the sum of \$2,000 and costs. The answer was a general denial. The case was tried to a jury.

The plaintiff and two or three witnesses on her behalf testified to facts substantially in accordance with the allegations of the petition. The conductor and motorman, who were in charge of the car, and two or three other witnesses, testified, in substance, that the car had not stopped, but was moving at the time the appellee stepped off and fell. The jury returned a verdict in favor of the plaintiff for \$461. A motion for a new trial was overruled, and judgment rendered according to the verdict.

The appellant urges only four of the eight assignments of error set forth in the abstract. It is urged, in No. 1, that the court erred in permitting the appellee to testify in rebuttal that on the same trip, and before the accident, she heard the conductor say that he was behind time, and he hurried everybody up and started the car almost before the people could get on.

No. 2 relates to similar objections to rulings upon the evidence of a witness, Mrs. Briggs, who testified to similar expressions of the conductor.

Before this evidence was offered, Mr. Barber, assistant superintendent of the railway company, had testified that this particular car was not late; that it was on time; that it was an extra car making an extra trip; that it really was not marked down on the time card for that trip. The evidence objected to was offered in rebuttal of these statements. It is also claimed that this was pertinent to show in what manner the car was handled at the time of the accident. In any event, the evidence does not seem very material, as several witnesses on each side testified as to how the car was handled at the immediate time of the accident.

The sixth instruction was as follows:

"If you do not find from the preponderance of the evidence that the plaintiff was injured as a direct and natural result of the negligence of the defendant's servants in starting the car in question while the plaintiff was in the act of alighting therefrom, then your verdict will be for the defendant."

The issue was thereby clearly defined to the jury, and the evidence of the witness, even if impertinent, was not prejudicial.

The third and fourth assignments of error may also be considered together. The third claim of error is to the refusal of the court to give an instruction, requested by appellant, which reads as follows:

"If you believe from the evidence that the plaintiff stepped from a moving car, and in consequence thereof received the injuries of which she complains, then your verdict should be for the defendant."

In lieu thereof, and upon this is based the fourth assignment of error, the court gave the following instruction:

"If you find from the evidence that the plaintiff stepped from the car in question while the same was moving, and that such act on her part was the proximate cause of the injuries of which she complains, then your verdict should be for the defendant."

We think the latter is the better statement of the law. It will be observed that contributory negligence was not pleaded in defense, yet without such pleading, if the plaintiff did an act which was the proximate cause of her injuries, she could not recover, as the court plainly told the jury. Under the instruction asked by the appellant, it would seem to be implied that the act of stepping from a moving car is negligence *per se*, and *ipso facto* debarred a recovery. This proposition has inferentially been decided adversely in *A., T. & S. F. Ry. Co. v. Holloway*, 71 Kan. 1, 80 Pac. 31; also in *Irvin v. Mo. Pac. Ry. Co.*, 81 Kan. 649, 106 Pac. 1063, 26 L. R. A. (N. S.) 739.

Moreover, the instruction asked by the appellant and refused by the court would seem to put the question of appellant's negligence in issue as fully as would an allegation in the answer that the appellee was guilty of contributory negligence in stepping from the car while it was moving. While it is true, if, in such action, the evidence of the party seeking to recover damages for an injury shows that the injury occurred through his own fault as the proximate cause, he cannot recover, it is also true that if the defendant, in such a case, relies upon contributory negligence as a defense he must allege and prove it. *Stevens v. M., K. & T. Ry. Co.*, 84 Kan. 447, 113 Pac. 398. Under the Kansas Code,

"the defendant may set forth as many grounds of defense * * * as he may have." Civ. Code, § 97 (Gen. St. 1909, § 5690).

In *Kan. Pac. Ry. Co. v. Pointer*, 14 Kan. 37, it is said:

"Contributory negligence on the part of the plaintiff is matter of defense; and if the record shows negligence of the defendant, and is silent as to the conduct of the plaintiff, a judgment for the plaintiff will be upheld."

See also *K. C., L. & S. R. Co. v. Phillibert*, 25 Kan. 583; 29 Cyc. 580; 5 Encyc. Pl. & Pr. 10.

Without pleading contributory negligence, however, as a defense, the defendant in this action was entitled to introduce any evidence which tended to controvert the facts which the plaintiff was bound to establish, in order to sustain her action. *Davis v. McCrocklin*, 34 Kan. 218, 8 Pac. 196; *Light Co. v. Waller*, 65 Kan. 514, 70 Pac. 365; *Railway Co. v. Brickell*, 73 Kan. 274, 85 Pac. 297.

Under the pleadings in this case, the plaintiff was not bound to prove that she did no act, or that she did not omit to do any act, the doing of which or the omission to do which contributed to her

injury. Hence the defendant was not entitled to prove either that she did or omitted to do such acts. If, however, the plaintiff's evidence was such that the jury might infer from it that the injury resulted from some act or omission of her own as the proximate cause thereof, the defendant was entitled to an instruction referring this question of fact to the jury. The court in this case gave the jury such an instruction.

We think that there was a fair trial, and that no substantial error was committed by the court.

The judgment is affirmed.

JOHNSTON, C. J., and MASON, BENSON and WEST, JJ., concurring.

PORTER, J. (dissenting). The appellant's objections to the instruction are not based upon the theory that it is negligence *per se* to step from a moving car. The complaint is that the instruction given should not have been substituted for the one requested, and that it brought into the case the question of contributory negligence, and, in effect, charged that, although the jury believed from the evidence that the car had not stopped when the plaintiff attempted to alight, she could recover, unless, in the opinion of the jury, under all the circumstances, her act in stepping from the moving car was negligence, and, in addition, that it was the proximate cause of her injury. As a matter of law, she could recover only by establishing that the defendant negligently started the car after it had stopped, and while she was attempting to alight. The specific and only negligence alleged is that the car "came to a standstill" at or near the usual place for passengers to get off, and that while plaintiff was in the act of getting off the defendant carelessly and negligently started the car suddenly forward and caused her to fall. In actions of this kind it has been repeatedly declared that the plaintiff must recover upon the specific acts of negligence complained of, and no other. *Telle v. Rapid Transit Ry. Co.*, 50 Kan. 455, 31 Pac. 1076; *Southern K. Ry. Co. v. Griffith*, 54 Kan. 428, 38 Pac. 478; *St. John v. Berry*, 63 Kan. 775, 66 Pac. 1031; *Planing Mill Co. v. Baker*, 74 Kan. 120, 85 Pac. 1016. Contributory negligence was not pleaded; nor was it injected into the case by the instruction requested. The instruction asked was based upon the evidence of a number of witnesses, including a fellow passenger of plaintiff, who testified that plaintiff got off the car before it stopped, and against the express warning of the con-

ductor. In the recent case of *Behen v. Street Railway Co.*, 85 Kan. 491, 118 Pac. 73, the plaintiff claimed to have been injured in the same manner, and a similar instruction was complained of. Solely because the defendant had set up the plea of contributory negligence, and offered proof in support of such defense, we held that it had invited the instruction, and that the giving of it was therefore not reversible error. In the case at bar, where the facts were alike in every respect, the defense was a general denial; and the defendant was clearly entitled to an instruction that plaintiff could not recover if the jury believed from the evidence that, as a matter of fact, she was injured by stepping from the car before it stopped. If she did this, she could not recover, irrespective of whether her act was negligence *per se* or negligence in any sense, and regardless of whether it was the proximate cause of her injury, because, unless the car had stopped, and started suddenly forward while she was in the act of stepping from it, the company was not negligent. It is not negligence for a street car company to keep its cars moving to the end of their destination. In the absence of negligence on the part of the defendant, the plaintiff certainly was not entitled to recover, merely because the jury might be willing to say, under the circumstances, that she was not negligent in stepping from the car, or because, as every one knows, it is not negligence *per se* to step from a moving car. The following excerpt from appellant's brief will demonstrate that appellant is not claiming that to step from a moving car is negligence *per se*:

"The defendant had the right to have the legal effect of the state of facts for which it contended simply and sharply defined to the jury; and hence asked the instruction which it did. It is to no purpose to say that it is not always negligence to step from a moving car. Such a proposition is in nowise involved in the consideration of the rejection of the instruction asked. The plaintiff denies she stepped off the moving car. She does not confess it, and attempt to excuse herself for doing so; and hence the instruction met the conflicting contentions fully and precisely, and should have been given without modification."

Nothing is said in the opinion respecting the error of the court in permitting plaintiff in rebuttal to testify to what she claims occurred when the conductor, after the accident, helped her up from where she had fallen. She was allowed, over the objections of the defendant, and outside of any issue raised by the pleadings, to testify that he spoke to her in a rude and unseemly manner, and that he employed unnecessary force in assisting her to arise.

"Q. What did this conductor do, if anything, to assist you to your feet? (Objected to as not rebuttal, mere repetition, incompetent and irrelevant.) The Court: Overruled. * * * A. Why, he took me by—he took me by my left arm, and jerked me, and says, 'You aren't hurt,' and shoved me back twice, and says, 'You aren't hurt.' And he says, 'I will get seven days for this.' And I could not talk."

This was not in rebuttal of any evidence offered by the defendant. I think its admission was error, and that it probably influenced the amount of the recovery.

Upon the whole record I cannot assent to the judgment of affirmance.

BURCH, J., also dissents.

Kneeshaw v. Detroit United Ry.

(Michigan—Supreme Court.)

AUTOMOBILE; COLLISION WITH STREET CAR; PASSENGER CHARGEABLE WITH NEGLIGENCE OF DRIVER.—Where the owner and driver of an automobile, after discovering that the steering gear will not respond to the lever, fails to stop the machine and allows it to continue in a circle and collide with a street car, he is guilty of contributory negligence, and a passenger riding with him is chargeable with his negligence and cannot recover for injuries received from the collision.

PLAINTIFF brings error from judgment for defendant. Reported 135 N. W. 903.

IMPUTATION OF NEGLIGENCE OF DRIVER OF AUTOMOBILE TO PASSENGER THEREIN.

(See Huddy on Automobiles [3d Ed.], §§ 113 and 114.)

The holding of the above reported case, so far as it imputes the negligence of the driver of an automobile to a passenger riding therein, seems contrary to the general trend of opinion upon the question. It is generally held that the negligence of the driver will not be imputed to the passenger.

United States.—City of Baltimore v. State of Maryland, 166 Fed. 641, 92 C. C. A. 335; Dale v. Denver City Tramway Co., 173 Fed. 787, 97 C. C. A. 511.

California.—Lininger v. San Francisco, etc., R. Co., (Cal. App.) 123 Pac. 235.

Connecticut.—Clark v. Connecticut Co., 7 St. Ry. Rep. 323, 83 Conn. 219, 76 Atl. 523.

Illinois.—Gaffney v. City of Dixon, 157 Ill. App. 589.

Louisiana.—Roby v. Kansas City Southern Ry. Co., 58 So. 696.

Massachusetts.—Chadbourne v. Springfield St. Ry. Co., 6 St. Ry. Rep. 625,

N. Calvin Bigelow, of Detroit (*Henry C. L. Forler*, of Detroit, of counsel), for appellant.

Brennan, Donnelly & Van De Mark, of Detroit, for appellee.

Opinion by BIRD, J.:

This is a personal injury case in which the trial court, at the conclusion of the proofs, directed a verdict for the defendant. The plaintiff has assigned error. The plaintiff and one Hodgson were riding with Mr. Edward Frolick in his electric automobile in the city of Detroit, going east on Jefferson avenue, intending to turn down Brush street. When they reached Brush street they were

199 Mass. 574, 85 N. E. 737. See also *Beaucage v. Mercer*, 206 Mass. 492, 92 N. E. 774.

Missouri. — *Turney v. United Rys. Co. of St. Louis*, 155 Mo. App. 513, 135 S. W. 93; *Rush v. Metropolitan St. Ry. Co.*, 157 Mo. App. 504, 137 S. W. 1029; *McFadden v. Metropolitan St. Ry. Co.*, 161 Mo. App. 652, 143 S. W. 884.

New Jersey. — *Horandt v. Central R. Co. of New Jersey*, 83 Atl. 511.

New York. — *Ward v. Brooklyn Heights R. Co.*, 119 App. Div. 487, 104 N. Y. Supp. 95, aff'd, 190 N. Y. 559, 83 N. E. 1134; *Jerome v. Hawley*, 147 N. Y. App. Div. 475, 131 N. Y. Supp. 897; *Terwilliger v. Long Island R. Co.*, 152 N. Y. App. Div. 168, 136 N. Y. Supp. 733.

Pennsylvania. — *Wachsmith v. Baltimore, etc., R. Co.*, 233 Pa. St. 465, 82 Atl. 755.

Washington. — *Wilson v. Puget Sound Elec. Co.*, 52 Wash. 522, 101 Pac. 50.

In **Wisconsin** it may be that the rule is similar to that of the reported case to the effect that the negligence of the driver is imputed to the passenger. *Lauson v. Town of Fond Du Lac*, 141 Wis. 57, 123 N. W. 629.

In applying the general rule it is held that, where the passenger is a mere guest of the driver or owner of the car, and has no control over the movements thereof, the negligence of the driver is not imputed. *Dale v. Denver City Tramway Co.*, 173 Fed. 787, 97 C. C. A. 511; *Lininger v. San Francisco, etc., R. Co.*, (Cal. App.) 123 Pac. 235; *Chadbourn v. Springfield St. Ry. Co.*, 6 St. Ry. Rep. 625, 199 Mass. 574, 85 N. E. 737; *Turney v. United Rys. Co. of St. Louis*, 155 Mo. App. 513, 135 S. W. 93; *Jerome v. Hawley*, 147 N. Y. App. Div. 475, 131 N. Y. Supp. 897; *Terwilliger v. Long Island R. Co.*, 152 N. Y. App. Div. 168, 136 N. Y. Supp. 733.

The negligence of a husband driving an automobile is not imputed to the wife riding therein. *Clark v. Connecticut Co.*, 7 St. Ry. Rep. 323, 83 Conn. 219, 76 Atl. 523; *Gaffney v. City of Dixon*, 157 Ill. App. 589.

The negligence of the chauffeur of a car hired by the passengers is not to be imputed to such passengers, where they exercise no control over the chauffeur except to indicate the route they wish to travel, or the place to which they wish to go. *Roby v. Kansas City Southern Ry. Co.*, (La.) 58 So. 696; *Wilson v. Puget Sound Elec. Co.*, 52 Wash. 522, 101 Pac. 50.

The negligence of the chauffeur of a sight-seeing automobile is not imputable

prevented from doing so by reason of a wagon which was in the way, so they continued their course on Jefferson avenue ninety to one hundred feet beyond the intersection. At this point they started to circle around to the left, intending to go straight into Brush street. After they crossed the defendant's tracks and were nearing the north curb, Mr. Frolich discovered that the steering gear had caught in some way and would not respond to the lever. The machine kept on in a circle, reaching the south curb just east of Brush street, when it immediately started northward on the second circle. When it reached defendant's south track it collided with one of its east-bound cars, wrecking the automobile and in-

to a passenger therein. *Rush v. Metropolitan St. Ry. Co.*, 157 Mo. App. 504, 137 S. W. 1029; *McFadden v. Metropolitan St. Ry. Co.*, 161 Mo. App. 652, 143 S. W. 884.

Where a passenger in an automobile is an employee of the company, the driver of the car being a member of the company, the negligence of the driver is not imputed to the passenger. *Ward v. Brooklyn Heights R. Co.*, 119 N. Y. App. Div. 487, 104 N. Y. Supp. 95, aff'd, 190 N. Y. 559, 83 N. E. 1134.

The negligence of the owner and operator of an automobile engaged in taking a lunatic and attendant to an asylum is not imputable to the attendant. *Wachsmith v. Baltimore, etc., R. Co.*, 233 Pa. St. 465, 82 Atl. 755.

Though the negligence of the driver is not imputable to the passenger, the latter is under the duty of exercising reasonable care for his safety, and a failure to so do renders him guilty of contributory negligence. *Clark v. Connecticut Co.*, 7 St. Ry. Rep. 323, 83 Conn. 219, 76 Atl. 523; *Wilson v. Puget Sound Elec. Co.*, 52 Wash. 522, 101 Pac. 50.

The duty is not imposed upon the passenger in every case to look and listen for approaching cars when about to cross a railway track, but he is bound to use reasonable care under all the circumstances. *Clark v. Connecticut Co.*, 7 St. Ry. Rep. 323, 83 Conn. 219, 76 Atl. 523. To charge a wife with negligence in riding in an automobile driven by her husband, where she knows that he has an injured hand, she must also know that because of such condition he was unable to manage the car with ordinary safety. *Gaffney v. City of Dixon*, 157 Ill. App. 589. But the fact that the passenger rode a distance of about 1,500 feet in about twenty seconds without remonstrance or even suggestion to the driver that he stop the car or slacken its speed charges him with negligence. *Jepson v. Crosstown St. Ry.*, 72 Misc. (N. Y.) 103, 129 N. Y. Supp. 233. In *Chadbourne v. Springfield St. Ry. Co.*, 6 St. Ry. Rep. 625, 199 Mass. 574, 85 N. E. 737, the court, discussing the negligence of a passenger, said: "She seems to have conducted herself as an invited guest of the driver of an automobile or other vehicle naturally would do. She trusted him as to the running of the machine; that is, she did not attempt to interfere with his management of the automobile. In view of her inexperience and of what might have been found to be the skill and experience of the driver, the jury might well have thought that this was a wise course on her part."

jurying plaintiff. The view which the trial court took of the proofs was that they failed to establish the negligence of the defendant, but did establish the contributory negligence of Mr. Frolich.

There is much discussion in the briefs of counsel as to the occurrences which preceded and led up to the collision, and counsel are in direct conflict as to many of the incidents. We think it would profit little to discuss the question of the negligence of the defendant, for the reason that, whatever our conclusion might be as to that question, the case will have to be affirmed on the ground of the contributory negligence of Mr. Frolich, whose negligence, so far as this case is concerned, is the negligence of the plaintiff.

It was clearly the duty of Mr. Frolich to stop his car when he learned that he could not guide it. He learned this fact just after he crossed the tracks the first time while on his way north around the circle. Instead of stopping his car, as an ordinarily prudent person would do, he kept on around the circle and passed in front of the street car and completed the circle at the south curb, and immediately started on another circle knowing the street car was very near. The automobile was not traveling at any time to exceed two miles an hour, and had he shut off his power or applied his brake at any point before starting on the second circle, the machine would have stopped almost instantly. The failure to use the usual and ordinary instrumentalities provided for stopping the car is, under the circumstances of this case, such contributory negligence as will bar a recovery.

In attempting to excuse plaintiff's failure to stop the automobile, his counsel argues that plaintiff was suddenly placed in a position of peril, and he seeks to apply the rule that is often applied in such cases. The difficulty with this contention is the plaintiff was not suddenly placed in a position of peril. He knew when he crossed the tracks going north on the first circle that he could not control his automobile, and he had ample opportunity to think and act while he was going on around the circle and before he reached the south curb. If Mr. Frolich had not discovered that his steering gear was out of order until after he had crossed in front of the car, there might be some room for such a claim. The facts as Mr. Frolich himself details them leave no room for the application of that rule.

It is also urged that, even though plaintiff were negligent, the motorman should have discovered the peril plaintiff was in and averted the collision. After the automobile crossed the track in

front of the car going toward the south curb, it was apparently in a place of safety, and it was not until it circled around and commenced to approach the track again that the motorman had any reason to suspect that plaintiff was in any danger. After that, and before the impact, the time was very brief, and there is no proof that the motorman did not do what he could to avoid the collision.

The judgment of the trial court is affirmed.

Evansville & S. I. Traction Co. v. Johnson.

(Indiana — Appellate Court.)

1. **COLLISION WITH WAGON AT CROSSING; INJURY TO DRIVER; COMPLAINT.** — A complaint in an action to recover for personal injuries sustained from a collision of defendant's street car with plaintiff's wagon at a crossing, which charges the defendant with negligence in running its car into plaintiff's wagon after it was in a place of danger, is sufficient, although it fails to allege that the car was running at a dangerous speed or that no signals were given.

2. **LAST CLEAR CHANCE DOCTRINE.** — A defendant is liable to a person who, by lack of due care, has exposed himself to danger and is injured by the defendant, if the situation is such that the defendant at some appreciable time before the injury had a chance to avoid it.

Where a plaintiff has reached such a point of danger that due care on his part will be unavailing, and the defendant could have prevented the injury by due care but failed to do so, it is liable where it actually knew of plaintiff's danger, or could have known in the exercise of due care.

But where a plaintiff negligently enters a place of danger, where there is nothing to prevent him from observing his danger and avoiding injury at any time before it occurs, and the defendant by failure to use due care does not see him in time to avoid the injury, neither has a last clear chance, and the defendant is not liable.

In an action for injuries to a person from a collision at a crossing, evidence examined and *held* to sustain a finding that the motorman was negligent in not stopping his car after seeing plaintiff.

3. **SAME; INSTRUCTIONS.** — Instructions governing the last clear chance doctrine approved.

DEFENDANT appeals from judgment for plaintiff. Reported 97 N. E. 176.

Last Clear Chance Doctrine. — For a discussion of the application of the Last Clear Chance Doctrine, see *Nellis on Street Railways* (2nd Ed.), §§ 462, 463.

Woodfin D. Robinson and William E. Stilwell, for appellant.

Chas. W. Wittenbraker and Jas. F. Eusle, for appellee.

Opinion by IBACH, J.:

Appellee recovered judgment below for personal injuries occasioned by a wagon which he was driving having been struck at a street crossing by appellant's street car.

Appellant claims that the complaint is not sufficient to state a cause of action, or to withstand a demurrer, urging that it undertakes to charge appellant with negligence in running its car at a high and dangerous rate of speed, and in failing to give any signals or warnings of its approach; but the only averment in the pleading as to speed is that the car was running at a high and dangerous rate of speed as it *approached* the crossing, and the only averment concerning the giving of warnings or signals is that appellee heard no warnings or signals as he approached the crossing. While appellant is correct in its contention that the complaint fails to allege that the car was running at a high and dangerous speed at the crossing, and fails to allege that no signals or warnings of its approach were given, the complaint avers other negligence on the part of appellant. It states facts showing that appellee, in the use of due care, having stopped and looked and listened for cars of defendant going in either direction, and having seen no car or heard no warning, proceeded to cross Second avenue,

"when defendant, through its agents, servants, and employees, carelessly, violently, unlawfully, and negligently hit said wagon with said car,"

and that the

"danger of the plaintiff, team, and wagon were in plain view and was evident to the defendant, its agents, servants, and employees at the time, and they made no effort to check the speed or stop the car or control the same, but carelessly and negligently ran said car upon said wagon, thereby causing"

certain injuries to plaintiff. This is a clear charge of negligence in running the car into plaintiff's wagon after it was in a place of danger, and such an allegation sufficiently states actionable negligence, where the facts alleged show the dangerous situation. See *Indianapolis St. R. R. Co. v. Marschke*, 4 St. Ry. Rep. 289, 166 Ind. 490, 77 N. E. 945; *Indianapolis St. R. Co. v. Seerley*, 3 St. Ry. Rep. 226, 35 Ind. App. 467, 72 N. E. 169, 1034.

Appellant contends that there should have been judgment in its favor upon the answers to interrogatories, and that the evidence is not sufficient to sustain the verdict. We shall consider the sufficiency of the evidence as including both these contentions; the answers to interrogatories being, if anything, slightly more favorable to appellee than the evidence. Appellant insists that uncontradicted evidence shows that a man with good hearing and good eyesight was approaching a street crossing in the city of Evansville, traveling west upon Franklin street, an east and west street one hundred feet wide, crossing Second avenue, a north and south street fifty-six feet wide, in the center of which were appellant's double tracks; that he was driving twenty feet north of the center of Franklin street; that there was nothing in the streets between the curb lines to obstruct the view along each of them; that when he passed the curb line of Second avenue he could necessarily have seen the car if he had looked, for a car could be seen four blocks away; that taking the highest rate of speed given by any witness that the car was running, and the rate at which appellee was driving, a slow walk, it would be impossible for the car to reach the crossing as soon as appellee reached it unless the car was at a point where appellee could see it when he passed the east curb line of Second avenue; that appellee admits that he saw the car just before it struck the wagon, and testifies that he did look twice to the north and once to the south after passing the curb line of Second avenue, but that he saw no car and heard no signals; that it was a dark night.

Appellant argues that it was not possible for appellee to fail to see the approaching car, if he looked, as he said he did. We must agree with appellant that, under the conditions disclosed by the evidence, a man of ordinary hearing and eyesight could have seen the car if he had looked for it, and, therefore, appellee is chargeable with what he could have seen, and was negligent in driving across the street as he did, in such a manner as to get into a place of danger on the track. However, it does not follow from this that appellee's negligence contributed to his injury, if this be a case to which the doctrine of last clear chance applied.

Appellant strongly argues that the doctrine of last clear chance does not apply to the circumstances of the case at bar. We shall not enter into any extended discussion of that doctrine, for in the recent case of *Indianapolis Traction & Terminal Co. v. Croly* (1911; No. 7,363 at the present term), 96 N. E. 973, it was very

fully discussed, and the present case will be decided in the light of the principles there laid down, and to that case we refer for complete discussion.

Where the doctrine of last clear chance applies, though the person injured was negligent, his negligence is not in a legal sense contributory to his injury. In such cases the injury is caused proximately by the failure of the defendant to use the last clear chance to avoid it, and the negligence of the plaintiff is only a remote cause. A defendant is, therefore, liable to a person who, by lack of due care, has exposed himself to danger and is injured by the defendant, if the situation is such that the defendant at some appreciable time before the injury had a chance to avoid it, for, having discovered the plaintiff in a place of danger, he owes to him a special duty to prevent his injury, if with reasonable care he can do so. Quoting from the opinion in the case of *Indianapolis Traction & Terminal Co. v. Croly, supra*:

"The doctrine of last clear chance applies to cases only where the defendant's opportunity of preventing the injury by the exercise of due care was later in point of time than that of the plaintiff. This is a rule of universal application, and it affords the test of applicability of the doctrine to a particular case. As a sort of corollary to this rule, the courts have stated as a general proposition that, where the person injured has negligently exposed himself to the injury, he cannot recover on account of the negligence of the defendant by an application of the doctrine of last clear chance unless it appears that the defendant's negligence intervened or continued after the negligence of the plaintiff had ceased. * * * The proposition stated in the corollary will serve as a general rule for the application of the doctrine, but it is not a proposition of universal application. There is at least one class of cases in which it has been held that an injured person may recover by the application of the doctrine of last clear chance, notwithstanding his own negligence continues up to the very time of the injury."

In the application of the rules announced, three classes of cases are recognized. The general proposition applies to those cases in which the plaintiff has negligently entered into such a place of danger that by the use of due care he cannot extricate himself therefrom in time to avoid injury, but the defendant could have prevented the injury by use of due care and failed to do so. In such a case the plaintiff's negligence is deemed to cease when he reaches such a point that due care on his part would be unavailing, and the defendant is liable, whether he actually knew of plaintiff's danger, or could have known in the exercise of due care.

Another class of cases is that in which the plaintiff negligently

enters a place of danger, where there is nothing to prevent him from observing his danger and avoiding injury at any time before it occurs, and the defendant by failure to use due care does not see him in time to avoid the injury. Here, both being negligent up to the time of the injury, and neither having the last clear chance to prevent it, the defendant is not liable.

But, again quoting from *Indianapolis Traction & Terminal Co. v. Croly, supra*:

"This proposition does not apply to that class of cases in which it appears that the motorman actually saw the person injured and realized or should have realized the peril to which he was exposed, or was about to expose himself, in time to have prevented the injury. In such cases the special duty toward the particular person arises as soon as the motorman sees him under such conditions as would indicate to a person of ordinary prudence that he was in danger of being injured by the car, or was about to expose himself to such injury. It then becomes the special duty of the motorman to use every reasonable means to avoid injuring him; and, if he does not do so, the injured person may recover, notwithstanding his want of care in failing to discover the approach of the car continued up to the very instant of the injury, and notwithstanding, also, that the plaintiff possessed the physical ability to have avoided the injury in case he had discovered his peril at any time before the accident happened. Under such a state of facts, the motorman possesses the physical ability to avoid the injury before the accident, and so, also, has the injured party. In this respect their chances are equal, but the motorman actually possesses the knowledge of the danger and appreciates the necessity of taking steps to avoid the injury, while the person injured has no actual knowledge of his danger, and does not appreciate the necessity of taking steps to avoid it."

We must next determine whether the facts shown by the evidence in the present case would bring it within any of the classes above.

Appellee and another witness testify that the horses were at one time on the track, across one rail, and that appellee was attempting to back them off when struck. The car struck the end of the wagon tongue, which broke in the motorman's vestibule door, and broke the handle on the side of the car. The tongue could not have projected far over the track when it was struck, for it does not appear that the horses were struck by the car, and from the height from the ground at which the tongue and car struck, it would seem that the tongue was raised, as in the act of backing. Before passing the curb line of Second avenue, an approaching car could have been seen but a very few feet north of the crossing.

Appellee testifies that he looked to the north after passing the curb line of Second avenue, looked to the south, and again to the north when on the east track, but that he saw no car until a second before it struck the wagon. The tracks are four feet eight inches apart, and the west rail of the east track is four feet eight inches from the east rail of the west track. The motorman's testimony as to where he was when he first saw appellee, and as to appellee's situation at that time, is contradictory. On direct examination he says he was twenty feet from appellee when he first saw him, and that appellee's horses' heads were "mighty near on the track." On cross-examination he stated that at the time he first saw appellee his car was north of the crossing of Franklin street, two-thirds of the way from the alley to the crossing, almost to the crossing, and this location of his position would make him from fifty to ninety feet from the point where, by the great preponderance of evidence, the accident occurred. He also says upon cross-examination that he first saw appellee when the horses were upon the outgoing east track, and that their noses were at least twelve feet from the track upon which his car was running. This is manifestly impossible, for the east rail of the east track is only about nine feet from the west track.

We scarcely think that the state of facts most favorable to appellee which could be deduced from the evidence in the case at bar, would bring it within the first class mentioned above, for it seems that, by the time plaintiff drove into such a situation that it was impossible for him to avoid injury, it was likewise too late for the motorman to have done so.

But we believe that facts may be inferred from the evidence which would bring the case under the third class. It was the jury's province to believe such portions of the motorman's openly contradictory testimony as they saw fit. They may have believed that he saw plaintiff when fifty to ninety feet away from him, and that when he first saw him his horses were very near to the track. If the motorman saw plaintiff under such conditions as would indicate to a person of reasonable intelligence and prudence that he was in danger from the car, or was about to expose himself to such danger, it was his duty to use every reasonable means to prevent injuring plaintiff. The evidence shows that plaintiff drove on the track without giving any indications of stopping, and did not see the car until a second before it struck him, at which time he began to back his team, and was, therefore, at the instant of the

injury not negligent. It was for the jury to find whether the circumstances under which he was seen by the motorman were such that they should indicate to the motorman that he was in danger or about to expose himself to danger, and whether, after seeing plaintiff in such circumstances, if he did see him, the motorman by the use of ordinary care could have avoided injuring him. The case is close, but the evidence is such that we cannot say that reasonable men would not draw therefrom inferences of the existence of such a state of facts as to make defendant liable for plaintiff's injuries, especially since such inferences have been drawn by twelve jurors, who were well instructed as to the law of the case.

Objection was made to instruction 5 given at appellee's request, because it applied the doctrine of last clear chance to the case. This instruction is a substantially correct statement of the doctrine, and, as we have seen, is applicable to the evidence, and also to the issues.

Error is also assigned in the refusal to give instruction 8 at appellant's request, which would have told the jury that if they found from the evidence certain facts to exist, among them that the car was being run at no greater rate of speed than from four to six miles an hour, that as it approached the place where the accident occurred the gong was sounded, and that as soon as the motorman saw that the plaintiff was driving into a place of danger he did all in his power to stop the car, but on account of the close proximity of plaintiff was unable to stop it before it struck plaintiff's wagon, then their verdict should be for the defendant. This instruction also enumerated certain other facts, and as a whole was a fairly correct statement of the law, and, since the court gave one instruction embracing the doctrine of last clear chance, it should have instructed the jury upon the state of facts to which that doctrine would not apply.

But by their answers to interrogatories the jury found that the car was running at about twenty miles an hour, and that the gong was not sounded as the car approached the crossing; also, that the motorman could, after he saw the plaintiff's proximity to the tracks, by the exercise of reasonable care and caution have stopped the car so as to avoid the collision. Where answers to interrogatories show that an instruction refused is based on facts which the jury found did not exist, the refusal to give such instructions is harmless. *Indianapolis St. R. Co. v. Brown*, 32 Ind. App. 130, 69 N. E. 407; *Chicago, etc., R. Co. v. Linn*, 30 Ind. App. 88, 65

N. E. 552; *Muncie Pulp Co. v. Hacker*, 37 Ind. App. 194, 76 N. E. 770; *Nichols v. Central Trust Co.*, 43 Ind. App. 64, 86 N. E. 878; *Keller v. Reynolds*, 12 Ind. App. 383, 40 N. E. 76, 280; *Baltimore, etc., Co. v. Harbin*, 160 Ind. 441, 67 N. E. 109; *Roush v. Roush*, 154 Ind. 562, 55 N. E. 1017.

* * * * *

No reversible error having been made to appear, the judgment is affirmed.

Campbell v. United Rys. Co. of St. Louis.

(Missouri—Supreme Court.)

1. **ELECTRICITY; DUTY TO PROTECT AND MAINTAIN WIRES IN SAFE CONDITION; NEGLIGENCE.**—It is the duty of street railway companies maintaining an electric system to use every protection reasonably accessible to prevent their wires from becoming dangerous, and the utmost care to keep them in a safe condition.

Any neglect of these precautions is such negligence as will render the one so negligent liable in damages for personal injuries directly resulting therefrom.

Care Required of Street Railway Company to Protect Electric Wires.—Persons using electricity must exercise due and proper care for the protection of all persons in all places where such persons have a right to be. It is the duty of an electric street railway company not only to construct, but to maintain, its plant reasonably safe and secure so far as the public who use the street are concerned. It is bound to the exercise of ordinary care to maintain its wires and other fixtures and appliances, regardless of any inherent danger in them when highly charged, and mindful of the liability of persons, accidentally or while in the pursuit of their lawful employments, to be brought in proximity to or in contact with them, so as not to cause injury to one using the street by his coming in contact with them. It is bound to know the condition of its wires and to keep them safely protected by ordinary and reasonable insulation, and to use ordinary and reasonable inspection to preserve such insulation from such impairment as would render the wires dangerous to those exposed to likelihood of contact with them. In some jurisdictions electric companies are held to a much higher degree of care. *Nellis on Street Railways* (2d ed.), Vol. 2, § 377.

Care Required Where Trolley Wire is Broken and Fallen in Street.—See *American Electrical Cases*, Vol. 9, p. 236, *note*.

* Remainder of opinion not material to street railways.

2. **INJURY TO BOY FROM CONTACT WITH FENCE WIRE ATTACHED TO LIVE GUY WIRE; EVIDENCE.** — A street railway company maintained a trolley wire in contact with a span wire fastened by being wrapped around the top of a pole on each side of its railroad. One of these poles was strengthened by a post sunk in the ground three or four feet behind it and extending about three feet above the surface of the earth, from which a guy wire, wrapped around its top, was stretched to the top of the pole and there wrapped in contact with either the span wire or another wire called a pull-off, wrapped around the top of the same pole. The guy wire being unprotected, a third party attached a piece of clothes line to it in such a way as to form a perfect contact between the two, fastening the other end to his own fence twenty feet away. The wire burned off near the fence, fell upon or near a path, and a boy twelve years of age came in contact with it and was injured by the electrical current. The railway company had inserted two mica "circuit breakers" in the span wire which it appeared often failed to break the circuit. In an action to recover for the injuries to the boy, evidence examined and held sufficient to sustain a verdict for the plaintiff.
3. **DAMAGES; VERDICT REDUCED.** — A verdict allowing the plaintiff \$20,000 was excessive and should be reduced to \$10,000.
4. **INTERVENING CAUSE.** — The fact that the wire attached by the third person was the instrument of the injury did not relieve the defendant from liability for its own wrongful act.

DEFENDANT appeals from judgment for plaintiff. Reported 147 S. W. 788.

STATEMENT OF FACTS BY COURT.

This suit was instituted in the Circuit Court for St. Louis county November 15, 1907, and was thence removed to the Circuit Court for St. Charles county, where it was tried September 14-18, 1908. Its object is to obtain damages for personal injuries sustained by the infant plaintiff by coming in contact with an electric wire through the alleged negligence of the defendant. The plaintiff was at the time of the injury twelve years old. The defendant operated a line of electric railway extending from the western limits of the city of St. Louis to Greve Cœur Lake in St. Louis county, a distance of about thirteen miles. Electricity for the operation of its cars was transmitted in direct currents from its transforming stations at each end of the line by a system of overhead construction, consisting of feed and trolley wires suspended on poles. The direct transmission to the propelling motors of the car was from a trolley wire suspended as nearly as practicable over the center line of each of the two tracks of the double-track road. These wires were of copper three-eighths of an inch in diameter, and entirely naked, so as to admit of the continuous contact of the trolley

attached to the car, and carried an electrical current of 550 volts of electromotive force.

At a point approximately in the middle of its line the road crosses, upon a curve convex to the north, a traveled highway known as the "Walton road." At this point the trolley wires were supported and held in position by the following construction: Two poles sunk in the ground opposite each other on either side of the road; the one on the outside of the curve being so planted as to lean slightly from the track. Opposite to the outside of this, and about four feet further away from the track, a post was sunk and firmly anchored in the ground, extending about three feet above its surface. A large wire called a "guy wire" was then wrapped around the pole near its top, stretched tightly, and wrapped around the top of the post, which was called a "guy post." The poles so secured were supposed to have the strength necessary to resist the tensile strain of the wire construction between them. A wire was then stretched between the tops of the two poles, and firmly fastened at each end by wrapping around them. This cross-wire seems to be known as a "span wire," and at a point above the center of each track its structure consists of a short sickle-shaped piece of metal with the opening beneath, the function of which is to suspend the trolley wire. The poles along the north side of the railroad are numbered consecutively, the one in the east side of the Walton road, where this accident occurred, being numbered 258. It seems to be practically conceded that this post stood within the limits of the road, in which, along the same side, at various distances from, but always near to the highway limit, ran a cinder path which answered the purposes of a sidewalk. North of the guy post which we have described, and extending from the Walton road east about 300 feet, was a tract of land about twenty feet wide. This was bounded on the south by the defendant's right of way, and on the north by the lot of Mr. George R. Hogg, which was fenced along the south side by a woven wire fence supported by cedar posts, and upon which Mr. Hogg resided. This strip had, years before, been dedicated as a public highway known as Midland boulevard, but, as that portion of the street had been practically destroyed by a railway cut just east of the Hogg premises, its use had been abandoned, and Mr. Hogg determined to render it less unsightly by plowing it up and seeding it in grass, which he proceeded to do, and in April, 1907, for the purpose of keeping stray stock from the premises, he attached an ordinary wire clothes line to the defend-

ant's guy wire near the top of the guy post, and stretched it to the corner of his own fence to which he fastened it, supporting the middle upon an ordinary broom stick. Whether this was in contact with the metal portion of Mr. Hogg's fence, or was only wrapped around the cedar post at the corner, does not clearly appear.

There is some evidence that another wire called the "pull-off wire" was attached to the pole standing in the Walton road, and extended thence to the trolley wire over the north track at some point between that pole and the next one to the west, for the purpose of pulling the trolley wire to a position over the center of the track at that point, but it is admitted that either this wire or the "span wire" was wrapped around the pole in contact with the upper end of the guy wire which was intended to keep the pole in position against a strain which had been sufficient to pull up the guy post with its anchor.

So far as above described, the situation was that the trolley wire charged with 550 volts of electric force was in perfect contact with a wire of equal, or at least of great, conductivity, wrapped around the top of the pole; that wrapped in contact with this was another wire called the "guy wire," which passed down to the post set in the ground, and in perfect contact with this was the Hogg wire which extended to Mr. Hogg's fence, so that if the Hogg wire should be grounded, or placed in contact with the moist earth, there would be a perfect metallic circuit from the power house of the defendant where the electricity was generated, through the Hogg wire, to the earth, which afforded the means of restoring the electrical equilibrium, so that the ordinarily innocent clothes line would have become an instrument of great danger. It appears in the evidence that the wooden members of this construction were of themselves nonconductors of electricity, while water, like the iron and copper of the wires, is a conductor; so that, when the wood becomes saturated with water, it becomes a conductor through the property of the water which fills its cellular structure. Water adhering to or running along the surface of the wood will also conduct the electric current. It also appears that the same phenomenon exists in case of the earth; so that a wire charged with an electric current of high tension, grounded by coming in contact with the saturated earth, will, with the heat developed at the point of contact, frequently dry the earth, and insulate itself by the condition it creates.

The testimony also shows that, to modify the obvious danger of such situations as we have described, the defendant used appliances called "circuit breakers," for the purpose of insulating, or electrically isolating, that portion of its system of wires which must necessarily remain charged from those wires which, like the guy wire and the Hogg wire, ought not to be charged at all. These circuit breakers consisted of two strong iron hooks contained in a ball of mica, a brittle material, easily crumbled. In the manufacture of this appliance, two of these hooks are placed in such a position that their longitudinal axes correspond, and the hooked ends, in other respects ready to engage, remain separated by about one-eighth of an inch of space at the points nearest to contact, and the ball of mica is then constructed around them, perfectly filling the spaces which separate the iron surfaces of the hooks. Upon the shank of each hook, which extends beyond the mica ball, is forged an eye through which the wire is bent and tied in place, so that the circuit breaker constitutes a section of the continuous wire, one end of it being charged with a current of electricity which cannot pass the thin film of mica which separates the conducting surfaces of the iron hooks. The evidence tends to show that one of these, either in the span wire or the pull-off wire, constituted the only impediment to the passage of the current with which the cars were operated, directly into this Hogg wire. These circuit breakers frequently become worthless by the fusing of the mica, which frequently happens from the effect of lightning, or from some other cause that permits the surfaces of the hooks to come in contact, so that the appliance becomes a conductor instead of a nonconductor of electricity, and they were sometimes left in place when known to be worthless. When they were found fused, it was attributed to lightning; the statement having been made by one of defendant's witnesses that these thirteen miles of wire would exercise an attractive influence upon that class of electric discharge for a quarter of a mile on each side of the line. The evidence shows that such guy wires are sometimes protected by wooden casings, so that the naked wires are not easily accessible.

On the afternoon of the accident plaintiff's mother had been shopping in St. Louis, and was expected home over defendant's line about 6 o'clock. It had been raining since about 4 o'clock, and was still raining when three of her children went down the Walton road to meet the car and take her an umbrella. Joe, aged eleven, and Nellie, aged eight, started first, barefooted, walking in the

mud in the middle of the road. Clarence, who was then twelve years old, and was wearing shoes, went down the cinder sidewalk. He suggested a race, and Joe and Nellie ran on ahead. When they got to the tracks they looked around and saw Clarence lying on his face on the cinder walk, with fire coming from his hands and feet. The Hogg wire had burned off near the fence, and fallen upon or near the path. The plaintiff had in some way come in contact with it, and it is not denied that his injuries were produced by the electrical current of defendant passing from its trolley wire through either the span wire or the pull-off wire, and thence through the guy wire and Hogg wire into his body. The character of his injuries was serious, and the evidence relating to them will be further mentioned in the opinion.

Mr. W. D. Burton, "trouble man" in the employment of defendant, testified for it that he went to the scene of the accident the next morning. He said:

"I saw the pull-off wire and back guy wire in contact, and knew where my electricity got out."

The petition specifically charges negligence in the following particulars: (1) In wrapping the guy wire upon the pole in contact with the wire supporting the trolley wire, and maintaining such negligent construction; (2) in not properly insulating the trolley wire so as to prevent the electrical current from passing therefrom into the supporting wire; (3) in not properly insulating the supporting wire so as to prevent the electric current from passing into it from the trolley wire, and therefrom into the guy wire; (4) in not properly insulating the guy wire so as to prevent the electrical current from passing therefrom into the Hogg wire, and so as to prevent the electric current from passing into the lower portion of said wire at all; (5) in not properly inspecting and maintaining the insulation of said wires, and each of them, so as to prevent them from becoming dangerous to persons lawfully passing on and along the Walton road; (6) in permitting the Hogg wire to be and remain attached to the guy wire for many weeks prior to said June 24, 1907, during all of which time the defendant, by its officers, agents and servants, well knew, or by the exercise of ordinary care would have known, that the guy wire was in a dangerous and defective condition, and was in a position well calculated to impart its said danger to the Hogg wire, and in not compelling the abatement and removal of said Hogg wire, and in not taking steps

to prevent its electric current from passing into said Hogg wire, which it well knew, or by the exercise of a high degree of care would have known, it was apt to do.

The defendant assigns error on the refusal of the court to direct a verdict for it; also its action with reference to certain other instructions asked by the respective parties.

T. E. Francis (Boyle & Priest and T. C. Bruere, of counsel),
for appellant.

Randolph Laughlin and J. B. Garber, for respondent.

Opinion by BROWN, C.:

1. The first error assigned by defendant is upon the refusal of the court to direct a verdict in its favor, on the ground, in substance, that the evidence establishes absolutely and indisputably the fact that its wires were properly insulated, and safely performing their functions, until a few minutes before the plaintiff was injured, and that the defendant is not shown to have been guilty of negligence thereafter. Upon this assignment it is necessary to briefly refer to the facts, as well as to the law applicable to them. Electricity is, perhaps, the most insidious, as well as the most destructive, of the natural forces of which we are cognizant, and have availed ourselves in the interest of the civilization of this age. It is insidious because it only manifests itself in the exercise of its destructive force. It is hidden from all the senses which constitute human apprehension until it strikes, and then its blow is so deadly that in many jurisdictions it has been selected by law as the surest and quickest, and therefore the most painless, instrument available for the destruction of human life in case of judicial executions. What it is, is simply a matter of speculation, for no one has ever seen it. It has been called a fluid, a form of radiation, an induced condition, and perhaps many other things, each of which is as far from expressing a true comprehension of its constitution as the others. All we know of it is that experts in the science have found certain phenomena following certain conditions, and have applied them to many useful purposes in the arts and industries; but our knowledge of the subject is still so limited that we must rely on these experts for information as to the conditions which mean life or death to those who come in contact with them. In this case an innocent looking clothes line, in a place where the public had the

right to be, and where children as well as adults were likely to come in contact with it, was the destructive agent so far as any agency was visible. It drew its baleful energy from an equally innocent looking guy wire placed in a similarly dangerous relation to those rightfully enjoying the use of the public road. There was nothing in the appearance of either to indicate danger, and the fact that they were so placed was an assertion on the part of those who had so placed them that they were harmless. The guy wire was placed in this public position by those whose calling required that they should be experts in electrical science, and upon whose skill and prudence the public must largely depend for protection. It was their province to consider in the interest of safety the danger that this wire might become highly charged with electricity, and, if such danger existed, to use every protection reasonably accessible to prevent it, and the utmost care to keep them in such safe condition. *Geismann v. Missouri-Edison Electric Co.*, 173 Mo. 654, 678, 73 S. W. 654; *Von Trebra v. Gaslight Co.*, 209 Mo. 648, 659, 108 S. W. 559. Any neglect of these precautions is such negligence as will render the one so negligent liable in damages for personal injuries directly resulting therefrom.

Negligence is the failure to exercise the degree of care which prudence requires under the circumstances of each particular case.

In this case a trolley wire, charged with a deadly current of electricity, was stretched over the center of one of defendant's railway tracks opposite the place of the accident. This was in contact with a strain wire, running across both tracks, and fastened in place by being wrapped around the top of a post on each side of its railroad. One of these posts, being on the outside of the curvature, was, in consequence of the tendency of the trolley wire to assume a straight position, subjected to greater strain than the opposite one, and was consequently strengthened by a post sunk in the ground three or four feet behind it and firmly anchored and extending about three feet above the surface of the earth, from which another wire, wrapped around its top, was stretched to the top of the pole and there wrapped in contact with either the span wire or another wire called a pull-off, wrapped around the top of the same pole, and extending to the trolley wire to hold it laterally in position. Which of these two wires was involved in this connection, and carried the offending current in this case, is, under the pleadings and evidence, immaterial. Wood, of which the pole and post were constructed, is a nonconductor of electricity; so that, had the guy wire become

charged, it would not have discharged itself into the ground, being insulated by the wood of the post. The earth is also, when perfectly dry, a nonconductor, or at least a very imperfect conductor of electricity, so that it would have been possible for a person standing on the dry earth to have held the guy wire in his hand without serious results. Were the earth moist, however, such a position would likely have been fatal. The only thing intended to prevent the charging of the guy wire was an insulator called a "circuit breaker," the distinguishing characteristic of which was the insertion in the strain wire, subject to all the strain of that wire, a ball of mica containing two hooks, separated by about one-eighth of an inch of mica, which was subject to a pressure equal to the strain upon the wire, and which, if crumbled, would permit the hooks to come together and make a perfect conductor of the instrument. It was not only subject to all the longitudinal strain of the wire in which it was inserted, but also to the lateral pressure of the wind, and the shaking incident to the passage of the trolley along the trolley wire. They were also subject to be fused by lightning, and it was stated by one of defendant's expert witnesses that the wires of the thirteen miles of road had an attractive influence for such electrical discharges extending a quarter of a mile on each side. Although there was some evidence that another one of these instruments was placed in the guy wire, it was not important, and would have no bearing upon the question of the negligence of defendant in maintaining the structures just described. The situation was that the defendant had placed in the public road an instrument with which children and others were liable, in the exercise of their right to use that thoroughfare, to come in contact, and that it was, under some circumstances, liable to be charged with a dangerous current of electricity is demonstrated by the circumstances of this case. That it was the duty of the defendant to use every reasonable means available to prevent injury therefrom we have already seen to be the settled doctrine of this court. To meet this requirement of common prudence it adopted a device, the protecting material of which was easily crumbled, as was shown by experiment in court, and was necessarily subjected to frequent movement under great strain, which was subject to destruction by lightning even in such moderate atmospheric disturbances as the one that took place on the afternoon of the accident, without leaving any visible indication of its inefficiency, and was constantly liable to become useless without any alteration in its external appearance. Instead of the con-

stant anxiety which such a condition would naturally excite, the evidence discloses no system of inspection calculated to disclose defects in this insulation, and it affirmatively appears in the evidence of the defendant that, instead of controlling their use by a system of expert supervision, the boss of any one of the many working gangs of the company had the right to determine whether they should be taken out after having become useless without substituting anything to fill the vacancy. It may be that these appliances constitute the most perfect means known in electrical construction to insulate one end of a metallic member from the other end charged with electricity; but, if this is true, the evidence of the defendant amply shows that care should be used in its maintenance, and to prevent the flow of fatal results from its failure to work. How this was done is illustrated by the testimony of Mr. Barton, an expert employee of defendant, whose duty it was to go to the place of the accident and ascertain what was the matter. He tells in his testimony what he saw when he got there in the following words:

"I saw the pull-off wire and back guy wire in contact, and knew where my electricity got out."

His company had chosen that the safety of the public, which had furnished it the place to plant its pole and strain its guy wire, should depend upon the working of an instrument which it admits to be unreliable, when it could have broken the circuit simply by wrapping the two wires that constitute it in separate positions upon the pole. There is ample testimony that the construction adopted was negligent, and the thing speaks for itself.

The company having chosen to make a continuous circuit from the current of their trolley wire to the attachment of the Hogg wire, only broken by the one or two insulating devices we have described, had created a situation that they were bound to protect against the consequences of its weakness, and the omission of any step necessary to such protection is negligence by virtue of the situation which creates the necessity. The offending guy wire being left naked by the defendant, it occurred to Mr. Hogg as a matter of convenience or economy to use it as a portion of his fence. He accordingly attached his piece of clothes line to it in such a way as to form a perfect contact between the two, fastening the other end to his own fence some twenty feet away. This added another element to the danger created by the railway company, by

extending its zone about twenty feet along the traveled road. The defendant chose to let it remain in this condition for about two months, a time sufficient to justify us in assuming as a matter of law that by the exercise of the care which the law imposes under the circumstances it would have become aware of this change, thereby assuming the duty of exercising care appropriate to and commensurate with such new condition. It could, however, have detached the Hogg wire, or could have prevented any contact with its guy wire by casing the latter with wood to a sufficient height, which the evidence shows is sometimes done; but, having neglected all such precautions, it became responsible for the condition it had permitted. Mr. Hogg's fence was constructed of woven wire supported by cedar posts. The evidence is not clear as to whether the wire which came in contact with the plaintiff had been fastened to one of these posts or to the wire structure, or as to whether it had been originally in contact with the wire at all, or as to whether the wire of the fence had been grounded in moist earth up to the date of the accident, so that it is by no means certain that its grounding on that day was not the result of the water which fell in considerable quantities rather than of the action of the lightning. The evidence that the wires were struck by lightning on that date consisted of the statement that the mica must have been fused because it was not performing its office; the statement that thunder was heard at the office of the United States Weather Bureau in the city of St. Louis on that afternoon, and the statement of one of the defendant's conductors that he saw some lightning of the dingle-dangle kind the same afternoon, but that he did not know whether there was any thunder or not. It is not important, however, to consider this question, for the case was tried by defendant upon the theory that lightning even of this kind is dangerous to its insulators, and it is therefore one of those incidents which it was the duty of defendant to take into consideration in the interest of public safety.

There being no question in this case that the electric current which injured the plaintiff proceeded from a naked wire maintained by the defendant in or upon the line of the public highway, which wire was, at the time, connected electrically with a trolley wire with the current from which its cars were operated, we hold that these facts constitute *prima facie* evidence of the negligence of the defendant, that the injury to the plaintiff resulted from such negligence, and that, in the absence of evidence tending to rebut the

presumption so raised, the plaintiff was in law entitled to a verdict. The evidence being clear and undisputed that, notwithstanding the use of the instruments called "circuit breakers," the defendant's guy wire was subject, by the action of lightning under ordinary circumstances, or otherwise, to become dangerously charged with electricity, it was its duty to use such other means of protection as were reasonably accessible; that in wrapping its pull-off or strain wire in contact with the guy wire by means of which contact the guy wire was charged, and by failing to insulate the same by wooden or other nonconducting casing to a proper height, the defendant failed in the performance of that duty, and has, for that reason, not only failed to meet, but has strengthened, the *prima facie* case against it.

The fact that the Hogg wire intervened, so that the current it carried by reason of the negligence of the defendant was the instrument of the injury, has no tendency to relieve the defendant from liability for its own wrongful act. Under these circumstances it is unnecessary to refer to the questions made by the defendant in his assignment of errors and brief upon the giving and refusal of instructions upon the question of the right of the plaintiff to recover.

We have carefully examined the case of *Strack v. Telephone Co.*, 216 Mo. 601, 116 S. W. 526, upon which the defendant seems greatly to rely, and see nothing in it which conflicts in the slightest degree with the views we have here expressed. In that case the question was whether or not the defendants had been guilty of negligence in maintaining an unused telephone wire, distant, horizontally, fifteen feet from the trolley wire of the street railway. By a severe storm the telephone wire had been broken and thrown across the trolley wire. This court very properly held in that case that there was nothing in the situation of these wires before the storm to indicate danger to the public. Had the telephone wire been wrapped around the trolley wire a question would have been presented calling, in all probability, for a different result.

2. The real question in this case is whether the jury overstepped the boundaries of its province with respect to the amount of the verdict. No one will deny that it is exclusively within the province of the jury to pass upon questions of fact presented by the evidence, including the assessment of damages in cases where they are not liquidated by law. There are, however, many elements of damage not susceptible of mathematical reduction to terms of

money. In such cases the amount of the resulting damage is, to a greater or less extent, a matter of opinion, founded upon the facts in evidence, and such inferences as may be legitimately drawn therefrom. Whether or not the fact tends to support the inference is in proper circumstances a question of law; and it is upon some such ground that appellate courts have reserved to themselves the power to judicially declare in such cases that the jury has exceeded its limit, however dim and shadowy it may be, and to refuse to sustain its action.

The facts in evidence affecting the amount of this verdict are substantially as follows: At the time of the accident, on June 24, 1907, the plaintiff was a "husky" youngster about twelve years old, who could plow, drive horses, ride after hounds, and had given no evidence of timidity in work or sport. His injury was such as might be inflicted by the passage of a current of electricity through his body from his hand to his foot. Its entry at his hand developed so much heat as to incinerate the flesh and destroy the member. It departed from his body at his feet with similar evidence of heat disturbances. So far as visible effect on the tissues is concerned, the phenomena attending its course through the body is a mystery. The trial took place about fifteen months after the injury. Although he was at a vigorous age, his growth had stopped during the time intervening between the accident and the trial. Some of his teeth had fallen out, and the enamel and enveloping membranes of their roots had been destroyed and his gums had receded, so that the roots of some of them were exposed. His ears were affected so that they gave him pain, and the tissues of the drums had relaxed so that they had become externally concave. His speech was affected. He was timid and very nervous. His power to learn had been impaired so that, although he had been able to do as much of the work at school as any of the other boys, he had become nervous and fidgety, so that he could not apply himself to his books. He would study at times, and then again was so nervous that it seemed as if he could not study. His physician described him as biting his fingers all the time as he came down on the cars to the trial. All these things were attributed by the doctor to low vitality resulting from the accident. His family physician said:

"Some people, it depends on their age, will recover, as years go on, and he might have a strain or something he wouldn't recover. It's pretty hard to say."

He was, in the opinion of the doctor, improving at the time of the trial. Within two months immediately succeeding the accident there were four surgical operations performed on him, including one by which a finger had been saved by grafting skin taken from his thigh. His suffering was intense.

The jury, in assessing the damages sustained by the plaintiff, no doubt took into consideration the fact of the loss of his hand, not only in an industrial sense, but with respect to its inconvenience in all the other relations of his life. They not only considered his acute physical suffering, but also the mental suffering that would probably result from both the disability and deformity, interference with his education already suffered, and which he would probably continue to suffer for an indefinite time in the future, and the uncertainty as to whether or not the vitality and vigor of mind and body which had before characterized him, and must stand behind all his efforts, would ever be restored. They were undoubtedly influenced more or less by the idea that the wrongdoer should not have the right to set a value on a healthy, intelligent American lad founded upon the efficiency he might probably attain with a pick and shovel. We think the jury had the right to determine this question from the standpoint we have stated. The defendant has seen fit to leave the statements we have referred to unquestioned, and, although sharply contesting the case, and being, no doubt, as in duty bound, in close touch with matters connected with the effect of its own motive power upon the constitutions of its victims, it has chosen to leave the prognosis of the plaintiff unquestioned. It only remains for us to determine whether these unquestioned facts, including the inferences which the jury might lawfully draw from them, tend fairly to support the verdict.

Considering this question as an original one in this court, we would be slow to hold that within the limits of this verdict we might lawfully substitute our own opinion for the unanimous opinion of the twelve men who tried the issue, whose peculiar province it was to determine such questions, and who had before them evidence which might aid us in the consideration of the same question, in the person of the boy himself. In the interest, however, of that uniformity and certainty without which legal process would become a game of chance in which our rights would be the stakes, we must defer to the course of this court so far as it tends to establish a consistent rule of adjudication.

We have not hesitated, whenever the interests of justice have

seemed to require it, to exercise a revising control over the amount of the verdict in cases of this character, and it has long been our practice to enforce that control, in proper cases, by requiring a remittitur as a condition of the affirmance of the judgment. Thus in *Waldhier v. Railroad*, 71 Mo. 514, the amount of the recovery was so reduced from \$25,000 to \$20,000 for loss of both legs below the knee. In *Markey v. Railroad*, 185 Mo. 348, 84 S. W. 61, the recovery for a similar injury was so reduced from \$35,000 to \$20,000, this court in ordering the remittitur saying:

"Thirty-five thousand dollars is a larger award than this court has ever approved. We prefer to adhere to the conservative course that our courts and juries have pursued in the past. If the jury had awarded the plaintiff \$20,000 damages, the verdict would have met our approval, but we are not satisfied that it would be just to affirm the judgment for the amount assessed."

In *Stolze v. Railroad*, 188 Mo. 580, 87 S. W. 517, a similar reduction was made from \$15,000 to \$8,000 on account of the breaking of both legs. In *Phippin v. Railroad*, 196 Mo. 321, 93 S. W. 410, a like reduction was made from \$12,000 to \$9,000 on account of the ruin of a hand, all of which was cut away except the thumb. In *Brady v. Railroad*, 206 Mo. 509, 102 S. W. 978, 105 S. W. 1195, \$15,000 was held to be too much, and a reduction to \$10,000 exacted on account of the loss of a foot. In *Partello v. Railroad*, 217 Mo. 645, 117 S. W. 1138, the plaintiff was the wife of Major Partello, the military commandant at Fort Reno, and had been accustomed, by virtue of that position, to take a leading part in the social functions at the fort, was fond of doing her own housework, walking and riding on horseback, and had the appearance of a strong and vigorous woman. The evidence tended strongly to show that the accident left her a helpless and incurable nervous wreck. It was said in the opinion none of her bones were broken, and no joint dislocated or injured, and there was no apparent disfigurement save a slight mark on the nose. The jury returned a verdict for \$30,000, from which she voluntarily remitted \$10,000 at the hearing of the motion for a new trial. The amount still remaining was held to be excessive, and the judgment was accordingly reversed by this court. In *Chlanda v. Transit Co.*, 213 Mo. 244, 112 S. W. 249, the plaintiff, who, just before her injury, was said by a physician who then examined her for insurance to have been "a picture of health" and "sound in all particulars," was injured December 6, 1901. The same physician who had exam-

ined her for insurance afterward examined her at intervals up to about July 26, 1903, and characterized her condition as that of a physical wreck. It stood "conceded that there were no broken bones." The verdict was for \$18,000, and an order granting a new trial was sustained by this court, which said:

"We are of opinion the order granting a new trial may be sustained on the theory of an excessive verdict somewhat attributable to such overwrought sympathy on the part of the jury as amounts (in legal effect) to prejudice and passion."

In *Magrane v. Railway*, 183 Mo. 119, 81 S. W. 1158, this control was exercised in a case where improper elements of damage had been submitted to the jury and were presumably included, with proper elements, in their verdict; this court forcing a remittitur to cure the error. This was expressly approved and followed in *Moore v. Transit Co.*, 226 Mo. 689, 126 S. W. 1013, the court, through Fox, J., saying:

"To the end that no injustice be done the defendant, we are inclined to require a substantial remittitur in such amount as in our opinion will fully meet the excess in the verdict by reason of any consideration which may have been given to the objectionable testimony by the plaintiff."

In *Clark v. Railroad*, 234 Mo. 396, 137 S. W. 583, the opinion describes the condition of the plaintiff, injured by coming in contact with an electric wire, as follows:

"He is horribly maimed and hopelessly crippled for life, and incapacitated from performing all manner of labor, not even able to feed himself."

The court, speaking through Judge Woodson, said: "The verdict was for \$20,000, and for that reason should be closely scrutinized." It was sustained. In *Cook v. Globe Printing Company* (a case in which no bones were broken), 227 Mo. 471, 127 S. W. 332, the court seemed to disregard the \$20,000 dead line, and itself laid the damages which plaintiff ought to recover at \$50,000, \$25,000 of which were specially assessed as compensatory. This does not indicate that in the opinion of this court the plaintiff in that case would have preferred the loss of a leg or arm or both, or the wrecking of his nervous system, to the publication of the article which was the subject of the controversy, but is more in the

nature of a tribute to reputation in the abstract. It gave practical voice to the reflection of Iago:

"Good name in man and woman, dear my Lord, is the immediate jewel of their souls."

In doing so it is barely possible that we may not have had vividly in mind another remark of the same sage to his friend Lieut. Cassio, who complained that he had lost the immortal part of himself — his reputation. Iago wisely consoled him thus:

"As I am an honest man, I thought you had received some bodily wound; there is more sense in that than in reputation. Reputation is an idle and most false imposition; oft got without merit, and lost without deserving; you have lost no reputation at all unless you repute yourself such a loser."

We have cited the foregoing cases, not for the purpose of sustaining or showing the power of this court to control the amount of the verdict, but for such hints as they contain as authorities affecting its amount. Although selected for that purpose they are far from satisfactory, not only because each case is necessarily in many respects *sui generis*, but because juries and even judges must necessarily have and exercise some latitude with reference to personal opinion, although the principles of law are constant.

After careful consideration, we have concluded that the judgment (which is for \$20,000) should be affirmed to the extent of \$10,000, and if the plaintiff, within ten days after the publication of this opinion, enter a remittitur in the amount of \$10,000, as of the date of the rendition of the judgment below, and it is so ordered. Otherwise the judgment will be reversed and the cause remanded for a new trial.

Opinion PER CURIAM.

The foregoing opinion of BROWN, C., is adopted by the court. All concur except VALLIANT, J., absent.

CASES REPORTED WITH BRIEF SYLLABI.

SPOATEA v. BERKSHIRE ST. RY. CO.

(Massachusetts — Supreme Judicial Court.)

Injury to Rider of Bicycle by Collision with Team, Alleged to Have Been Caused by Being Blinded by Headlight of Car.

PLAINTIFF excepts to verdict for defendant. Reported 99 N. E. 467.

Opinion by RUGG, C. J.:

The plaintiff, traveling in the nighttime upon a bicycle on a highway, was injured by collision with a team. It is sought to fasten liability upon the defendant because a headlight upon one of its cars proceeding on its track dazzled the plaintiff so that he ran into the team. The plaintiff testified: "The light blinded me. I was unable to guide my bicycle. * * * It blinded me for the moment and I could not see; it was one of those large light reflectors. * * * It was the same light on the cars that I saw them ordinarily use; that is, about the same. * * * The light was thrown on me as it rounded a curve. I was coming down the hill, straight down, when the car rounded the curve." The plaintiff saw the team a few steps ahead. The street was wide, and the tracks of the defendant were on its side, and there was plenty of room to pass without collision but for the blinding effect of the light.

This, in substance, is the plaintiff's case. It is too meagre to show any negligence on the part of the defendant, either in the character or management of the light or in the running of the car. At most, there appears to have been only a momentary blinding of the plaintiff as the rays from a headlight such as are in common use included him in their range for an instant while the car came around a curve. More facts than these must appear before it can be said that there was fault in the use or operation of the light or car.

Exceptions overruled.

FITZGERALD v. NEW ORLEANS RY. & LIGHT CO

(Louisiana — Supreme Court.)

Deraiment of Car by Stone on Track; Injury to Child in Shed Struck by Car; Liability of Company.

DEFENDANT appeals from judgment for plaintiff. Reported 59 So. 26.

Opinion by PROVOSTY, J.:

One of the electric cars of the defendant company, going at full speed down Chippewa street, left the track at the intersection of Philip street, and ran

into a corner grocery shed, and demolished it. A little girl, who was seated on the doorstep under the shed, was struck by some piece of the debris, and her mother brings this suit for the injury, charging that it occurred through the negligence of the defendant company in running the car at excessive speed — beyond the rate fixed by the city ordinances. Although the little girl was made unconscious, her injuries were but slight, and none of a permanent character. She had two bumps on the back of the head, and some scratches and bruises on her arms and sides. The derailment is not to be accounted for, unless the statement of the motorman that there was a cobblestone upon the track is accepted; for the course was straight, and no defect existed in either track or car, and the speed was not greater than usual, or beyond city regulation. The strange thing is that no one but the motorman saw this cobblestone. But his statement as to its presence is made plausible by the fact that the street was paved with cobblestones, and that a large number of children had just been playing there. All those whom the accident attracted seem to have had their attention too strongly drawn by something else to have noticed the stone. In fact, most of them did not even know that a little girl had been hurt. The conductor first busied himself investigating the condition of the car, and then went into the grocery to telephone headquarters. He corroborates the motorman to this extent, however. He says:

"After I came back from the phone I was informed that the rock was on the track."

The motorman explains his not having seen the stone in time to stop the car by saying that it lay directly under the electric light that hung overhead at the center of the street intersection, and that the bottom part of the electric lamp cast a shadow at that spot, so that he did not see the obstruction until he was within about twenty feet of it. If we accept his statement as true, as we must, in the absence of any contradiction and of all opposite probability, the company's defense is fully made out, figuratively, as it is literally founded on a rock.

Judgment set aside, and suit dismissed, with costs in both courts.

MUNSTER v. NEW ORLEANS RY. & LIGHT CO.

(Louisiana — Supreme Court.)

Horse Frightened by Car; Rider Injured; Failure of Motorman to See Danger; Punitive Damages.

DEFENDANT appeals from a judgment for plaintiff. Reported 59 So. 38.

Opinion by PROVOSTY, J.:

Plaintiff and a companion were on horseback, going down a street, the full width of which, practically, was occupied by the double tracks of the defendant railway company. One of the electric cars of the defendant company, coming behind plaintiff, frightened his horse, when within about 100 feet, and the animal became uncontrollable. The street was narrow, and more or less obstructed by a buggy and a wagon coming up towards plaintiff on the other

track, and by a milk wagon which had stopped on the side; so that plaintiff found it impossible to force his skittish mount out of the way of the car. Realizing his danger, he by signs and cries sought to attract the attention of the motorman, but in vain. The latter was not looking ahead, but was eating his luncheon — a sandwich in one hand and a can of coffee in the other. He failed to see plaintiff until too late. The horse was struck and knocked out of the way, and plaintiff thrown on the track in front of the car. Fortunately he succeeded in holding onto an iron bar underneath the platform of the car, so that he did not go under the wheels, but was only dragged on the ground. The testimony varies as to how many feet he was thus dragged; but the point is not very material. As soon as the car stopped he got out and stood up; not much hurt, though very badly scared, and more or less bruised and scratched. His injuries were severe enough, however, to keep him in bed for some ten days, and keep him away from his work for about two weeks. The case was tried without a jury, and \$962 allowed. This included \$300 punitive damages. This element of damages must be discarded. This court has frequently held that punitive damages will not be imposed upon an employer who is only vicariously at fault. *Patterson v. Railroad Co.*, 110 La. 797, 34 South. 782, and cases there cited.

The judgment is reduced to \$662, and as thus reduced is affirmed, plaintiff to pay costs of appeal.

SHELLY v. BOSTON ELEVATED RY. CO.

(Massachusetts — Supreme Judicial Court.)

Wilful Trespasser on Cars; Duty of Company; Ejection of Boy by Conductor; No Cause of Action.

Reported 98 N. E. 575.

This was an action of tort for personal injuries sustained by plaintiff falling or jumping off a moving car of defendant. Plaintiff, a little over ten years old, boarded the car to steal a ride. The conductor on discovering him ordered him to get off, shaking his fist at the same time. Plaintiff became frightened, and lost his balance, or attempted to jump off. The conductor did not lay his hand on plaintiff or touch him with anything.

Opinion by HAMMOND, J.:

The plaintiff was a wilful trespasser, and to him "the defendant owed no duty, except to refrain from wilfully or wantonly and recklessly exposing him to danger." Knowlton, C. J., in *Bjornquist v. Boston & Albany R. R.*, 185 Mass. 130, 132, 70 N. E. 53, 54 (102 Am. St. Rep. 332). It is unnecessary to recite the evidence in detail. It is contradictory in many respects, but even if it be taken in the light most favorable for the plaintiff it falls far short of showing that the defendant failed to perform the limited duty it owed to the plaintiff. The case must stand in the class with *Bjornquist v. Boston & Albany R. R.*, *ubi supra*; *Albert v. Boston Elevated Railway*, 185 Mass. 210, 70 N. E. 52; *Massell v. Boston Elevated Ry.*, 191 Mass. 491, 78 N. E. 106;

Anternoitz v. New York, New Haven & Hartford R. R., 193 Mass. 542, 79 N. E. 789; Lebov v. Consolidated Railway, 203 Mass., 380, 89 N. E. 546, 26 L. R. A. (N. S.) 265, and similar cases.

Judgment on the verdict.

LANG v. BOSTON ELEVATED RY. CO.

(Massachusetts — Supreme Judicial Court.)

Action for Injuries; Issues; Negligence of Motorman; Evidence.

DEFENDANT excepts from judgment for plaintiff. Reported 98 N. E. 580.

Opinion by HAMMOND, J.:

One of the questions was whether in the circumstances of the collision between the plaintiff and the defendant's car the motorman was negligent. That was to be determined by his acts either of commission or omission. Upon the questions what those acts were and whether they or any of them were negligent, the length of time he had been in the defendant's employ as a motorman and the nature and amount of his instructions were entirely immaterial, and the evidence upon those matters was wrongly admitted. The defendant seasonably excepted to its admission. It is suggested by the plaintiff that putting an inexperienced or incompetent person in the position of a motorman might be of itself evidence of the defendant's negligence. But unless there was evidence of negligence in the conduct of the motorman the negligence of the defendant in employing him did not contribute to the accident and therefore was immaterial.

It is further argued by the plaintiff that the error, if any, was corrected by the words of the presiding justice to the jury. It appears that after the evidence had been admitted and during the further cross-examination of the motorman by the plaintiff, the presiding justice remarked to the jury upon the bearing of the evidence as follows: "The company was represented by the motorman so far as the running of the car under the direction of the conductor. Now if the motorman was not careless, not lacking in due care, it is not of the slightest importance how many days had intervened since he had ceased receiving instructions from an inspector, or whatever may be the name of the official that accompanied him and gave him instructions, whether a day or a year. If he was not careless, it is certainly of no importance. But I have let the evidence in as to how long he had been there, and it may or may not throw a little light upon the question of whether or not he was in the exercise of due care. It may or may not. If it does not, that is the end of it. If he was careful it makes no difference. I only mention this to you so that you will understand the purport of the evidence as it proceeds." In his final charge at the close of the case he spoke upon this matter as follows: "If you find that the plaintiff was in the exercise of due care, then you come to the question of the motorman; and the discussion of his due care has been involved somewhat in that of the plaintiff. Was he managing that car as a prudent motorman should — reasonably prudent? * * * It is of no im-

portance, I take it, whether he had been in the employ of the company one month or one year, or five years. The question is, Did he act as a reasonably prudent man should, under the circumstances, no matter how long or how short his services?"

It will be observed that there was no express withdrawal of the remarks first made to the jury. If there was inconsistency in the two statements it cannot be known which statement the jury followed. We think that the original remarks were not sufficiently withdrawn either expressly or by fair implication.

The evidence was immaterial, and to one accustomed to trial by jury in this class of cases it is not difficult to see that it was calculated to be prejudicial to the defendant upon the question of the negligence of the motorman.

Whether the evidence as to damages was properly admitted in the way in which it was presented is not free from doubt, but in view of the result to which we have come upon the other part of the case we do not think it necessary to consider it.

Exceptions sustained.

BRYANT v. BOSTON ELEVATED RY.

(Massachusetts — Supreme Judicial Court.)

Injury to Pedestrian on Sidewalk by Vehicle Thrown Against Him by Car Proceeding Around a Curve; Concurrent Use of Highways by Vehicles and Street Cars; Recovery Against Joint Defendants.

PLAINTIFF excepts from a verdict ordered for one defendant and refusal to order verdict for a joint defendant. Reported 198 N. E. 587.

Opinion by BRALEY, J.:

The plaintiff while upon a public way as a pedestrian without any reasonable cause to apprehend that his position might be unsafe was struck, knocked down, and rendered unconscious by a wagon driven by a servant of the defendant express company. If the combination of circumstances which produced the injury may be infrequent, they are not extraordinary, and the issue of this defendant's negligence having been a question for the jury, the refusal to order a verdict in its favor was right. *Powell v. Deveney*, 3 Cush. 300, 50 Am. Dec. 738; *Slattery v. Lawrence Ice Co.*, 190 Mass. 79, 76 N. E. 459; *Hanley v. Boston Elev. St. Ry.*, 201 Mass. 55, 59, 87 N. E. 197; *Dulligan v. Barber Asphalt Paving Co.*, 201 Mass. 227, 231, 87 N. E. 567. But the ruling that the plaintiff could not recover against the defendant railway company should not have been given. The parties were concurrently using the public ways, and each defendant could not disregard the rights of other travelers, or escape the consequences if every reasonable precaution was not taken to avoid injury to them. *O'Brien v. Blue Hill St. Ry.*, 186 Mass. 446, 447, 71 N. E. 951. The jury would have been warranted in finding that for some distance below the place of the accident the car and wagon, while moving in the same direction, proceeded with equal speed, when as they approached a sharp curve in the railway track where it turned into a cross street the car passed the

wagon, which then moved up until as they entered the curve the car and wagon were abreast, or the wagon might have been slightly in advance. As it approached the curve the car slackened speed, while the wagon moved slowly, and the width of the street, with the sharp curvature of the track plainly showed, that the wagon, whose driver intended to turn to the left at the corner of the intersecting street, and the car which must keep on to the right could not pass around the curve and corner simultaneously, without coming in contact. It also appeared that at this corner travel during the day time became greatly congested, and because of the volume of traffic a police officer had been stationed for the protection of travelers. It was with this situation before them that in broad daylight the motorman and the driver, after a signal from the officer that they could proceed, moved forward, and the car going at greater speed outstripped the wagon. The projecting rear end of the car in passing swung over the roadway, and coming into collision with the wagon forced it over the sidewalk, where it felled the plaintiff. It was the duty of the motorman to have stopped the car if he saw that the driver had determined to go on, and it was the duty of the driver not to have attempted to pass the car and turn the corner until the car had passed him, and if either the motorman or the driver had acted with ordinary prudence the collision would have been averted, and the injury to the plaintiff would not have happened. *Carrahar v. Boston & Northern St. Ry.*, 198 Mass. 549, 85 N. E. 162, 126 Am. St. Rep. 461; *Wright v. Boston & Northern St. Ry.*, 203 Mass. 569, 570, 571, 89 N. E. 1073. The plaintiff having offered abundant evidence that his injuries could be attributed to the concurrent misconduct of the defendants, he can recover judgment against both, although he can have but one satisfaction in damages. *Feneff v. Boston & Maine R. R.*, 196 Mass. 575, 581, 82 N. E. 705. By the terms of the report judgment is to be entered on the verdict for the plaintiff against both defendants. So ordered.

GODFREY v. MERIDIAN RY. & LIGHT CO.

(Mississippi — Supreme Court.)

*Liability of Company for Failure to Stop Car and Admit Passenger;
Action for Failure; Instructions; Evidence; Punitive Damages.*

PLAINTIFF appeals from judgment for defendant. Reported 58 So. 534.

STATEMENT OF FACTS.

The appellant brought suit against the appellee for the sum of \$5,000 damages for the alleged failure of the defendant to stop its car and admit her as a passenger at a street crossing in the city of Meridian.

The declaration alleges that plaintiff went to a corner in the business section of the city for the purpose of taking a car, and signaled for it to stop; that the signal was seen and understood by the motorman, but that he made no effort to stop the car until it had passed by plaintiff, finally stopping about fifty yards beyond her; that his failure to stop was wilful and grossly negli-

gent; that when the car stopped the conductor on the rear of the car looked back and saw that plaintiff wished to board car; that without giving her time to reach it, or offer to back the car to the crossing where she stood with her baby, eighteen months old, the conductor wilfully, negligently and insultingly, knowing that plaintiff desired to become a passenger, signaled the motorman to go ahead, and left the plaintiff standing at the corner; that, by reason of the gross negligence and wilful wrong done plaintiff by defendant, she was compelled to walk a great distance, carrying her child, suffering physical pain and mental anguish, to her damage, etc., and further, that because of the insults and humiliations heaped upon her by the servant of the defendant she is entitled to damages.

The case was submitted to a jury under instructions of the court, and resulted in a verdict for defendant, from which comes this appeal.

Opinion by WHITFIELD, C.:

The sixth instruction given for the defendant is fatally erroneous for two reasons: First, it assumes what was certainly in controversy that Freeman and Chatham were the motorman and conductor on this particular street car; and, secondly, it took entirely from the consideration of the jury the question of whether the defendant was guilty of gross negligence. Punitive damages are recoverable, not only for wilful and intentional wrong, but for such gross and reckless negligence as is the equivalent of wilful wrong in the eye of the law. This is not the law. If this charge were correct, then it would follow that, although the jury might have believed that Mrs. Godfrey was in the place for embarkation on the car at the time stated by her, they would, nevertheless, find for the defendant, if only they further believed that the motorman and conductor did not see Mrs. Godfrey. They might not have seen her, and yet been guilty of gross negligence in not seeing her.

The sixth instruction is as follows: "Unless the plaintiff has shown by a preponderance of the testimony that Freeman and Chatham wilfully refused to stop at a time and place when plaintiff was entitled to board the car, then plaintiff is not entitled to recover punitive or exemplary damages against defendant; that punitive or exemplary damages are what is called in law smart money or vindictive damages to be given in cases when those against whom they are inflicted have been guilty of wilfully and knowingly wronging the party or parties claiming said damages."

The fourth instruction given for the defendant is as follows: "The court instructs the jury that the burden of proof is on plaintiff to show by a preponderance of the evidence that defendant's servants negligently omitted to stop the car and take her on as a passenger before plaintiff is entitled to recover at all; and, further, that, in the event the jury should believe from the evidence that defendant's servants did negligently omit to stop the car and accept plaintiff as a passenger, the burden is also on plaintiff to show by a preponderance of the testimony that she sustained actual damages and the amount thereof with reasonable certainty before she can recover any actual damages, and, if the jury believe from the evidence that plaintiff did not sustain any actual damages, and that the conduct of defendant's servants was not insulting, and intentionally wilful even though negligent, then the jury should only award plaintiff nominal damages." The last clause of this

instruction, which tells the jury that if they believe from the evidence that plaintiff did not sustain any actual damages, and that the conduct of the defendant's servants was not insulting, capricious and intentionally wilful, even though negligent, then the jury should award plaintiff only nominal damages, is objectionable for two reasons: First. Because it required the jury to believe that the defendant's conduct was insulting, capricious, and intentionally wilful. The three adverbs should have been used in the alternative, and not conjunctively. Second. The phrase, "even though negligent," would have warranted the jury in believing that any degree of negligence, even gross negligence, was intended. Gross negligence is negligence, but it is negligence to the N'th power.

The second instruction for the defendant is also erroneous, because it omits liability growing out of gross negligence. The instruction was calculated to make the jury believe that they might find for the defendant simply because the motorman and conductor did not, as a fact, actually see the plaintiff. The servants of the defendant company were required to use due care to see her, and if, by the exercise of due care, they would have seen her, the defendant would be liable. The instruction ignored the right of recovery growing out of gross negligence. The second instruction given for defendant is as follows: "If the jury believe from the evidence in this case that the conductor and motorman did not see plaintiff, and did not intentionally capriciously decline to stop the car and let her take passage thereon, the jury should not award any punitive or exemplary damages against the defendant." The third instruction for the defendant is also fatally erroneous, which is as follows: "The court charges the jury that if they believe from the testimony that Freeman and Chatham did not observe that plaintiff desired or wanted to board defendant's car at the corner of Thirteenth street and Twenty-fourth avenue, and failed to stop and take her on for the reason above stated, then the verdict of the jury should be, 'We, the jury, find for the defendant.'" The court here attempts to make a concrete application of the law to the facts of the case, and directs the jury to find a verdict for the defendant if they believe the facts stated in the instruction. The facts set out in the instruction are that, if the jury believe Freeman and Chatham did not observe that plaintiff desired to board defendant's car and failed to stop and take her on for that reason, to wit, that they did not actually see her, they should find for the defendant. We have already pointed out that this is fatally incorrect. If the conductor and motorman failed to see her through the want of ordinary care, the company would certainly be liable. Liability would follow from a failure to see her, if by the use of due care she would have been seen, just as clearly as from the fact, if it were so, that they did not see her at all. The jury might have believed that Mrs. Godfrey was at a proper place, and in abundant time to catch the car, and yet they were told that, if they did not simply see her, they should find for the defendant. If she might have been seen by the motorman and conductor by the use of ordinary care, the company was plainly liable for the violation of its general duty which it owes the public to see. *Wilson v. N. O. & N. E. R. R.*, 63 Miss. 352.

Harper v. State, 83 Miss. 402, 35 South. 572, announces the true rule, which is: "Where an abstract proposition of law is incorrectly announced by an instruction, and the same or similar propositions of law are thereafter cor-

rectly set forth in other instructions in the cause, then if, taking the instructions on both sides as a whole, the court can safely affirm that no harm has been done to either side, and that the right result has been reached, the verdict of the jury will not, in such cases, be disturbed. *Skates v. State*, 64 Miss. 644, 1 South. 843, 60 Am. Rep. 70.

But where, as in the instant case, the court undertakes to collate certain facts, and, making a concrete application of the law to such facts, instructs the jury to bring in a stated verdict if they believe in their existence, and the facts therein stated will not legally sustain the verdict directed, such error cannot be cured by other instructions; the reason for the difference being that in the first instance it is simply an erroneous statement of a legal principle, which may or may not mislead the jury, according to the varying circumstances of causes, but in the latter instance, where a verdict is directed to be based upon the facts stated in the instruction, other instructions embodying other and different statements of facts and authorizing verdicts to be predicated thereon do not modify the erroneous instruction, but simply conflict therewith. If, by an erroneous instruction, a jury be charged to convict if they believe certain facts to exist, and by another instruction the jury be told that they should acquit unless they believe that certain other facts also exist, these instructions do not modify, but contradict, each other. The one is not explanatory of the other, but in conflict therewith. In such a state of case the jury is left without any sure or certain guide to conduct them to the proper conclusion. *Hawthorne v. State*, 58 Miss. 778; *Collins v. State*, 71 Miss. 691, 15 South. 42; *Josephine v. State*, 39 Miss. 617; *Owens v. State*, 80 Miss. 499, 32 South. 152.

This instruction was fatally erroneous, and not cured. We notice just one other matter. Testimony is set out in the record as to the motorman seeing a woman and a child, which he supposed to be a girl, wanting to get aboard the car. A good deal of testimony was taken as to what the conductor and the motorman did with respect to this woman and her child, extending from page 33 to and including page 42 of the record. At the end of all this testimony, the court of its own motion excluded all this testimony, to which action of the court both the plaintiff and the defendant excepted. We think the jury were entitled to hear this testimony as to what was done by the motorman and the conductor, and what they saw with reference to this woman and her child. We are very much inclined, though expressing, of course, no positive opinion about it, to the view that the woman and child seen by the motorman were very likely the plaintiff in this case and her child. The motorman's idea that the child was a girl was, of course, pure guesswork, and his estimate of the age was of like little value. At any rate, it was for the jury to determine what his opinion as to both were worth, and to give to all this testimony as to what the conductor and the motorman saw and did, with respect to this woman and her child, just such weight as from the evidence they saw proper.

Per Curiam. The above opinion is adopted as the opinion of the court, and, for the reasons therein indicated, the judgment is reversed and the cause remanded.

SOUTHERN BITULITHIC CO. v. ALGIERS RY. & LIGHTING CO.

(Louisiana — Supreme Court.)

Paving; Liability of Street Railway Company for Cost.

DEFENDANT appeals from judgment for plaintiff. Reported 58 So. 588.

Opinion by PROVOSTY, J.:

The present suit is to recover the cost of the paving of that part of Teche street between the rails of the railroad of the defendant company and extending one foot on each side. It is founded upon the following clause of the contract by which the defendant company obtained its franchise:

"Should any paved or unpaved street, occupied by a track or tracks, be ordered paved or repaved, the purchaser shall pay the cost of paving or repaving between the rails of each track, and for one foot on the outside of each rail."

Under the city charter, the abutting property owners have the right to choose the kind of pavement to be used upon the street, if they are to pay any part of the cost. In the present instance they chose bitulithic, and, accordingly, that part of the pavement on which they were to pay a part of the cost was so laid. But the part to be paid for by the defendant was laid in granite blocks. These two kinds of pavements require the same kind of foundation, namely, a six-inch layer of concrete.

Plaintiff was the contractor who did the work. Under the contract, that part of the pavement to be paid for by defendant was to be measured by the square yard, and to be paid for at the rate of \$3.95 per yard. The other part of the pavement was to be paid for on the basis of \$6.60 per cubic yard of concrete foundation, and \$1.95 per square yard of bitulithic surfacing. The difference in the cost of using granite blocks instead of bitulithic on that part of the street to be paid for by defendant was \$2,951.13.

Defendant contends that, under the above-quoted clause of the contract, ing of said clause to so interpret it as to authorize the city to require defendant to pay for a more expensive kind of pavement than that ordered for there was no obligation on its part to pay for paving unless the entire street was ordered to be paved; and that, when this was done, the kind of pavement chosen was thus chosen for the entire street; and that it would be a stretch the street.

Defendant claims a further reduction for the space occupied by the rails, and measures this space by the width of the head of the rails, according to which the space to be deducted would be one-tenth of the whole. And defendant claims a further reduction for the space occupied by the cross-ties, which, being embedded in the concrete foundation, economize that many cubic yards of concrete.

In the latter two claims we find no merit. The work of laying the foundation in that part of the street occupied by defendant's roadbed was very much more difficult and expensive than the rest of the street, owing to the constant passing of cars, and to the presence of the rails and cross-ties which operated as so many obstructions, and, in general, owing to the irregularity of the surface to be paved. Because of this, a different mode of measurement had to be

adopted for that part of the work. Nothing is said in the contract about any deduction having to be made on account of the rails in computing the yardage; but we think that by a fair interpretation of the contract such deduction should not be made, as the evidence shows that the presence of the rails adds to the expense of the work very much more than it lessens it. Moreover, the testimony abundantly shows that the usage is not to make such deduction. Usage enters into every contract, and is properly admissible in evidence for the purpose not only of elucidating the contract, but also of completing it. C. C. arts. 1903, 1953; Marcade, Com. on articles 1135 and 1159, C. N. In *Kernion v. Hills*, 1 La. Ann. 419, proof of usage was admitted as supplementary to a statute.

How far the same argument as to the greater difficulty and expense of work owing to the passing of cars might apply to the work of surfacing the street we do not know; but we are clear that there is no answer to the contention that the defendant cannot be made to pay, under the above-transcribed clause of the contract, for a more expensive kind of pavement than that ordered for the entire street.

However, the defendant company knew that this work was being done; indeed, had its inspectors on it all the time. If the defendant company intended to refuse to pay for this more expensive kind of pavement, but intended to insist upon the other kind, it should have given formal notice to that effect to the city authorities before the work was done. This it did not do, and, under familiar principles, is estopped now from so doing.

Judgment affirmed.

MORRISSEY v. BOSTON ELEVATED RY. CO.

(Massachusetts — Supreme Judicial Court.)

Collision with Vehicle Going in Same Direction Ahead of Car; Assumption that Motorman Will Sound Gong Before Changing Course of Car; Negligence; Question for Jury.

PLAINTIFF excepts from verdict directed for defendant. Reported 97 N. E. 83.

Opinion by DE COURCY, J.:

This action was brought by William E. Morrissey to recover for personal injuries; and he is hereinafter referred to as the plaintiff although the action is now being prosecuted by his administrator. The collision complained of occurred between six and seven o'clock in the evening of January 31, 1908, at the corner of Dorchester avenue and West Fourth street in South Boston. The defendant company maintained double tracks in both streets. At the time of the accident cars were running southerly on Dorchester avenue as often as once a minute, more than one-half of them proceeding straight down the avenue and the others turning into West Fourth street by means of a switch and curved track. On the avenue the nearest westerly rail was twelve feet from the curbstone, and the curved rail, in turning the corner into West Fourth street, approached to within three feet of the curb.

The plaintiff was driving a two-horse, covered express wagon and was going southerly along Dorchester avenue, with his right-hand wheels close to the curb of the westerly sidewalk, when the collision occurred.

The trial court directed a verdict for the defendant. The question before us is whether, upon the view of the testimony most favorable to the plaintiff, there was evidence of his due care and of the motorman's negligence proper for the consideration of the jury. *Sellon v. Boston Elev. Ry. Co.*, 208 Mass. 507, 94 N. E. 684.

There was evidence on which the jury would be warranted in finding that the motorman was driving his car slowly on account of the congested traffic; that the plaintiff's team was proceeding in the same direction, a short distance ahead of the car and in plain sight, and apparently about to cross West Fourth street; and that the motorman, without ringing any warning gong, entered upon the curved track which crossed the plaintiff's path and ran the car into the wagon behind the forward left wheel. This made the question of the defendant's negligence one of fact for the jury, notwithstanding that the witnesses called by it testified that the wagon ran into the car.

Although the case is closer on the issue of the plaintiff's due care, this question also was for the jury on the testimony of his witnesses. Upon their story we have virtually a rear-end collision, with no warning signal of the car's approach. *Kerr v. Boston Elevated Ry.*, 188 Mass. 434, 74 N. E. 669; *Callahan v. Boston Elev. Ry.*, 205 Mass. 422, 91 N. E. 388. There is no direct evidence that the plaintiff listened, but he might well assume that the motorman would sound the gong before changing the course of the car and attempting to cross the path of the team. And if any duty to look devolved upon the plaintiff under the circumstances, the jury might consider that his look should be forward towards the intersecting street which he was approaching. According to some of the evidence, even if he had looked backward when the horses reached the curved track, he would have seen the car on the straight track and apparently proceeding as if to cross West Fourth street. And on the plaintiff's version of the accident the collision would not have occurred if the car had remained on the straight track.

Exceptions sustained.

GARLAND v. BOSTON ELEVATED RY. CO.

(Massachusetts — Supreme Judicial Court.)

Injury to Passenger Alighting from Car; Negligence; Contributory Negligence; Questions for Jury; Evidence.

DEFENDANT excepts from verdict for plaintiff. Reported 97 N. E. 97.

The conductor in charge of the car testified on cross-examination that while collecting fares he heard screams from passengers while plaintiff was on the running board, and looked up and saw her falling off the car. He was then asked the following: "Q. Didn't it occur to you that night that something had happened, before she got on the running board, to make the people scream?

A. I don't remember of any occurrence." And further testified that she had her right hand on the post when he first looked and saw her; that she had one foot on the running board, and one foot as if she was about to step off, with her right hand on the post. "Q. And could you see any reason why any one should scream then, unless they were worrying about the rain on her hat? A. Why, yes." That he would have slipped along the running board, except that she stepped off just about the time when his attention was attracted to her; that he gave no signal to stop the car afterwards; that it stopped itself with the signal already given; that the front of the car stopped right in front of the white post; that he knew she was going to get off at this stop because of the signal she had given him.

On redirect he testified that the reason why he did not see her coming from her seat to the edge of the car was that he was collecting a fare. "Q. You were asked about reasons why persons screamed, as you understood. Why did they scream when she was getting off? A. Why, she was getting — Mr. Daggett: One minute. I object to that. The Court: I think it must be excluded. If they said anything — Mr. Hannigan: He was asked that question on the cross, your honor — very much like it. That is why I am asking on rebuttal. He was asked why they should scream — didn't they scream for this reason or that reason? That is why, it seems to me, it is opened up. The Court: I still think that I must exclude the question."

Opinion by DE COURCY, J.:

The plaintiff was a passenger on an open car of the defendant. In response to her signal the conductor rang the bell to stop the car, and while the speed slackened she walked to the end of the seat preparatory to alighting. The main fact in controversy was whether the car had come to a full stop just before the accident occurred. The contention of the defendant was that the plaintiff stepped from the car while it was slowing down but still moving, and a number of witnesses so testified. But there was also testimony from which the jury could find that the car had come to a full stop opposite the white post to allow the plaintiff to alight, and that while the plaintiff was in the act of alighting she was thrown to the ground by reason of the car being started suddenly and prematurely. Upon the evidence the issues of the plaintiff's due care and the defendant's negligence were for the jury. *McDermott v. Boston Elevated Railway*, 208 Mass. 104, 94 N. E. 309. Upon the plaintiff's story, which the jury believed, this case is unlike those cited by the defendant, where passengers were thrown down by a sudden jerk in a moving car not due to negligence. *McGann v. Boston Elevated Railway*, 199 Mass. 448, 85 N. E. 570, 18 L. R. A. (N. S.) 506, 127 Am. St. Rep. 509; *Stevens v. Boston Elevated Ry.*, 199 Mass. 471, 85 N. E. 571. And see *Work v. Boston Elevated Railway*, 207 Mass. 447, 93 N. E. 693.

The court might well in its discretion exclude the question to the witness Alexander, asked in redirect-examination. And the defendant was not harmed by the exclusion since he obtained the evidence, in another form, from the witness. *Bennett v. Susser*, 191 Mass. 329, 77 N. E. 884; *Walker Ice Co. v. American Steel & Wire Co.*, 185 Mass. 463, 474, 70 N. E. 937.

Exceptions overruled.

CONWAY v. METROPOLITAN ST. RY. CO.

(Missouri — Kansas City Court of Appeals.)

Collision with Horse; Action for Damages; Instructions Must Conform to Pleadings.

DEFENDANT appeals from judgment for plaintiff. Reported 143 S. W. 516.

Opinion by ELLISON, J.:

Defendant operates a line of street cars in Kansas City, and plaintiff's brother was riding plaintiff's horse along one of such streets when the car struck and killed the horse. This action followed, and plaintiff recovered in the trial court.

Defendant makes complaint of the petition, and plaintiff makes excuses therefor; but, as the cause is to be retried, we assume all valid objection will be removed. The petition charges negligence and specifies in what it consisted, i. e., that defendant in approaching plaintiff's brother ran its car at a dangerous, rapid, and excessive rate of speed and without warning to him. The only instruction on negligence was not confined to the negligence specified. On the contrary, it was couched in such language as would permit a recovery for any negligence in the operation of the car, within or without the allegations. This was error. *Beave v. Transit Co.*, 212 Mo. 331, 111 S. W. 52; *Detrich v. Metropolitan Street Ry. Co.*, 143 Mo. App. 176, 127 S. W. 603.

The trial court properly denied a demurrer to the evidence offered by defendant.

The judgment is reversed, and cause remanded. All concur.

STATE EX REL. FORD v. SUPERIOR COURT.

(Washington — Supreme Court.)

Validity and Construction of City Ordinance Authorizing Construction of Electric Street Railways; Authority to Erect Trestle in Street.

WRIT OF CERTIORARI, application for. Reported 120 Pac. 514.

Opinion by GOSE, J.:

This is an application for a writ to review a judgment of necessity entered in an eminent domain proceeding. The respondent Olympia Light & Power Company has for several years operated an electric street railway system in the city of Olympia, and between that city and Tumwater. On the 5th day of May, 1911, the city of Olympia granted it a franchise to extend its railway system to what is known as "West Olympia." The ordinance provides: "That said Olympia Light & Power Company is hereby authorized to erect a trestle to carry its tracks over the Port Townsend & Southern Railroad, said trestle to be located on the southerly side of Fourth street, and to extend from a point at or near the draw-bridge to a point at or near the intersection

of Fourth and Front streets. Plans and detailed specifications for said trestle to be approved by the city engineer and the city council, and said trestle to be constructed in accordance therewith." Pursuant to the franchise, the respondent, while taking the initial steps to construct the trestle, was enjoined by the court from constructing it until it had appropriated the easements of access, light, and air of the relators. Thereafter, in a suit instituted by the respondent for that purpose, an order was entered declaring that the proposed trestle was necessary, that the public interest required its construction, and that the easements of access, light, and air sought to be appropriated were necessary in the prosecution of the enterprise. The relators thereupon applied to this court for a writ of review. The proposed trestle will commence north of the sidewalk area on the south side of Fourth street, at or near the east end of the drawbridge, and extend west a distance of 640 feet, to a point near the intersection of Fourth and Front streets. Where it crosses the track of the Port Townsend & Southern Railway it will have a height of 22.36 feet. From thence to the point of contact with the street it will have an ascending grade of approximately 3 per cent. The base of the trestle will have a width of 16 feet at the east side of the relators' property, and 10 feet at its point of contact with the street near the west line of their property. The top of the trestle will be 10 feet in width. The driveway in the street north of their property will vary in width from 27.2 feet at their east line, to 30 feet at the west end of the trestle. The relators' property lies between the track of the Port Townsend & Southern Railway Company and Front street, and abuts upon the south side of Fourth street. There will be no interference with the sidewalk area. The purpose of the trestle is two-fold: (1) To avoid a grade crossing at the railway track; and (2) to give the street car track a better grade between that track and the west end of the trestle. The railroad track lies in a depression between the drawbridge and the West Fourth street hill. West Fourth street in front of the relator's property has a grade of approximately 12 per cent.

The relators' contention is that the city did not have the power to authorize the construction of the trestle or to permit the laying of the street car track except at grade. Respondent contends that express authority for the granting of the franchise, including the construction of the trestle, is conferred by the provisions of Rem. & Bal. Code, §§ 9080, 9081. Section 9080, so far as applicable to the present inquiry, is as follows: "The legislative authority of the city or town having control of any public street or road, or where such street or road is not within the limits of any incorporated city or town, then the board of county commissioners wherein such road or street is situated, may grant authority for the construction, maintenance and operation of electric railroads or railways, motor railroads or railways, and railroads and railways of which the motive power is any power other than steam, together with such poles, wires, and other appurtenances upon, over, along and across any such public street or road, and in granting such authority the legislative authority of such city or town or the board of county commissioners, as the case may be, may prescribe the terms and conditions on which such railroads or railways and their appurtenances shall be constructed, maintained and operated upon, over, along and across such road or street, and the grade or elevation at which the same shall be maintained and operated." Section 9081

confers the right upon railway companies operated by electricity to appropriate "real estate and other property for right of way or for any corporate purpose," subject to the condition that the right of eminent domain cannot be exercised with respect to any public road or street until the location of the road has been authorized in accordance with the provisions of section 9080. Relators rely upon State *ex rel.* Schade Brewing Co. v. Superior Court, 62 Wash. 96, 113 Pac. 576. In that case we held, after reviewing the legislation applicable to commercial railroads, that the city of Spokane had no authority to grant a franchise to a commercial railroad to lay its track below the grade of the street so as to exclude the public from the part of the street occupied by the railroad. The statute under review in that case gives to cities of the first class the power to authorize the construction and operation of commercial railroads "in, along, over or across" any street, etc., and to prescribe the "duration and condition" of such use. Delaware, etc., R. Co. v. Buffalo, 158 N. Y. 266, 53 N. E. 44, and Lake Shore, etc., R. Co. v. Elyria, 69 Ohio St. 414, 69 N. E. 738, are quoted from at length in the opinion in the Schade case. These are cases involving the right of commercial railroads to place piers and abutments in the street. In the Buffalo case the legislative authority was to construct roads "across, along, or upon" any street with the assent of the municipal authorities. In the Elyria case the statute relied upon as conferring the power provided: "If it be necessary in the location of any part of a railroad, to occupy any public road, street, alley way, or ground of any kind, or any part thereof, the municipal or other corporation, or public officers or authorities, owning or having charge thereof, and the company may agree upon the manner, terms, and conditions upon which the same may be used or occupied." The rule announced in the Schade case is that the power of the municipal authorities to permit the exclusive use of any part of its street by a railroad must be granted by the State, by "clear and unmistakable language." In the Buffalo case it is said that the authority of the city must appear "in express terms or by clear and unmistakable implication." In the Elyria case the court said that the authority of a municipality to grant more than a joint occupancy of the way "required clear and express language in the statute to that effect."

It is not questioned that the State, in the exercise of its sovereignty, can confer upon municipal officers the power to permit either a street railway company or a commercial railroad to construct its track either above or below the grade of the street, and thus destroy the common public user of the portion of the street thus occupied. The question here presented is: Has the Legislature conferred this power upon the city of Olympia, to quote from the Schade case, by "clear and unmistakable language." We think it has. Any other construction would, we think, nullify the plain meaning of the words "and the grade or elevation at which the same shall be maintained or operated."

The statute gives authority to the law-making power of the city to grant the right to construct, maintain, and operate electric railways and railroads having other than steam power, "upon, over, along and across" any public street, to prescribe "the terms and conditions" of their construction, maintenance, and operation "upon, over, along and across" the street, and to prescribe "the grade or elevation at which the same shall be maintained or

operated." If the Legislature did not intend to authorize the city authorities, in the judicious exercise of the powers conferred upon them, to authorize the construction of a railway track at least above grade, the word "elevation" is surplusage and must be rejected and read out of the statute. It seems clear that the Legislature contemplated that the contour of a street might be such that the public safety would require the road to be constructed and operated above grade. The construction contended for by the relators would, we think, render the meaning of the words "grade or elevation" meaningless. It is the duty of the courts in construing statutes to give effect to all the words found in the statute if possible, and as was said in the recent case of *State v. Whitney*, 120 Pac. 116, to neither enlarge the terms of the statute by ingenious reasoning, nor diminish them by strained construction. The relators say: "The conferring of the power to prescribe the grade or elevation simply means that the Legislature has said to the city council that, 'You may have the power and authority to protect the inhabitants of the city whom you represent officially against any public service corporation attempting to fix its line at an improper grade or elevation.'" This argument is hardly in harmony with the contention that the city had no power to permit the construction of the road except upon the surface of the street. Moreover, such authority had already been conferred upon the council by the use of the words "upon, over, along and across," and by the further provision giving it the power to prescribe "the terms and conditions" upon which such roads shall be constructed, maintained, and operated. If the law-making body of the State had intended that street car tracks could only be laid level with the surface of the streets and in conformity with the grades then or thereafter established, we think such intention would have been clearly expressed. We think, construing the statute according to the plain and ordinary meaning of the words employed, the city was warranted in requiring a grade separation. In the *Schade* case we said: "We are not concerned here with the right of any public service corporation save that of a railway company." In that case we were dealing with the rights of a commercial railway, and the language there used must be read in the light of that fact. As was said by Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheat. at page 399, 5 L. Ed. 257: "It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. * * * The reason of the maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." We are prompted to make these suggestions because we have not considered the respondent's further contention that the power of condemnation given to street railway companies by the provisions of section 9081 carries with it, by necessary implication, the power to destroy the right of common public user in the portion of the street to be occupied by the railway company.

It was argued at the bar by the respondent that an abutting owner cannot claim compensation where a street car track is laid upon a level with the street grade, and that it follows that the authority given to street railway companies to exercise the right of eminent domain in the streets necessarily

implies the right — the city assenting — to separate the track from the street grade. It is, of course, not questioned that street railways facilitate street travel, and that commercial railways are not designed or operated for that purpose. Finding express power in the statute for the franchise as granted, we do not find it necessary to decide this question.

The writ is denied.

DUNBAR, C. J., and CROW and PARKER, JJ., concur.

CHADWICK, J.: I concur in the result, upon the second ground stated in the opinion, but not decided by the majority. I am led to take this view because of the fact that it is only in cases of grade separation that an abutting owner is entitled to damages. In view of this fact, the right of condemnation conferred by section 9081 would be rendered meaningless, if it did not carry with it the power to permit the precise condition presented by the case at bar. The Schade case has been properly distinguished by Judge GOSW. The company there involved was a steam railroad, and the decision was correct. But in arriving at its conclusion I think the court must have overlooked the distinction which Judge GOSW has pointed out, and used expressions which were calculated to mislead, and which have in fact encouraged this proceeding. In the Schade case will be found the following broad statement: "It seems to us that a railway company given the use of a public street, under the powers of the city council here invoked, must be given that use, if it is to occupy any of the surface of the street, upon substantially the same terms as any other traveler upon such street may use it; that is, a free passage along the portion of the street surface so granted, when it is not in the actual use of some other traveler." This expression is inadvertent and, as I read the cases, is not sustained by reason or authority. Under its general police power a city can, if the safety or welfare of the citizen demands it, say that a part of a street shall be given up to pedestrians and a part to vehicles; that certain vehicles shall not go upon certain streets; or, as was held in the New York Elevated Railway cases, a grade separation may be ordained. While rights in a street are as between the pedestrian and the vehicle, be it street car, wagon, or automobile, mutual, the city may, for the safety of either or the convenience of the general public, give over a part of the street to one class, although technically it may seem that the use is exclusive. The remedy of the abutting owner is to take his damages.

STONE v. BOSTON ELEVATED RY. CO.

(Massachusetts — Supreme Judicial Court.)

Pedestrian Struck by Car While Crossing Track in Daylight; Contributory Negligence; When Question of Law.

PLAINTIFF brings exceptions from judgment for defendant. Reported 97 N. E. 747.

Opinion by HAMMOND, J.:

While crossing the tracks of the defendant on Washington street in this city, near Guild street, about nine o'clock in the forenoon of August 3, 1907,

the plaintiff's intestate, a man then 63 years of age, was struck by a car and killed.

The accident occurred in broad daylight. There is no evidence that the deceased received any invitation from the defendant or any one else to cross, nor that there were any other vehicles to complicate the situation or to distract his attention at the precise time of the accident. Nor was there anything to shut off the view of the car for at least 500 feet from the place of the accident. There was no wind or rain to interfere with his view or to distract or require his attention; nor does it appear that he became suddenly confused. If the witnesses for the plaintiff are to be believed, the intestate, seeing a rapidly moving car approaching, deliberately attempted to cross when it was so near that the attempt was rash in the extreme. The case falls far short of showing due care on his part. It is clearly distinguishable from *McCarthy v. Boston Elevated Railway*, 208 Mass. 512, 94 N. E. 749, upon which the plaintiff relies, and it must be classed with *Haynes v. Boston Elevated Railway*, 204 Mass. 249, 90 N. E. 419, and similar cases.

Exceptions overruled.

LUNDERKIN v. BOSTON ELEVATED RY. CO.

(Massachusetts — Supreme Judicial Court.)

Injuries to Old Man Struck by Car When Nearly Across Street; Contributory Negligence; Question for Jury.

Report from Superior Court.

Opinion by RUGG, C. J.:

There was evidence tending to show that the plaintiff was walking across Huntington avenue, where it is intersected by Ruggles street, when he was struck by a car of the defendant. He stood upon the sidewalk several minutes waiting for cars to pass. Double tracks of the defendant were in a reservation in the middle of Huntington avenue, on either side of which was a driveway. The distance from the curb of the sidewalk on which the plaintiff stood to the nearest rail of the defendant's track was twenty-eight feet. The plaintiff was seventy-eight years old and was carrying with his arm around its bottom a peach basket filled with clothes. He started to cross Huntington avenue, and when about midway of the driveway or twelve feet from the nearest rail saw a car moving slowly toward him on the nearer track, and four or five car lengths away. He kept looking at the car occasionally, but thinking he had time to cross continued to walk onward, and just as he was stepping off the further rail he was struck by the car. The car was about thirty feet in length. The substance of the case is that, although the evidence was conflicting, the jury might have found that an old man, on the lookout for passing cars, after being somewhat delayed in waiting for them to go by, when twelve feet from the tracks, saw a car coming toward him slowly 120 or more feet away, and tried to go in front of the car, having made up his mind that he had a reasonable chance to get over without harm and was struck when another step would

have brought him to a place of safety. This conduct cannot be pronounced wanting in due care, as matter of law. It was a fact proper for the determination of the jury. This case falls within the class of which *Albee v. Boston Elevated Ry. Co.*, 209 Mass. 6, 95 N. E. 110; *Magner v. Boston Elevated Ry. Co.*, 209 Mass. 60, 95 N. E. 102, and *Coleman v. Lowell, Lawrence & Haverhill Street Ry.*, 181 Mass. 591, 64 N. E. 402, are illustrations. It is distinguishable, either in observation on the part of the plaintiff or the distance of the car or its speed, from *Madden v. Boston Elevated Ry. Co.*, 194 Mass. 491, 80 N. E. 447; *Callaghan v. Boston Elevated Ry. Co.*, 200 Mass. 450, 86 N. E. 767; *Rundgren v. Boston & Northern St. Ry. Co.*, 201 Mass. 156, 87 N. E. 189, and the other cases upon which the defendant relies.

It has not been argued that there was not evidence sufficient to support a finding of negligence on the part of the motorman of the defendant's car. *Jedfrey v. Boston & Northern St. Ry. Co.*, 198 Mass. 232, 84 N. E. 316.

New trial ordered.

SIGL v. GREEN BAY TRACTION CO.

(Wisconsin — Supreme Court.)

Injury to Passenger Attempting to Board Car When in Motion; Contributory Negligence as Matter of Law.

DEFENDANT appeals from judgment for plaintiff. Reported 135 N. W. 506.

STATEMENT OF FACTS.

Plaintiff brought this action to recover damages for injuries sustained while attempting to board one of defendant's interurban cars in the city of Green Bay. The complaint alleged that the car in question was proceeding in a northerly direction on Webster avenue, after having stopped at the corner of Porlier street and Webster avenue; that plaintiff approached the car from the south, and at the same time signaled to the motorman to indicate that he desired to get on; that the car proceeded very slowly up to the point where plaintiff met it, and, as he was about to board the front end, started with a jerk, materially increasing its speed, and plaintiff was thrown to the ground and rolled against the trucks of the car. The answer put in issue the material allegations of the complaint. By its answers to questions submitted on a special verdict, the jury found that plaintiff was injured by falling from one of defendant's cars while attempting to get on; that his fall was caused by the car being jerked forward by a sudden increase of speed after plaintiff had gotten hold of the handrails and had his foot on the lower step; that the motorman was negligent in so increasing the speed of the car; that a man of ordinary intelligence and prudence in the motorman's position should reasonably have foreseen that suddenly increasing the speed of the car would cause some injury to the plaintiff; that no want of ordinary care on the part of the plaintiff contributed proximately to his injury; and that plaintiff was damaged in the sum of \$569. On such verdict judgment was entered. Defendant appeals.

Opinion by BARNES, J.:

The following facts are undisputed: The car was in motion when plaintiff attempted to board it. It had stopped at a usual stopping place, and had just started. The signals which the plaintiff made to the motorman were made before the car started. It was evident to the plaintiff that the motorman either did not see the signals or that he did not intend to pay any attention to them. The attempt to board the car was made when it was being speeded up. The front vestibule door of the car was closed, so that plaintiff was notified to stay out, rather than invited to come in. It was not only closed, but was locked by means of the trapdoor being down, although the plaintiff did not know this fact. Still he had as much right to assume that it was locked as he did to assume that it was unlocked. The bottom of the door came close to the top of the platform. When the door was closed, it was nearly, if not quite, flush with the step leading to the platform. Or, stated in another way, the outer edge of the step was almost on a line drawn perpendicularly from the door to the step. There was a foothold on the step, but plaintiff could retain his position thereon only by hanging to the handholds, and he could not open the door, if it were unlocked, except by using one of his hands. Under these facts, we conclude that plaintiff was guilty of contributory negligence as a matter of law. *Champagne v. La Crosse City Ry. Co.*, 121 Wis. 554, 99 N. W. 334; *Fosnes v. Duluth St. Ry. Co.*, 140 Wis. 455, 122 N. W. 1054, 30 L. R. A. (N. S.) 270; *Paulson v. Brooklyn City Ry. Co.*, 13 Misc. Rep. 387, 34 N. Y. Supp. 244; *Philips v. Railway Co.*, 49 N. Y. 177.

Having reached this conclusion, it is unnecessary to consider any other errors that are assigned. There was no evidence of gross negligence to go to the jury. The evidence of ordinary negligence was, to say the least, slight. It may be that the accident would have happened if the vestibule door had been open; but it would not have happened if the plaintiff had not negligently attempted to board the car. It follows that the court should have directed a verdict for the defendant.

The judgment of the Circuit Court is reversed, and the cause is remanded, with directions to dismiss the complaint.

CLARK v. DETROIT UNITED RY.

(Michigan — Supreme Court.)

Injuries to Passenger Alighting and Passing Behind Car in Front of Another Car Going in Opposite Direction; Failure to Look and Listen; Contributory Negligence.

PLAINTIFF brings error from judgment for defendant. Reported 134 N W 463.

Opinion by OSTRANDER, J.:

Plaintiff's testimony (no other was introduced) tended to prove that she alighted from a west-bound street car at the corner of Michigan avenue and Fifth street in the city of Detroit, passed in the rear of the car across the

street, and was struck and injured by an east-bound car running on a parallel track. The tracks are separated by a space of five feet. She alighted on the north side of the north, or west-bound, track. She stood there until the car from which she had alighted had proceeded some distance — she at first testified that it was three or four feet, and later fifteen feet — when she looked to the west, was able to see down the track about 125 feet, saw no approaching car, and thereupon, without again looking for a car, proceeded to cross the street. “Q. Just before you stepped on the track you did not look west? A. I looked west before I started to cross the first track. Q. But when you came to go across the south track, when you came to the south track, you were not looking west; if you had you would have seen the car, would you not? A. Certainly I would. Q. So that just before you stepped on the south track you were looking right straight ahead? A. Yes, sir. Q. And if you had looked west you would have seen the other car as the other person did? A. If they had rung the bell. Q. If you had looked west before you stepped on the track you would have seen the car, so that you were not looking that way? A. I was not looking west. Q. If you had looked west just before you stepped onto the south track you would have seen the car? A. Certainly I would. * * * When I got right into the second track some person hollered, and I looked over my shoulder, and the car was on top of me, and I stepped back to save me from getting under the car.”

There was nothing obstructing her view to the west except the car from which she had alighted. Assuming that defendant was negligent in the operation of the car, it is clear that plaintiff failed to exercise ordinary care for her own safety. *McCarthy v. Citizens' Street Railway Co.*, 120 Mich. 400, 79 N. W. 631; *Davis v. Detroit United Ry.*, 162 Mich. 240, 127 N. W. 323. See *Manos v. Detroit United Ry.*, 130 N. W. 664.

The court below properly directed a verdict for defendant, and the judgment for defendant is affirmed.

NICHOLS v. CONNECTICUT CO.

(Connecticut — Supreme Court of Errors.)

Injury to Pedestrian on Track; Last Clear Chance Doctrine; Care by Motorman; Question for Jury.

PLAINTIFF appeals from judgment for defendant on directed verdict. Reported 83 Atl. 1022.

Opinion PER CURIAM:

The plaintiff does not claim that she was free from fault in the premises. Her contention is that the verdict was improperly directed, for the reason that there was evidence from which the jury might properly have found the defendant liable upon the application of the doctrine of “the last clear chance.” That doctrine had an extended consideration in *Nehring v. Connecticut Co.*, 8 St. Ry. Rep. 489, decided at the present term, and certain principles of general application were there laid down which do not call for repetition.

The facts of the present case, which, under these principles, must be controlling of its determination, relate to the conduct of the parties within a short space of time, and to the relation to each other of rapidly occurring events, concerning all of which matters much was left to inference and argument from evidence as to distances, speed of travel, and relative locations, which in itself was by no means harmonious or certain. A variety of reasonable theories may be built up upon the testimony, according as different portions of it are accepted as expressing the truth. Under such conditions the direction of a verdict for the defendant cannot be justified, unless it appear that no theory adequate to support the plaintiff's action could reasonably have been entertained by the jury upon testimony which could have been reasonably credited by it.

Our examination leads us to the opinion that the plaintiff was entitled to go to the jury upon the proposition that, after the motorman knew, or in the exercise of due care ought to have known, that she was in a position of danger, was unaware of that danger, and for that reason would not remove herself to a place of safety, there was time and opportunity for him to have saved her from harm by the exercise of due care in view of the situation; that he failed to exercise such care, and that as a direct consequence of such want of care she was hurt. Such a proposition, sanctioned by the jury, would have brought the case within the third of the group of cases discussed in *Nehring v. Connecticut Co.*, 8 St. Ry. Rep. 489, and justified a verdict for the plaintiff.

There is error, and a new trial is ordered.

WILLIAMS BROS. & CO. v. CONNECTICUT CO.

(Connecticut — Supreme Court of Errors.)

Injuries to Driver of Wagon Hit by Street Car; Failure to Look and Listen; Contributory Negligence.

PLAINTIFF appeals from a judgment for defendant on a directed verdict. Reported 83 Atl. 1022.

Opinion PER CURIAM:

One of the plaintiffs was driving a horse harnessed to a business wagon, all the property of the plaintiffs, along Olive street, in New Haven, and across Chapel street, one of the principal thoroughfares of the city, about thirty-two feet wide between curbs, in the middle of which is laid a double line of trolley tracks of the defendant. In his progress northerly across these tracks, a car of the defendant approaching from the west struck the wagon and injured it and the horse and harness. The testimony as to the speed of the approaching car varied from five to thirty miles an hour. The plaintiff driver estimated it at about twenty. His testimony was that he was driving at about five miles an hour; that as he approached Chapel street on Olive he started to look up Chapel street to see if a car was coming; that he could not there see on account of the obstruction to his view, caused by a large building on the

corner; that he continued on without looking again until he was upon the tracks; that he then saw the car within ten feet of him and coming fast; and that he then attempted to urge his horse on, but did not succeed in avoiding a collision. This statement of the movement of the team and the conduct of its driver was the only one upon those matters before the jury.

The verdict was directed upon the ground that the plaintiff driver was guilty of contributory negligence. The appellants contend that they were entitled upon the evidence to have this question submitted to the jury, and no other claim is made. We find it impossible to read the driver's story, which, in respect to his conduct, stands unqualified, without reaching the conclusion that a jury could not reasonably have reached any other decision than the one which under the direction of the court was embodied in the verdict.

There is no error.

ERVIN v. BURKE.

(New Jersey — Supreme Court.)

Ejection of Passenger Who Refuses to Pay Fare; When Policeman Not Authorized to Arrest Conductor for Ejecting Him.

PLAINTIFF demurred to plea. Reported 83 Atl. 772.

Opinion by GARRISON, J.:

The declaration avers that the plaintiff, while engaged in his duty as a conductor of a street railway car, was assaulted by the defendants Burke and Harding, dragged from his car, and imprisoned. A special plea filed by the defendant Harding alleges that he was at the time of the alleged assault a city policeman on duty, and while lawfully riding on the car in question was forcibly ejected for refusal to pay the five cents fare demanded of him by the plaintiff, and that he thereupon took the plaintiff into custody in order to convey him before the city recorder. To this plea the plaintiff has demurred.

Upon the facts of the declaration that are uncontradicted and those of the plea that are admitted the question presented by this demurrer is whether a conductor of a street car may lawfully be arrested without a warrant for the ejectment of a passenger, who was in fact a policeman, for refusal to pay his fare.

We think not.

Assuming that the defendant, by force of certain city ordinances under which the street railway company had constructed its line, was entitled to free transportation, and that he has an action against such company based upon the breach of such contract or duty, whichever it may be, that circumstance did not render his ejectment for refusal to pay a fare an unlawful act of the conductor.

Controversies of this nature are not to be settled in a wrangle between a passenger and the conductor over the payment of a fare, nor is the latter the agent selected by the company to determine its legal rights and duties, or to represent it in controversies in which they come in question. The matter is

set entirely at rest by the decision of the Court of Errors and Appeals in the case of *Shelton v. Erie Railroad Co.*, 73 N. J. Law 558, 66 Atl. 403, 9 L. R. A. (N. S.) 727, 118 Am. St. Rep. 704, 9 Ann. Cas. 883, where, speaking of the agency of the conductor in this respect, it was said: "It is all comprised in his duty to collect a fare from every passenger or to eject him from the train." As between the plaintiff and the defendant, the plaintiff was in the right in ejecting the defendant, and the defendant, for anything set up in his plea, was in the wrong in arresting the plaintiff. We do not dwell upon the fact that the defendant was not in uniform, or did not tell the conductor that he was a policeman, or that he was on duty, deeming these circumstances to be unimportant, in view of the broad rule as to the carriage of passengers laid down by the case cited. The right of a policeman to arrest without warrant for a breach of the peace committed in his presence has, of course, no rational application to a case where the policeman himself provoked the breach and was in the wrong, and the man he arrested was in the right.

Judgment on demurrer is given for the plaintiff.

SCULLY v. MANCHESTER ST. RY.

(New Hampshire — Supreme Court.)

Evidence; Testimony of Witness as to Speed of Car; Competency of Question to Test His Credibility.

DEFENDANT brings exceptions to verdict for plaintiff. Reported 83 Atl. 512.

One point in issue was the speed of the car which collided with the intestate. A witness for the plaintiff having testified that about the time of the accident he saw another car pass by at the rate of eighteen or twenty miles an hour, he was asked by the court whether the speed of the car was the subject of comment by himself or others. Subject to the defendants' exception, he was allowed to answer that it was.

Opinion by WALKER, J.:

The question was clearly competent for the purpose of testing the credibility of the witness. If he had answered the question in the negative, it would have had some tendency, under the circumstances, to show that he was exaggerating the speed of the car, while the affirmative answer which he gave tended to show he was telling the truth. As the testimony was at least competent for this purpose, its admission was not error, even if it was incompetent for other purposes. *Haskell v. Railway*, 73 N. H. 587, 64 Atl. 186; *Robinson v. Stahl*, 74 N. H. 310, 67 Atl. 577; *Conn. River Power Co. v. Dickinson*, 75 N. H. 353, 358, 74 Atl. 585.

Exception overruled. All concurred.

TACOMA RY. & POWER CO. v. TURNER.

(U. S. Circuit Court of Appeals — Ninth Circuit.)

*Injury to Passenger on Ice Step of Street Car While Alighting;
Instructions.*

DEFENDANT brings error from judgment for plaintiff. Reported 196 Fed. 484.

Opinion by Ross, Circuit Judge:

The defendant in error brought this action in the court below to recover damages for personal injuries alleged to have been sustained by him because of the negligence of the defendant to the action, the plaintiff in error here. The negligence alleged was that the defendant permitted snow and ice to accumulate upon the steps of one of its street cars on which the plaintiff was a passenger, and that in alighting at a street corner at which the car had stopped the plaintiff slipped upon one of the steps, because of the snow and ice so negligently permitted to accumulate, resulting in the injury for which he sued. In its answer the defendant denied any negligence on its part, and set up affirmatively contributory negligence on the part of plaintiff.

The only one of the two points here presented that we can consider relates to the refusal of the court below to give to the jury a certain requested instruction. We are unable to see how counsel for the plaintiff in error can say in their brief, as they do, that:

"Plaintiff himself testified that he saw no snow or ice on the steps when he boarded the car. The car then ran about four miles, constantly taking on and letting off passengers throughout the snow-covered city. These facts are uncontradicted."

Turning to the transcript, we find this in the testimony of the plaintiff:

"There were two steps on this car, and snow showed at each end of the step just as it apparently had fallen, and also showed a broken line clear through with toe marks here and there. Where I slipped was simply ice, slick as glass, with an angle down. Just as quick as my feet struck there they flew from under me, and my back struck the step. The ice was one or two inches thick at the rear of the steps, and down to a feather edge at the outer part of the step. It covered the entire step. The snow did not appear to be what passengers might have tracked in. I remained on the car until I reached Thirty-fifth and Stevens streets, about two blocks from my house. Mr. Bisby and his son assisted me off the car, and assisted me home. At that time I noticed the snow on the steps. The weather that day was pretty cold. It was not thawing when I fell on the street. There was no snow, but ice, on the paved street. On this day I do not remember that any snow or sleet fell. The day was quite cold, and on the day before I was working building a chimney, and, in order to work, we had to clean off quite a lot of snow to get at the work. As the conductor picked me up he remarked that I slipped on the ice of the step, and I said, 'It is a pity you could not clean it off.' He said, 'I tried to clean it off and could not.'"

Of course, this was testimony tending to show negligence on the part of the defendant, which was one of the questions for the jury to determine.

The requested instruction which the court refused to give, and to which action the defendant reserved an exception, is as follows:

"I instruct you that the fact that there was snow and ice on the step of the car from which plaintiff was alighting at the time of his injury constitutes no evidence of the negligence of the defendant. It is shown by the evidence that there was snow on the ground at the time of the accident. You will call to your aid your experience at a time like that, and if you find that the accumulation of snow and ice on the step could not have been prevented by ordinary care it will be your duty to find for the defendant."

In the first place, the instruction was properly refused because of the first clause contained in it, which states that the fact that there was snow and ice on the step of the car from which the plaintiff was alighting at the time of his injury constitutes no evidence of the negligence of the defendant. It was certainly one of the circumstances tending to show such negligence.

Besides, the court in its charge sufficiently and properly instructed the jury in respect to the law governing the case as follows:

"This rule of law that I have explained, that refers to this very high degree of care, would apply to the cleaning off of any ice that might be upon the car when it leaves the shop or the car barn in the morning. The company would be bound to exercise this very high degree of care to see that its car when it starts out in the morning for the general business of transporting passengers is safe if it can be made safe by this very high degree of care. A different rule applies, however, to snow that accumulates upon a car during its ordinary use as the day progresses. The common experience of mankind is that in snowy weather that more or less snow is tracked in upon the car during the progress of snow storms. Of course, more or less snow alights upon the car. I understand the evidence here, if I am mistaken counsel will correct me, is uncontradicted that no snow fell upon the day of the accident, but the evidence is also uncontradicted that there was more or less snow upon the ground, in the neighborhood of seven inches, or at a later time reduced to five. Just how much was on the ground at the time of the occurrence is for you to say from the evidence. If snow which is upon the ground is tracked upon the car during its passing to and fro in the ordinary prosecution of business, the company is bound to remove that snow, but it is not bound to exercise that very high, extraordinary degree of care that I have mentioned.

"The employees upon the car have other duties to perform, and you are to consider the reasonable and practical operation of the car. The degree of care that should be exercised to remove snow that accumulates from being tracked in by passengers is the ordinary degree of care that is the usual care that an ordinarily prudent person would exercise under like circumstances and conditions. That is the usual rule of care that applies to the ordinary individuals in the ordinary affairs of life, namely, to exercise that degree of care and prudence which is commonly exercised by persons of ordinary care and prudence under like circumstances and conditions. If the snow accumulated there during the day as the movements of the car progressed, and it was snow which should have been removed in the exercise of that ordinary care and still remained there, and by reason of its being there the plaintiff was injured, then its being there was negligence. If, however, it was an accumulation of snow of such character that the employees of the company in the exer-

cise of ordinary care would not have removed it, but might be there in spite of their exercise of ordinary prudence, then its existence would not be negligence."

The judgment is affirmed.

SAN ANTONIO TRACTION CO. v. HAUSKINS.

(Texas — Court of Civil Appeals.)

Injuries to Passenger While Alighting from Car; Instructions; Evidence; Issues.

DEFENDANT appeals from judgment for plaintiffs. Reported 148 S. W. 1100.

Opinion by MOURSUND, J.:

Nellie B. Hauskins and her husband, J. E. Hauskins, sued appellant for \$30,000 damages, alleged to have been sustained by her on account of injuries received while alighting from one of appellant's cars. The grounds of negligence alleged were: (1) That the car was started up while she was alighting, causing her to be thrown to the ground and pavement with great force and violence. (2) That the car was stopped where passengers alighting from the same would step upon a portion of the street which was rough, uneven and filled with holes, and that when Mrs. Hauskins alighted from said car she stepped into a hole or depression, in consequence of which she was thrown to the ground and injured. That by reason of such condition of the street it became the duty of defendant and its employees to inform Mrs. Hauskins thereof and to assist her in alighting in safety, but that they failed to so warn or assist her. The defendant answered by general and special denial, and further specially answered that her injuries, if any, were received after she had left the car and had ceased to be a passenger, and because of the negligent and careless manner in which she walked, and by her negligently stepping into a hole in the street after she had ceased to be a passenger, and without any fault on the part of defendant. The trial before a jury resulted in a verdict and judgment for \$2,000, from which defendant appealed.

The first assignment of error complains of the refusal of the court to give special charge No. 4, requested by defendant, as follows: "If you believe from the evidence that the car was not started up while the plaintiff Mrs. Hauskins was in the act of alighting, and that she alighted safely from said car, and after she had alighted she turned and walked away and stepped into a hole in the street a step or two away from the place where she had alighted, and that she was thereby caused to fall, then you will return a verdict for the defendant." The assignment is submitted as a proposition, also the following proposition: "The only duty that defendant owed plaintiff was to use the care required by law to see that she safely alighted. It was not responsible for the condition of the street or for her safety after she had alighted from the car, and if she had safely alighted and stepped into a hole in the street after she turned to walk away, and was thereby injured, the defendant would not be liable. This issue was not separately submitted by the court in its

main charge, and therefore the defendant was entitled to have the charge given."

The court gave the following defensive charges: "If, however, you find that at the time Mrs. Nellie B. Hauskins attempted to leave said car, said car had been stopped, and you further find that said car was not again put in motion until after Mrs. Nellie B. Hauskins had left the same, then you are instructed that plaintiffs are not entitled to recover under the first paragraph of this charge, and you will so find. You are further charged that if you find that the place where the defendant stopped its car for the purpose of discharging and receiving its passengers was a reasonably safe place for passengers to alight from said car, and that plaintiff alighted from said car safely, and that after she alighted therefrom and was walking away from said car she stepped into a hole in the street and was thereby caused to fall, and as a result thereof was injured, then you will find for the defendant under the second paragraph of this charge."

We think that portion of the charge last quoted was erroneous in placing the burden upon defendant of showing not only that plaintiff alighted from the car safely and after she alighted therefrom and was walking away she stepped in a hole in the street, but also that the place where defendant stopped its car for the purpose of discharging and receiving its passengers was a reasonably safe place to alight. Appellees admit in their brief "that, if the place where it stopped the car was a reasonably safe place for passengers to alight, it was entitled to a verdict on that issue, regardless of whether Mrs. Hauskins alighted safely from said car." This is an admission that the defensive charge by the court was too burdensome upon defendant, because such charge required much more than a finding that it was a reasonably safe place to alight, in order to find for defendant.

We believe that under the pleadings in this case defendant was entitled to have the special charge given, and that same would not have been upon the weight of the evidence.

Appellee says the giving of such charge would have been error because it is not the law that Mrs. Hauskins could not recover if she alighted on the ground in safety and then took one step into a hole in the street, which caused her to fall and injure herself. The proposition of law involved in such contention is not before us for consideration in this case, because the pleadings do not raise any issue of stepping into a hole, after alighting safely, but only the issue that when she alighted she stepped into the hole. Nor does the charge of the court submit such issue, and we see no reason why the defensive charge should go further than to require the finding of facts negating the cause of action as alleged.

Counsel for appellee urge various reasons why the refusal of the special charge should not be deemed reversible error; but, as the same question will not arise upon another trial, and we think the case should be reversed under the second assignment, we will merely say that we think the assignment shows error.

The second assignment complains of the charge; the first proposition being that the court should not have submitted the issue whether Mrs. Hauskins stepped into the hole or depression when she alighted from the car, because there was no evidence justifying the submission of said issue.

We find that Mrs. Hauskins did not testify she stepped into a hole, but that just as she was about to alight from the car it was started, and that threw her to the ground.

J. C. Shannon, who was clerk in the drug store into which Mrs. Hauskins was taken after she sprained her ankle, testified she stated that the conductor was not to blame; that she stepped into a hole and sprained her ankle; that she stepped to the ground, and after she stepped to the ground she sprained her ankle.

Alexander Chaves, another clerk in such store, testified that upon said occasion Mrs. Hauskins said something to the effect that she stepped into a hole in Soledad street and turned her foot and sprained her ankle, and it was not the conductor's fault.

The witness Fitzgerald was very positive that he saw Mrs. Hauskins get off the car, and that she made two steps after getting off the car before she fell. At one place in his testimony appears the statement that she made only one step after getting off, but upon being questioned later he was sure he did not make such statement, and that it was two steps. We copy the following statement: "She made two steps, just natural steps. No, she did not step off the car right down into this, stepped right close to it, made two steps after she stepped off, stepped over toward the drug store. Well, there was the hole." At one place he said: "She was going toward the curbing there on Soledad street." He testified that the hole was caused by a mesquite block having been taken out, and that Soledad street was paved with such blocks where the accident occurred, extending maybe five or six feet north of Houston street. He testified he measured the distance from the rail to the hole in which Mrs. Hauskins stepped, and it was thirty inches. He admitted that he might be mistaken, but his evidence indicates that he was pretty positive concerning the correctness of his measurement.

Witness Martin testified the hole was about two feet from the rail, but he also testified positively that he saw Mrs. Hauskins come out of the car and get off, and that she fell after she left the car and had taken one step; that when she alighted she turned immediately around and made one step and fell to her knees; that part of the street had been laid in concrete, and the part adjoining it which still retained the blocks was about two inches higher than the concrete; and that Mrs. Hauskins lost her footing in stepping from the higher to the lower surface.

The conductor, Bruce, testified that the car was a San Pedro car; that Mrs. Hauskins got off where the car turned into Soledad street from Houston street. He testified further: "After she had gotten off the car, she kinder walked around to the side, and turned her foot, so she said, turned her ankle, stepped into a little hole, stepped toward the sidewalk, just to the right of way about four feet, I suppose, something like that, from the car, stepped and fell to her knee." Again, he testified: "I was standing by the car, and she stepped out at arm's length from me, going off of Soledad street, going to the sidewalk—not across Houston street. No, going onto the sidewalk, and had made, no sir, not four or five steps, four or five feet—about two steps, I should judge. Her feet kinder careened, she said, and she fell to her knees. She was to the right of me. I turned and caught hold of her to keep her from falling down." On cross-examination he said: "Yes, I say this

lady got off the car with my assistance and made one or two steps toward the sidewalk and stepped into a hole caused by where mesquite blocks had been taken out."

The witness Johnson testified that the distance from the wheels to the end of the step of a car such as the one from which Mrs. Hauskins stepped was twenty-two inches, as near as he could get it.

Appellees say the evidence shows the hole was at a place where it would be from two to eight inches from the step of a car; that consequently there was evidence that the hole was right where a person stepping from the car would step in it; and therefore the court was correct in submitting such issue.

We have examined the evidence carefully. Every witness who testified about the existence of the hole and Mrs. Hauskins injuring herself by stepping in same, swears positively that she alighted safely from the car and afterwards stepped in the hole. We do not think the evidence concerning the location of the hole sufficient to raise the issue whether she stepped in it when stepping from the car, and are of the opinion that the court erred in submitting such issue.

The second and third propositions complain because, in conjunction with the issue complained of under first proposition, the court submitted the issues whether the conductor failed to assist Mrs. Hauskins to alight, and whether he informed her of the existence of the hole in the street. The charge did not authorize a recovery upon the finding of either issue against defendant, and that such omission on the part of the conductor constituted negligence, but only upon finding both of said issues against defendant, and also that Mrs. Hauskins was injured by stepping into the hole when alighting, and upon finding that each of such omissions by the conductor constituted negligence, and that it was negligence to stop the car at such place. We are therefore of the opinion that these propositions would show no error if the evidence had warranted the submission of the issue discussed under the first proposition; but, when same is eliminated from the charge, the issues now complained of go with it.

By the third assignment complaint is made because the court refused a special charge instructing the jury to disregard the issues made by plaintiffs' pleadings as to the duty of the conductor to assist Mrs. Hauskins off the car. The evidence being that she was a strong, healthy woman, and no evidence that she was incumbered, or that the step was muddy, and her testimony being that she was thrown from the car by a sudden movement thereof, and all the other evidence showing that she alighted safely, we are of the opinion that this charge should have been given.

In view of another trial, it will not be proper to pass on the fourth assignment, which complains that the verdict is excessive.

For the errors mentioned, the case is reversed and remanded.

TAYLOR v. METROPOLITAN ST. RY. CO.

(Missouri — Kansas City Court of Appeals.)

Collision with Hook and Ladder Truck; Injury to Fireman; Contributory Negligence of Fireman in Remaining on Truck; Ordinance; Evidence; Hypothetical Question as to Distance Within Which Car Could Have Been Stopped; Instructions; Damages.

DEFENDANT appeals from a judgment for plaintiff. Reported 148 S. W. 470.

Opinion by ELLISON, J.:

Plaintiff was a fireman in the employ of the Kansas City fire department, and defendant is the operator of a street railway in that city. Plaintiff was injured by being struck by one of defendant's cars, and brought this action for damages. He recovered judgment in the Circuit Court.

Defendant's tracks run east and west on Eighteenth street and pass Agnes avenue, which runs north and south intersecting Eighteenth street. Each street is narrow, being about forty-five feet in width. It seems there is a "jog" of about forty feet where the avenue intersects with the street, and in order to continue on down the avenue you must make a turn into the street for the distance of forty feet to an entrance again into the avenue. A fire alarm was sounded, when plaintiff and a driver got upon the hook and ladder wagon, which was about forty-five feet long, and started the horses rapidly down the avenue approaching Eighteenth street. On account of this "jog" in the streets, it became necessary to turn into Eighteenth street instead of crossing it at right angles, and then again into the avenue. To do this in the narrow streets with a fire wagon forty-five feet long was a somewhat difficult performance, which the firemen call a maneuver in the shape of the letter "S." As plaintiff approached, he saw a butcher waving his white apron, as plaintiff supposed, warning a car of the approach of a fire wagon. The wagon gong was sounded when plaintiff himself saw the car perhaps 180 feet away. The wagon was brought practically to a standstill on the railway track, waiting for the car to stop so they could make the proper turn. The car was then 100 feet away. Plaintiff's seat on the wagon was seven feet from the ground. A city ordinance pleaded by plaintiff gave fire wagons and apparatus paramount right of way over the streets in going to a fire, and also made it the duty of all street railway employees in charge of a street car to stop the car when any fire wagon approaches, until it has passed by. Plaintiff, though seeing the approaching car that distance away, supposed it would stop as by observance of the law car operators always had. He continued to think it would stop until it was close enough (fifteen or twenty feet) for him to realize it would not, when he called profanely to the motorman why he did not stop. It was then too late for him to save himself by jumping from the wagon. He said the only place he could have jumped would have been on the track in front of the car. The car struck the wagon at the front wheels, which threw him off and inflicted the injury of which he complains.

The first objection to the judgment, that plaintiff sat on the wagon seeing

the car, and "watched and waited for it to run up and hit him," is put much too strong for the facts as stated by the plaintiff. He did sit on the wagon and saw the car coming, but not to "hit him," for he all the time supposed it would stop, and, when he saw no movement made to stop, he called to the motorman. It was then too late for him to jump from his high seat; he stated his only place to jump would have been on the track in front of the car.

The natural question follows: Why did he suppose the car would stop? We think a good reason was shown. He, his fellow firemen, and his great wagon of forty-five feet length were in plain view, and it is common knowledge that fire wagons have paramount right of way, which every one concedes. When one is known to be approaching, footmen scurry to safety, vehicles get to one side, and street cars stop. But in this case an ordinance was pleaded and proved requiring street cars to stop, and it was shown in evidence that they customarily did stop. Defendant objects to the right to show a custom when it was not pleaded. "Custom," like many other words, may vary in its meaning with the connection in which it is used. In this instance, proving that cars customarily stopped, or that it was their custom to stop, was merely proving their general observance of the ordinance, and thus showing that plaintiff not only had a right to rely upon the ordinance and that it would be obeyed, but that it had actually always been obeyed. This was all proper enough to show that plaintiff did not invite defendant's servants to run over him and explain why plaintiff was upon the track. It tended to take out of the case defendant's insistence that plaintiff could not recover on the last chance rule, or under any rule, because he wilfully took position on the track and deliberately waited for defendant to "hit him." In this view the case did not depend upon a custom, or upon an ordinance; nor does the petition found the right of action upon an ordinance. The ordinance was pleaded, we assume, merely to permit proof in explanation of plaintiff's conduct. And it seems to be justified, for defendant continuously insists that plaintiff wilfully invited and waited for the collision. We think no error was committed.

Objection, we think too critical, is made to the hypothetical question as to the distance in which a car could have been stopped, going at the rate of ten miles an hour, as the one in controversy was. We do not think there was any valid objection pointed out, when the matter is viewed from a practical standpoint. The witness was familiar with the grade, and he was asked in what distance the cars which were run on that line, running at the rate of ten miles an hour, could be stopped. We judge from the objection that the question should have been made to apply only to the particular car which struck the wagon. If so, it would be rare that evidence of this nature could be produced for a plaintiff in cases of collision with cars. If there was any peculiarity about this car from those in general use on that line, defendant could have made it the basis for cross-examination, or evidence in its own behalf.

The next objection relates to instruction No. 1, in that it calls special attention to particular portions of the evidence in plaintiff's behalf. We think it does not do so in the sense complained of. It merely submits the hypothesis of facts upon which plaintiff's case is based. It is a part of the basis of his

case that he was a fireman in performance of his duty to the city, and when struck he was in the position made necessary by those duties.

It is then claimed that the instruction conflicts with defendant's on the matter of contributory negligence. But we find the instruction is right, and whatever of wrong there was is found in defendant's instructions 3 and 9. Giving them was error in defendant's interest, and, of course, it cannot complain.

Complaint is made of an instruction on the measure of damages, limiting the damages to pain and suffering already endured "and such as he is reasonably *likely* to suffer therefrom in the future." Defendant insists the word "certain" should have been used instead of "likely." We think the objection has no substantial merit. *Illinois Cent. Ry. v. Davidson*, 76 Fed. 517, 22 C. C. A. 306; *Scott Twp. v. Montgomery*, 95 Pa. 444; *Curtis v. Railway*, 20 Barb. (N. Y.) 282.

In *Devoy v. St. Louis Transit Co.*, 192 Mo. 197, 91 S. W. 140, an instruction using the words "reasonable probability" was approved, and so is that expression justified by the remark of Judge Valliant in *Reynolds v. Transit Co.*, 189 Mo. 408, 422, 88 S. W. 55, 107 Am. St. Rep. 360.

The last objection is that the verdict of \$1,500 was excessive. We have examined the evidence in connection with defendant's suggestion, and find the amount justified.

The verdict being for plaintiff, we must assume the evidence in his behalf to be the facts in the case, and in that view defendant has no standing in this appeal. Here was a large and unwieldy fire wagon on the track, and defendant's car bearing down upon it, with every opportunity to stop, and did not do so. If the facts are as the evidence for plaintiff tends to show them, the conduct of defendant's servants in charge of the car was without excuse.

The judgment is affirmed. All concur.

BIRMINGHAM RY., LIGHT & POWER CO. v. BARRETT.

(Alabama — Court of Appeals.)

Injury to Passenger; Complaint Charging Negligence in Operation of Car; Allegation of Wanton Injury; Instructions; Care Required.

DEFENDANT appeals from judgment for plaintiff. Reported 58 So. 760.

Opinion by PELHAM, J.:

An action was brought by the appellee against the appellant, a common carrier, for lost services of his wife, by reason of injuries alleged to have been sustained by her while a passenger on one of the appellant's cars. There was a verdict and judgment for the plaintiff, from which the defendant prosecutes this appeal.

The first count of the complaint, after stating the relationship of the parties and how the plaintiff's wife was injured, and describing her injuries, etc., concludes in a separate paragraph alleging negligence in general terms

as follows: "And plaintiff avers that his wife's injuries were proximately caused by the negligence of the defendant in the negligent way or manner in which it run or operated its said car." The court stated a good cause of action and sufficient averment of negligence under the rules of pleading applicable to such cases as approved by the Supreme Court. *Birmingham R., L. & P. Co. v. Harris*, 165 Ala. 483, 51 South. 607; *Birmingham R., L. & P. Co. v. Selhorst*, 165 Ala. 477, 57 South. 568; *Birmingham R., L. & P. Co. v. Oden*, 164 Ala. 1, 51 South. 240; *Birmingham R., L. & P. Co. v. Jordan*, 170 Ala. 530, 54 South. 280; *Central of Ga. Ry. Co. v. Carleton*, 163 Ala. 64, 51 South. 27; *Armstrong v. Montgomery St. Ry. Co.*, 123 Ala., 233, 26 South. 349.

The second count of the complaint contains confused, inconsistent, or repugnant averments in alleging the responsibility for the injuries as due to or proximately caused by the defendant's servants or agents while acting in the line and scope of "his" employment, in that "he" inflicted the injuries, etc., while engaged in the line of "his" duties; but whether or not the demurrers sufficiently point out the defect and raise the question of this count's being subject to the vice discussed in the case of *Birmingham R., L. & P. Co. v. Bennett*, 144 Ala. 372, 39 South. 565, it is not necessary to decide, as the case must be reversed for reasons to be subsequently given, and the count is easily amended to avoid this question arising upon another trial.

The count should be so amended as to clearly aver that the employee or employees who caused the sudden movement or jerk of the car, or the employee or employees upon whose negligence reliance is placed for a recovery, is the servant or servants, employee or employees, of the defendant who were conscious of the danger and wantonly inflicted the injury.

The first two assignments of error going to the court's ruling on the defendant's demurrers to the complaint we have disposed of. The third assignment is that the court erred in giving the following written charge at the request of the plaintiff: "It is the duty of a street car company to exercise the highest degree of care known to human skill and foresight in regard to the carriage of its passengers, and the carrier is liable for the slightest degree of negligence." The appellant insists that the charge exacts a higher degree of care of defendant than is imposed by law, and does not limit the defendant's liability for negligence to that negligence proximately contributing to the injury sustained.

A charge that the law requires the highest degree of care, diligence, and skill by those engaged in the carriage of passengers by railroads, known to careful, diligent, and skilful persons engaged in such business, was approved as "the universal doctrine of the courts and text-writers" by the Supreme Court of Alabama in the case of *Montgomery & Eufaula Ry. Co. v. Mallette*, 92 Ala. 215, 9 South. 363, and a long list of authorities was cited in support of the proposition. In a more recent case (*So. Ry. Co. v. Burgess*, 143 Ala. 364, 42 South. 35), the court approves this charge: "A common carrier of passengers owes to its passengers the duty to exercise the highest degree of care, skill, and diligence, known to very careful, skilful, and diligent persons engaged in like business." The use of the word "very," as employed in this charge, was made the ground of attack, and the court carefully analyzes the import of the word in the connection in which it is used, and concludes that the charge does not express the superlative degree of diligence or care,

and does not transcend the degree of diligence required of carriers of passengers. It will be noticed that the very careful, skilful and diligent persons as embraced in the charge are limited to those "engaged in like business." In the opinion in this case (*Railway Co. v. Burgess, supra*) the proposition under consideration as treated in the cases of *Montgomery & Eufaula Ry. Co. v. Mallette, supra*, and *Attalla Union Ry. Co. v. Causler*, 97 Ala. 235, 12 South. 439, is discussed, and the charge condemned in the last case for exacting "extraordinary" care, skill, and diligence with reference to the degree of care, skill, and diligence required of common carriers in carrying passengers, is held to have been properly condemned. The degree of care required to be exercised by the defendant in the charge under consideration is without limitation of any kind whatever, and embraces an exaction of the superlative degree of care, skill, and foresight upon the part of the common carrier. "The highest degree of care known to human skill and foresight," without regard to the conditions or attendant circumstances, but charged by the court as a broad, sweeping statement without restriction or limitation of any kind, and not made commensurate with the duties to be performed, may well be taken to include and refer to the exercise of care by men of extraordinary skill, and charge the defendant with liability for the slightest degree of negligence by employees of extraordinary skill, without even taking into consideration the nature of the duties to be performed as affecting the degree of care or skill to be exercised. This would be to require a higher degree of care than exacted by the law, and the charge, as thus construed (and it is fairly and reasonably susceptible of the construction), would be open to the vice pointed out by *STONE, C. J.*, in the opinion in the case of *Attalla Union Ry. Co. v. Causler*, 97 Ala. 235, 12 South. 439.

The appellee, in brief filed in support of the charge under consideration, quotes copiously from the decisions of the courts and text-book writers, using in some instances language that would seem as a general statement to uphold the proposition laid down in the charge as a correct rule of law; but, as said by *COLEMAN, J.*, in *McGee v. State*, 117 Ala. 229, 23 South. 797: "It often happens that judges in writing opinions, and authors of legal text-books in discussing or defining propositions of law, express themselves in language wholly unsuited for the purpose of instructions to juries." See, also, *Meighan v. Birmingham Terminal Co.*, 165 Ala. 591, 600, 51 South. 775; *K. C., M. & B. R. R. Co. v. Matthews*, 142 Ala. 298, 39 South. 207.

The charge, in our opinion, goes further, requires more, than the law exacts with reference to the care, skill and foresight required of common carriers, and the court committed an error in giving it that must necessitate a reversal of the case.

The discussion of other assignments of error would serve no proper or beneficial purpose.

Reversed and remanded.

O'KEEFE v. KANSAS CITY WESTERN RY. CO.

(Kansas — Supreme Court.)

Intoxicated Passenger Thrown from Car and Injured While Rounding Sharp Curve at High Speed; Negligence; Contributory Negligence; Proximate Cause; Damages.

PLAINTIFF appeals from judgment for defendant. Reported 124 Pac. 416.

Opinion by BENSON, J.:

This action is to recover for injuries to the appellant while a passenger in the defendant's street car. The verdict and judgment were for the defendant. Errors are alleged in the instructions, for which a new trial is asked.

The petition alleges negligence in the construction and maintenance of the track with a "sharp curve or jog," and that it was dangerous and unsafe to operate cars upon this curve at a high rate of speed; also that an ordinance of the city limited the speed of street cars to twelve miles an hour. It was averred that at the time of the alleged injury the car in which appellant was riding was being negligently operated at a very high and dangerous rate of speed, so that it came upon the curve referred to with such violence as to cause a lurch or jolt, whereby the appellant, who was upon the rear platform with other passengers preparatory to leaving the car, was thrown from the car and severely injured. The answer contained a general denial and pleaded contributory negligence.

Evidence was offered tending to prove that the car was running at about eighteen or twenty miles an hour; that it lurched at the curve; and that appellant, a passenger thereon, was thereby thrown off and injured, as alleged. On the part of the appellee, evidence was offered tending to prove that the appellant was intoxicated when he boarded the car, and was requested to go inside, but remained upon the platform until he fell off because of his condition, and that his injuries were caused by the use of intoxicants.

At the request of the appellee the court gave the following instruction touching this matter: "The jury are instructed that if they believe from the evidence that plaintiff's condition was partly caused by the negligence of defendant, and partly caused by plaintiff's voluntary and excessive use of intoxicating liquors, and you cannot separate the two, then the plaintiff cannot recover in this action, because it is not only necessary, in an action such as the one at bar, for the plaintiff to show that he is entitled to recover from the defendant, but he must also show what the amount of such recovery should be; and when the testimony discloses such a situation that the jury cannot determine how much of any damage sustained is due to the defendant, and how much to the plaintiff, then plaintiff has failed to present such a case as makes recovery possible."

In an action of this nature there is no precise rule for determining the exact amount to be awarded, which must be left to the sound discretion of the jury, under instructions stating the elements to be considered. The substance of this instruction was that if the appellant's habit of being intoxicated, or in-

toxication at the time, increased his damages, and the plaintiff had not definitely shown to what extent, he could not recover. It will be observed that they did not relate to contributory negligence—that is, to intoxication which contributed to cause the plaintiff to fall and be injured—but to added or increased injury and resulting damages caused by intoxication. If he suffered any additional injury from that cause the jury were precluded from returning a verdict in his favor, unless he had shown what *amount* of damages was caused by the negligence of the company alone, excluding any damages resulting from the use of intoxicants. A party presenting a claim of this nature should produce evidence showing the manner, circumstances, and extent of the injury, the loss of time and its value, the necessary expenses, if any, and any other element of damages permissible in the particular case. But the amount to be awarded must be left to the jury. Ordinarily it cannot be definitely fixed by the evidence. Where personal injuries result in part from the negligence of the defendant, and in part from voluntary intoxication, but such intoxication is not a contributory cause of the injury, the plaintiff may recover for the injuries that he would have suffered if sober. In such a situation the jury should from all the evidence determine what compensation ought to be given for pain, suffering, disability and losses they find to be fairly chargeable to the defendant's negligence, but not including (under the petition in this case) any added injuries or losses resulting from intoxication. This is said only of the damages resulting in such a situation, and not of contributory negligence, which might prevent any recovery.

In an action for damages for malpractice, where it was claimed that the pain and suffering complained of were in part the result of an ailment for which the defendant was not responsible, an instruction was given as follows: "In such case it will be necessary, as best you may from the evidence, to distinguish the pain, suffering and injuries or ill health of the plaintiff, if any, chargeable to the fault of the defendant, from those chargeable to her condition when the defendant was called to treat her, and also those, if any such there are, justly chargeable to the treatment of other physicians, or to any other cause." In approving this instruction, the court said: "The difficulty suggested by counsel in assessing damages under the rule laid down by the court is rather imaginary than real, as in all other actions to recover unliquidated damages the jury must assess the same according to their best judgment, with due regard to all the circumstances of the case proved on the trial affecting the amount of damages." *Gates v. Fleischer*, 67 Wis. 504, 510, 30 N. W. 674; 3 *Suth. on Damages*, § 1244, and note.

The instruction in this case, upon which comment has been made, cannot be interpreted to refer to contributory negligence (that subject was fully treated in other instructions), but related, as the language fairly shows and the jury must have understood, to damages partly caused by the use of intoxicants, even if such use or intoxication did not contribute to the fall. It is hardly necessary to say that a person may be intoxicated, and yet such intoxication may not contribute to cause an injury he receives while in that condition. Whether it did or not is a fact to be determined in any particular case.

It appears from the counter-abstract that the appellant stated during the trial that, if he was under the influence of liquor at the time and fell off the car for that reason, then he would not claim a recovery; and it is argued that

any error in the instruction referred to was therefore immaterial. It will be noted, however, that there was an important qualification in this statement, not contained in the instructions, viz., that his fall was because of his intoxication.

Other instructions are criticised because they assumed the fact of intoxication, which was in dispute; but in one instruction, at least, the jury were told that it was a question of fact for them to decide whether the plaintiff was intoxicated.

The stenographer's notes were destroyed in the burning of the courthouse, and the transcript of the evidence was made up under the direction of a judge succeeding the one who presided at the trial. This situation prevented that absolute certainty concerning the evidence ordinarily attainable. The judge certifies that material evidence was given at the trial, not included in the transcript; and from this fact it is argued that alleged errors in the instructions cannot be considered. But from the instructions, which were preserved, and the statements of the parties, it plainly appears that the intoxication of appellant was one of the principal matters in controversy before the jury. It is treated at length in several instructions, and must be considered material. The omitted evidence on this subject, it appears, was only cumulative; and that given upon other matters, if any, would not affect the questions we have considered. No other waiver is suggested than the statement of the appellant, upon which comment has already been made.

Another matter discussed in the briefs is that the jury, before returning a verdict, requested the court to inform them what was said in the instruction about gates upon the car, to which the court answered that gates had not been mentioned, and the question of gates had nothing to do with their determination of the case. In describing the car in the petition, it is briefly stated, among other things, "that there were no gates on the back end of said car." The court, in stating the issues from the pleadings, repeated this language. No testimony appears in the abstract relating to gates, and it must be presumed that no claim or proof of negligence was presented on that subject. The casual mention of gates in stating the issues was probably deemed immaterial in answering the question of the jury, and they were correctly informed that there was nothing for them to consider on that subject.

An instruction to the effect that there could be no recovery because of any diminished earning powers of the appellant was based, it seems, in part upon the supposed lack of an allegation in the petition presenting that element of damages. The petition, however, is deemed sufficient in this respect to permit the admission and consideration of evidence on that subject.

Because the instructions relating to damages, which have been examined and commented upon, were misleading and erroneous to a degree prejudicial to the appellant, the judgment will be reversed, and the cause remanded for a new trial. All the justices concurring.

OWENSBORO CITY RY. CO. v. TUCKER.

(Kentucky — Court of Appeals.)

Pedestrian Struck by Car While Crossing Street; View Impeded by Vehicles; Negligence; Ordinary Care; Instructions; Evidence; Opinion of Expert; Damages.

DEFENDANT appeals from judgment for plaintiff. Reported 147 S. W. 916.

Opinion by WINN, J.:

In April, 1911, James Tucker, starting to walk across Main street, in Owensboro, at the intersection of Elm street, collided with or was struck by a car of the appellant railway company. He brought his action below against the company to recover for his injury, and obtained a judgment for \$1,000. The railway company appeals.

There is no complaint that the case should not have gone to the jury. A reversal is asked because of the instructions given, and certain testimony admitted in plaintiff's behalf. The instructions were erroneous, and demand the desired reversal. The fourth instruction attempted to define ordinary care and negligence in these words: "By 'ordinary care' is meant such care as is usually exercised by ordinarily prudent persons, and by 'negligence' is meant the absence of ordinary care." As is well said by appellant, the standard of ordinary care varies with varying circumstances—the greater the danger, the greater the care, the less the danger, the less the care. What might be adequate care under ordinary conditions might be wholly inadequate care under extraordinary conditions. The observation is well illustrated by the facts in the case at bar. There were two vehicles, a covered huckster's wagon and a top buggy, standing alongside each other between the car track and the sidewalk of the street where the car was approaching. The evidence tends to show that Tucker's view of the approaching car was obscured by them. Obviously, if this be true, the surroundings at that point of crossing were those of more than ordinary danger. If the vehicles obscured the vision of the motorman of the car, the measure of ordinary care owed by him in operating the car might be larger than such as would obtain under every-day conditions. This court has adopted a plain and satisfactory definition of ordinary care in many cases, among which may be mentioned those of *West Kentucky Coal Co. v. Davis*, 138 Ky. 667, 128 S. W. 1074, and *C. & T. P. Ry. Co. v. McElroy*, 146 Ky. 668, 142 S. W. 1009. In substance, the definition of ordinary care is "such care as an ordinarily prudent person will usually exercise under circumstances like or similar to those proven in this case." Had the trial court in the case at bar added the qualifying measure of like or similar conditions, an apt standard would have been set up for the jury's guidance in the peculiar condition of fact above set out. While we might be disposed to consider the error ordinarily as rather a narrow ground upon which to base a reversal, it seems that the omission of the qualifying clause in the case at bar was misleading.

Upon the trial the court gave an instruction in the following words: "The court instructs the jury that if they believe from the evidence that the car

which struck plaintiff was running at a reasonable rate of speed at the crossing of Main and Elm streets, and notice of its approach thereto was given by ringing the gong, and plaintiff attempted to cross the track, knowing of the approach of the car so close to the approaching car that the motorman in the exercise of ordinary care, and with the means at his command for stopping said car was not able to stop it before injuring plaintiff, then the law is for the defendant, and the jury should so find." This instruction was offered by defendant without the words "knowing of the approach of the car" in it. These words were added by the court, and the instruction as modified by them was given in the language quoted, over the defendant's objection. The instruction in this form was highly prejudicial to the railway company. If the defendant had as a matter of fact discharged its duties of signaling the car's approach and of operating the car at a reasonable rate of speed (there being no claim of any actual discovery of Tucker's peril), it had done all that was required of it; and if the plaintiff was injured in attempting to cross the track over which defendant's car was being properly operated, his right to recover, or rather the railway company's obligation to pay, under the facts proven, is not affected by his knowledge or his nonknowledge of the car's approach. The instruction given excused the railway company from payment, no matter if it had discharged every duty owed by it, only upon the condition that Tucker knew of the car's approach. The mere statement shows the harmful error in the instruction as given. As offered by the defendant, without the words "knowing of the approach of the car" embraced in it, the instruction should have been given. The instruction is not sustained by the cases of *Louisville Railway Co. v. Byers*, 130 Ky. 437, 113 S. W. 463; *Louisville Ry. Co. v. Gaugh*, 133 Ky. 467, 118 S. W. 276, and *Whitman's Adm'r v. Louisville Ry. Co.*, 134 Ky. 6, 119 S. W. 165, cited by appellee. In each of them this phase of the discussion turned upon the issue that the party injured, seeing the car's approach, endeavored to cross the track hurriedly in front of it. These cases in line with the only reasonable view hold that, if the traveler knowingly assumes the risk of crossing in front of the car the motorman meantime discharging his duty, there can be no recovery. If such facts were in the case at bar, an instruction on them should have been given as indicated in the *Gaugh* case, and not in the misleading language quoted above as given in the case at bar, but, in the absence of testimony upon such an issue, this phase of the matter should have no further discussion. The motorman testified that Tucker ran out from behind the vehicle, but did not say that he endeavored to hurry across the track in front of the car.

Complaint is also made by appellant of the admission of the testimony of Dr. E. R. Pennington. The record, however, fails to disclose any objection upon the trial to the admission of this testimony, or any exception to the fact that it was admitted. We are therefore not permitted to review upon this hearing the competence of that testimony.

There was, however, submitted to this physician a hypothetical question, framed upon an inquiry as to whether or not the condition in which this physician had found Tucker could have resulted from the injuries which the evidence disclosed he had suffered. To this question proper objection was entered, and to the admission of the answer proper exception was saved. The admission of this testimony was not error. As to whether or not this testi-

mony would have been competent had proper objection been entered to the preceding testimony of this witness, we are not permitted to decide. That question is not before us, and cannot be before us until such time, if ever, as the entire body of testimony of this witness may, on proper exception, be presented to us.

Complaint is likewise made of the testimony of Samuel Tucker, a son of James Tucker, who, over the objection of the railway company, was permitted to state that the appetite of the injured man at a later time was bad, and that he did not sleep well. The admission of this testimony was proper. The loss of appetite and inability to sleep were not set up in the petition as a specific injury for which the plaintiff sought recompense, but plaintiff testified that as a result of the accident he could not sleep well, and that he had no appetite, conditions which were admissible in evidence under the pleadings as made, because they reasonably and properly might be expected to follow the shock of the collision and the injuries described. The son's testimony, corroborative of that of the plaintiff father, was competent.

The judgment of the trial court is reversed.

BENNETT v. COLUMBIA ELECTRIC ST. RY., LIGHT & POWER CO.

(South Carolina — Supreme Court.)

Child Struck by Car; Instructions; Vindictive or Punitive Damages; Evidence.

DEFENDANT appeals from a judgment for plaintiff. Reported 75 S. E. 277.

Opinion by GARY, C. J.:

This is an action for damages alleged to have been sustained by the plaintiff when he was about a year and a half old through the negligence and recklessness of the defendant.

The allegations of the complaint, material to the questions involved, are as follows: "That on or about August 7, 1910, the defendant, while running one of its cars on its track through the Olympia Mill village, on Olympia avenue, at or near its intersection with Ninth street, which is also one of the public highways of said Olympia Mill village, on a level grade, at a rapid and dangerous rate of speed, and in violation of the rules of said defendant, requiring all cars to be stopped when they cross the Bluff road, a public highway about 400 feet east of where Ninth street crosses said Olympia avenue, without warning or signal, and without having air or other brakes than hand brakes on said car, ran against said Thomas Bennett, who was on and crossing said Olympia avenue at its said intersection with Ninth street. That the aforesaid injuries to the plaintiff were caused by the carelessness, negligence, wilfulness, recklessness, and wantonness of defendant, its agents, and servants in allowing the car to be run at a rapid and dangerous rate of speed; in that, well knowing said crossing to be dangerous and collisions likely to occur thereat, it failed to stop at the Bluff road crossing, as the rules required, thereby enabling the conductor and motorman to get a clear view of and

down said Olympia avenue, to and past the Ninth street crossing, and see if it were obstructed, in failing to give any signal to warn plaintiff of its approach, in allowing said car to be run with worn and defective brakes and appliances for stopping same, in that it failed to bring said car to a stop, and avoid running against and injuring said plaintiff, in failing to keep a proper lookout down said track, and to have seen the plaintiff in time to have stopped its car and avoided the injury."

The defendant denied the allegations of negligence and recklessness, and set up as a defense "that on the date alleged the plaintiff herein walked or crawled out on defendant's track near its father's residence, and, being a child of only two or three years of age, it assumed a position where it could not be seen until defendant's car was almost upon it, whereby it received some injuries, but defendant does not know the nature or extent of said injuries." The defendant also set up as a defense the contributory negligence of the plaintiff and his parents, but subsequently withdrew said defense. The defendant's attorneys presented the following request, which was refused: "I charge you there is no evidence which will justify you in finding any verdict whatever for punitive damages, and, as to this, I direct you to find for defendant." The jury rendered a verdict in favor of the plaintiff, whereupon the defendant made a motion for a new trial, which was refused, and it afterwards appealed.

The first question presented by the exceptions, which will be considered, is whether there was error on the part of his honor, the presiding judge, in failing to define punitive damages, or to instruct the jury as to the grounds upon which they could be given. His honor, the presiding judge, after defining actual or compensatory damages, charged the jury as follows: "Then there is another kind of damages, what is known as 'vindictive' or 'punitive' or 'exemplary' damages; that is, an amount in addition to actual damages, given by way of punishment against the wrongdoer, as a lesson to him and others doing likewise. These kind of damages are called 'vindictive,' 'punitive,' or 'exemplary' damages. You have heard it sometimes alluded to as 'smart money.' Now, in this case, the plaintiff not only sues for actual damages, but sues for vindictive damages, or exemplary damages, or punitive damages, as it is called." At the close of the charge the defendant's attorney said: "Your honor has declined my request to direct a verdict, there being no evidence at all as to wilfulness." The request to which he had reference was as follows: "I charge you that there is no evidence which will justify you in finding any verdict whatever for punitive damages. * * *

The following cases show that, if the appellant desired that the instructions should be more specific, they should have been presented, as requests to charge. *State v. Adams*, 68 S. C. 421, 47 S. E. 676; *Jennings v. Mfg. Co.*, 72 S. C. 411, 52 S. E. 113; *Williams v. Ry.*, 76 S. C. 1, 56 S. E. 652; *State v. Thompson*, 76 S. C. 116, 56 S. E. 789; *Snipes v. Ry.*, 76 S. C. 208, 56 S. E. 959; *Morrison v. Ass'n*, 78 S. C. 398, 59 S. E. 27; *State v. Boyleston*, 84 S. C. 574, 66 S. E. 1047; *State v. Chastain*, 85 S. C. 64, 67 S. E. 6; *State v. Hendrix*, 86 S. C. 64, 68 S. E. 129; *State v. Du Rant*, 87 S. C. 532, 70 S. E. 306.

The next question for consideration is whether there was any testimony tending to show that the plaintiff was entitled to punitive damages. There was testimony to the effect that the usual speed down Olympia avenue was

about fifteen or 20 miles an hour, but that on this occasion the car was running about twenty-five or thirty miles an hour; that it is required by the rules of the company that the car should stop at the Bluff road crossing, but that there was a failure to comply with this requirement; that there was a failure to give any signals when approaching the crossing at Ninth street; that the car did not have an emergency brake, and that an emergency brake would have enabled the motorman to stop the car more quickly; that the motorman saw the child on the crossing, when the car was 100 feet therefrom, and that it ran about fifty feet beyond the crossing before it stopped; that, when running ten miles an hour, a car can be stopped in little over a car length, which in this instance was forty-five feet long; that, when the car is running twenty miles an hour, it can be stopped in about a car length and a half, or two car lengths; that the track from Bluff road crossing, to Ninth street crossing, is level and straight, and that the motorman on that occasion saw persons whom he recognized at Eighth street crossing, which was one block from Ninth street crossing, or two blocks from Bluff road crossing. Of course, there was contradictory testimony, but this raised a question to be determined by the jury, and not by the persiding judge.

The rule stated in *Tolleson v. Railway*, 88 S. C. 7, 70 S. E. 311, and quoted with approval in *Bennett v. C. U. Station Co.*, 90 S. C. 308, 73 S. E. 340, is that: "Not only is the conscious invasion of the rights of another in a wanton, wilful, and reckless manner an act of wrong, but that the same result follows, when the wrongdoer does not actually realize that he is invading the rights of another, provided the act is committed in such a manner that a person of ordinary prudence would say that it was a reckless disregard of another's rights." "The question whether a railroad company owes any duty to an infant trespassing upon its track until it discovers the infant has given rise to much discussion, and the authorities upon the subject are in irreconcilable conflict. Even conceding that a railroad company is not bound as a general proposition to look out for trespassers upon its track, it nevertheless is bound to exercise ordinary care in running its trains. The law imposes upon it the duty of keeping a reasonable lookout for obstructions on its track. The safety of its passengers and the rights of the public generally demand the enforcement of this rule. It is a general rule of law that a railroad company is liable in damages for an injury inflicted by it, when its negligence was the direct and proximate cause of the injury. If the direct and proximate cause of the infant's death was the negligence of the defendant in failing to keep a reasonable lookout, and to discover the child in time to have prevented the injury, it is as much liable in damages as if the proximate cause of the injury had been its negligence, after discovering the child upon its track." *Mason v. Railway*, 58 S. C. 70, 36 S. E. 440, 53 L. R. A. 913, 79 Am. St. Rep. 826.

The exceptions raising this question are therefore overruled.

Judgment affirmed.

WOODS, HYDRICK, WATTS, and FRASER, JJ., concur.

EVANS v. BLUE RIDGE RY. CO.

(South Carolina — Supreme Court.)

Collision with Automobile at Crossing; Evidence; Negligence Per Se; Failure to Comply with Speed Ordinance; Proximate Cause; Question for Jury.

DEFENDANT appeals from judgment for plaintiff. Reported 75 S. E. 275.

Opinion by GARY, C. J.:

This is an action for damages alleged to have been sustained by the wrongful acts of the defendants in causing the motor car operated by them to collide with plaintiff's automobile at a street crossing in the city of Anderson, S. C.

The allegations of the complaint material to the questions involved are as follows: "That on the 14th day of May, 1911, the plaintiff was driving his automobile along Fant street, in the city of Anderson, at the point where defendant's line of railway intersects said street. As soon as plaintiff came into view of the track of defendant's line of railway, he was surprised by the approach of said motor car, running at a greater rate of speed than allowed by law. The sudden surprise and lack of warning on the part of the approaching car, coupled with the short distance plaintiff had in which to avoid the impending collision, made it impossible for plaintiff to do otherwise than to try to keep out of the way of the onrushing car. He turned his automobile quickly to the left, and was almost clear of the track of defendant's line of railway, when defendant's motor car, running by said crossing at a great rate of speed, struck the automobile of plaintiff, doing it great damage and endangering the lives of its passengers; that said collision was not due to the negligence of plaintiff, neither did any negligence on his part contribute to the injury, but the same was due to the defendant's negligence in running by said street crossing at a greater rate of speed than allowed by law; that section 226 of the ordinances of the city of Anderson, S. C., 1910, is as follows: 'No railroad engine, car or train shall be run through or within the city, at a greater speed than at a rate of fifteen miles an hour, nor over any street or crossing, at a greater speed than four miles an hour, and any engineer, conductor or other person causing or permitting the same, to run at a greater rate of speed, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished as hereinafter prescribed.' The defendant's motor car was running at a greater rate of speed than four miles an hour at the time hereinabove referred to, against the provisions of said ordinance." There was also a second cause of action in the complaint, alleging recklessness instead of negligence. The defendants denied the allegations of negligence, and set up the defense of contributory negligence on the part of the plaintiff.

At the close of the plaintiff's testimony, the defendants made a motion for a nonsuit on the ground that the collision was caused by the plaintiff's contributory negligence, which motion was refused. The jury rendered a verdict in favor of the plaintiff for \$500 actual damages, and the defendants appealed.

All the exceptions relate to the sufficiency of the evidence, or assign error on the part of his honor, the presiding judge, in refusing the motion for non-

suit, on the ground that plaintiff's damages were the result of his contributory negligence. Rule 77 (73 S. E. vii) of the Circuit Court is as follows: "The point that there is no evidence to support an alleged cause of action, shall be first made, either by a motion for nonsuit, or a motion to direct the verdict. * * *" Therefore the only question properly arising under the exceptions is whether there was error in refusing the motion for nonsuit on the ground of plaintiff's contributory negligence.

"Failure to comply with a city ordinance providing that trains should not be run faster than four miles an hour within the city limits, and that a man should precede an engine while crossing a street or lane with certain signals, is negligence *per se*, and even if a man at a street crossing, trying to get his horse off the track, is guilty of negligence and is injured, whether the negligence of the railroad company or of the deceased was the proximate cause of the injury, should have been sent to the jury." (Syllabus) *Butler v. Railway*, 90 S. C. 273, 73 S. E. 185. In that case the court uses this language: "A failure to comply with the requirements of the ordinance that a train should not exceed four miles an hour. * * * was negligence *per se*. * * *" It was held in *Craig v. Railway*, 89 S. C. 161, 71 S. E. 983, that it is the duty of a railroad company to keep a lookout for persons and pedestrians on its track at a highway crossing. It will thus be seen that there was testimony tending to show negligence on the part of the defendant, and, even conceding that there was negligence also on the part of plaintiff's intestate, the question whether the negligence of the defendant or that of plaintiff's intestate was the proximate cause of the injury should have been submitted to the jury. We see no difference in principle between the case now under consideration and that just mentioned.

Judgment affirmed.

WOODS, HYDRICK, WATTS, and FRASER, JJ., concur.

DONOVAN v. CONNECTICUT CO.

(Connecticut — Supreme Court of Errors.)

Death of Conductor; Derailment of Car; Flat Wheel; Evidence; Question for Jury; Inspection of Switches by Conductor; Instructions; Assumption of Risks.

PLAINTIFF appeals from judgment for defendant. Reported 84 Atl. 288.

Opinion by WHEELER, J.:

This case was before us in 84 Conn. 531, 80 Atl. 779. The pleadings remain unchanged.

The complaint alleges that the intestate suffered injuries through the derailment of the defendant's car by reason of the defendant permitting its trolley car, equipped with front vestibule doors, which were very difficult and almost impossible to operate, with wheels which were old, worn out, broken, cracked, and worn flat on one side, and the flanges of which were worn out, chipped, broken, and insufficient to hold the car on the rail, and with old,

worn out, and broken scrapers, to be operated over a track having, at or near the place of the accident, a switch and groove formed by a guard bolted to the rail, forming practically a guard rail, in which the flange of the wheel ran along the inside of the right-hand rail, said groove being full of dirt, ice, and snow, causing the flange to rise upon and over the rail, located a few feet from the edge of a high embankment, at the base of which was a pond, and having no guard rail to prevent derailment alongside of the rail nearest the embankment, and with no fence or other construction to obstruct the progress of the derailed car down the embankment.

The ground of negligence alleged was in permitting the use of the car at this time and place, in its then condition with defective equipment, over a defective track having no proper safeguard to prevent or minimize the danger from derailment in the direction of the pond. *Donovan v. Conn. Co.*, 84 Conn. 534, 80 Atl. 779.

The plaintiff offered evidence in support of most of these defects. In at least one important particular, evidence was offered supplying the omission of the causal connection noted in the former opinion by proof that proper railroad construction required the said guard rail, fence, or other construction in the direction of the pond to prevent or minimize the danger from derailment.

The judge charged the jury: "And in all these respects—the doors, the flat wheel, the scrapers, the brakes—there has never been in this case anything or any evidence to show, or any circumstances which would permit you to say, that these defects, if you should find the allegations true, had anything to do with causing this accident. You will therefore leave them out of your consideration when you are deliberating in regard to your verdict in this case."

The facts claimed to have been proved by the plaintiff, as they appear in the finding, required this charge, so far as applied to the defective doors, scrapers, and brakes. So far it followed our former opinion.

The flat wheel was one of the defects in equipment to which the accident was attributed in the complaint. The finding sets forth: That the plaintiff offered evidence that the car had had a flat wheel thirteen days before the accident, and also on the night before and on the morning of the accident; and it sets forth that the defendant offered evidence that this car had been in use the three days prior to the accident, and had no flat wheel, or other wheel defect, at the time of the accident. Here was a conflict in the evidence.

In a late case this court said: "From an examination of the evidence, it is apparent that there was a decided conflict in the testimony of the witnesses, and the weight to be given the evidence must have been one of the material questions in the determination of the case. It was for the jury to determine the credibility of the witnesses and the weight and effect of their evidence." *Schleifenbaum v. Rundbaken*, 81 Conn. 623, 624, 71 Atl. 899, 900; *State v. Boylan*, 79 Conn. 463, 470, 65 Atl. 595; *State v. Bissonnette*, 83 Conn. 266, 76 Atl. 288; *Occum Co. v. Sprague Mfg. Co.*, 34 Conn. 529, 538; *Hogben v. Met. Ins. Co.*, 69 Conn. 503, 510, 38 Atl. 214, 61 Am. St. Rep. 53.

The finding of the existence of the flat wheel involved consideration of the credibility of witnesses, or of the weight or effect of evidence.

The plaintiff also offered evidence to prove that with a flat wheel "there is danger of its [the car] jumping;" that "they [the witnesses] should think

it [the flat wheel] would derail it [the car];" and that "the flat wheel might have a tendency to cause a derailment." There was no evidence offered in contradiction of this; but, whether disputed or not, it was for the jury to find whether the flat wheel might cause a derailment.

If, then, the jury found that this car was equipped with a flat wheel, and that such a wheel might cause a derailment, and that the car in fact became derailed, could the jury legally infer or conclude that the cause, or one cause, of the derailment was the flat wheel?

All courts agree that the trier — judge or jury — may infer facts from those already found, upon which its ultimate conclusion may rest in whole or part. *Bunnell v. Berlin Iron Bridge Co. et al.*, 66 Conn. 36, 33 Atl. 533; *C. & C. El. Motor Co. v. Frisbie Co.*, 66 Conn. 67, 76, 33 Atl. 604; *Doyle v. B. & A. R. Co.*, 145 Mass. 386, 14 N. E. 461. And the jury may make all inferences and conclusions which, in their judgment and discretion, may logically and reasonably be drawn from the facts in evidence. *North Chicago St. R. Co. v. Rodert*, 203 Ill. 413, 67 N. E. 812; *Chicago & E. R. Co. v. Thomas (Ind.)*, 55 N. E. 866; *City of Columbus v. Straassner*, 138 Ind. 301, 34 N. E. 5, 37 N. E. 719; *Gavett v. Manchester R.*, 16 Gray (Mass.) 501, 506, 77 Am. Dec. 422.

The test is, not that the inference must unavoidably and unerringly point in one direction, but, rather, whether the rational mind could with reasonableness draw the inference. *Hanrahan v. Baltimore City*, 114 Md. 517, 535, 79 Atl. 197; *McElderry v. Flannagan*, 1 Har. & G. (Md.) 308.

If two rational minds could reasonably draw different inferences from facts in evidence, whether controverted or uncontroverted, the decision is for the jury. *Mumma v. Easton & A. R.*, 73 N. J. Law, 653, 658, 65 Atl. 208; *Harvell v. Lumber Co.*, 154 N. C. 262, 70 S. E. 389; *Central Coal Co. v. Owens*, 142 Ky. 21, 133 S. W. 966; *Powers v. Transit Co.*, 202 Mo. 267, 100 S. W. 655; *Miller v. Sovereign Camp*, 140 Wis. 507, 122 N. W. 1126, 28 L. R. A. (N. S.) 178, 133 Am. St. Rep. 1095; *Galvin v. Brown & McC.*, 53 Or. 598, 101 Pac. 675; *Henry v. Omaha P. Co.*, 81 Neb. 237, 115 N. W. 777.

In the first instance, the court determines whether there is any evidence having a logical and reasonable tendency to prove the fact or the inference in dispute. If not, it should not submit the question to the jury. *Theobald v. Shepard*, 75 N. H. 52, 55, 71 Atl. 26; *Gavett v. Manchester R.*, *supra*. On the other hand, if reasonable men might find the fact or draw the inference, the court must leave the determination to the jury.

The court will judge the reasonableness of the inference claimed in the light of the evidence as weighed by its experience and knowledge of events; and if its conclusion be that there is no probability or presumption that would lead to this inference, it will exclude its consideration from the jury; if it conclude that there is such a probability or presumption, or that reasonable men, reasoning logically, might reach several conclusions, of which the one claimed was one, it will leave its finding and consideration to the jury. *Doyle v. B. & A. R. Co.*, 145 Mass. 386, 388, 14 N. E. 461.

An inference or conclusion that the flat wheel caused or tended to cause the derailment of this car was certainly one of the inferences which reasonable men might draw from the facts before the jury, and could not be held to be an illogical and unreasonable conclusion in view of the finding which

the jury, on the evidence, were at liberty to make of the existence of the flat wheel, of its tendency to cause a derailment, and of the fact of the derailment.

The withdrawal of this ground of negligence from the jury was based upon the want of causal connection between the accident and the flat wheel; and the presence or absence of this causal connection was an inference or conclusion which was within the province of the jury to make. *Acker, Merrill & Co. v. McGaw*, 106 Md. 536, 551, 68 Atl. 17, 19.

The court did not, in express terms, comply with the defendant's request that it charge the jury: "There is no reason why, in the nature of things, it is any more the duty of the defendant than of its motorman or conductors to inspect and test switches during storms, to see whether or not they are in such condition that cars can safely pass over them." But in effect it did.

We cannot quote the charge on this point *in extenso*. Two extracts will suffice to show the justice of our interpretation: The court said, "and that there is no evidence that I can remember to show that there was any other agent who had a particular duty to inspect or clear it [the switch] at this time and place." The agent referred to was the intestate conductor. Later the court continued: "But I am asking you seriously to consider, taking all these circumstances into consideration—that fact that the snow plow had been through there within a few hours before this time; that the car was approaching a switch; that there was no other servant or agent of the corporation there—whether it was not the duty of that man, in passing over that switch, and he being practically the only man to do it at that time and place, whether it was not his duty to do it."

There was no evidence before the jury of any rule of the defendant or any duty which imposed an inspection of the switch and rails upon the conductor. Under the admitted circumstances of the case, we do not think such a duty, so foreign to the ordinary duties of a trolley car conductor, should be found, without some definite proof of the existence of the specific duty.

The court improperly charged the jury that, if the risk which befell the intestate was one of the ordinary risks of his occupation, or if an extraordinary risk which he knew, and hence voluntarily assumed, no recovery could be had. The situation called for an explanation of what would, in law, constitute an ordinary and what an extraordinary risk. The limitation of the assumption of the extraordinary risk to mere knowledge was too narrow. The court should have said, if the jury found the risk to be an extraordinary one, there would be no assumption of it, unless the intestate voluntarily continued in the defendant's service after that risk was known to and comprehended by him.

Recent decisions discuss this subject and make unnecessary more than reference to them. *Baer v. Baird Machine Co.*, 84 Conn. 269, 273, 79 Atl. 673; *Belevicze v. Platt Bros. Co.*, 84 Conn. 632, 638, 81 Atl. 339.

The witness Rood, having testified that he had testified before the coroner, was inquired of: "Q. And you told him the car was going medium fast, didn't you?" The question was objected to, upon the ground that it should be asked by quoting from the coroner's testimony. The objection was improperly sustained. There is nothing in the record to indicate that the ruling so prejudiced the rights of the plaintiff that a new trial should be granted as a result of it. The objection belonged to that numerous company of objec-

tions whose use too often clogs trials, distracts the attention of the trier, and serves no useful legal purpose.

The analysis of the complaint in the former case was so clear that adherence to it will place the main issue before the jury with distinctness. For this reason, and because the other assignments of error are not likely to appear on another trial, we do not think it profitable to discuss them.

There is error; the judgment is set aside, and a new trial ordered. The other judges concurred.

UNITED RYS. & ELECTRIC CO. v. DEAN.

(Maryland — Court of Appeals.)

Injuries to Passenger; Derailment of Car; Negligence; Question for Jury; Damages; Evidence; X-ray Examination; Opinion of Physician.

DEFENDANT appeals from a judgment for the plaintiff. Reported 84 Atl. 75.

Opinion by BRISCOE, J.:

The principles of law controlling this class of negligence cases are well established by a number of decisions of this and other State courts. The chief difficulty consists in a proper application of them to the state of facts presented on the record in each case.

The plaintiff brought this suit in the Circuit Court for Baltimore county, on the 16th day of January, 1911, against the defendant, the United Railways & Electric Company, to recover damages for personal injuries received by him while a passenger on the railway, on its route from Baltimore city to Towson, in Baltimore county. On the 15th day of April, 1911, the case was removed to the Circuit Court for Carroll county for trial, and from a judgment entered in that court in favor of the plaintiff for the sum of \$1,800 and costs, the defendant has appealed.

The rulings of the court below upon the defendant's demurrer to the declaration, the overruling of its motion for a rule for bill of particulars, and its exception to the action of the court in dismissing the defendant's petition for payment of costs of the former trial (where the plaintiff submitted to a *non pros*, before suit in this case, the cause of action being the same in both cases), were waived in this court, and are not pressed in the argument in the brief.

The questions for our consideration on the record now before us arise upon twenty-four bills of exceptions reserved by the defendant, during the trial of the case, on rulings of the court upon the evidence and the prayers. Twenty-two of these present rulings of the court upon the evidence. The first, fourth, fifth, seventeenth, nineteenth, and twentieth were abandoned at the hearing, and are not discussed by the appellant in its brief. The twenty-third and twenty-fourth exceptions relate to the court's rulings on the prayers.

At the trial of the case, the plaintiff presented four prayers, all of which

were granted. The defendant offered sixteen prayers, and of these the second, third, fourth, fifth, sixth, seventh, and fifteenth were granted. The twelfth was granted, as modified; but the defendant's first, eighth, ninth, tenth, eleventh, thirteenth, fourteenth, and sixteenth prayers were rejected. The rulings of the court in granting the plaintiff's prayers, the modification of the defendant's twelfth prayer, and the rejection of eight of the defendant's prayers form the basis of the twenty-fourth exception.

The facts set out in the record before us, and on which the rulings of the court below are based, briefly stated, are these: The defendant is a corporation, and operates an electric railway in Baltimore city and Baltimore county. The plaintiff is a resident of Harford county, and on the 10th of July, 1910, was a passenger of the defendant company from Baltimore to Towson. He left Baltimore city to return to his home in Bel Air, Harford county, at 9 o'clock on the night of the accident, and took a car at Ranier avenue and Tenth street, and transferred to the York Road car to Towson, and from there he took the train to Bel Air. The car upon which the appellee was riding was derailed; as it approached the overhead bridge crossing the Maryland & Pennsylvania Railroad, near Susquehanna avenue, Towson, it jumped the track and struck a telegraph pole and pile of lumber.

The plaintiff testified that at the time of the accident he was sitting about the center of the car, on its right-hand side, and remained in the same position during the entire transit. "I was sitting with my foot up on the side rail. There is a little projection out; I had my foot upon that. They had small transverse seats, which seat two, just like a steam car has. Going out from Govanstown to Towson, the car was traveling at a very high rate of speed. I suppose there were ten people on the car, which was traveling very fast. You could see by the side; you could tell by the feel of it. When it was going through the curve (reverse curve) and over the switches, the car started to wobble, and it never straightened up any more until it jumped the track. They never slackened up for the curve at all. When it went through the curve, it shook the people in the car. When the car left the track, it threw me forward and jammed my knee between the seat there and the window. My leg was jammed in between the two. It was jammed in there as far as it would go; it was jammed in there pretty tight; and it remained in there until the car struck the telephone pole or a pile of lumber. It threw my body forward, and my head and shoulder against the seat in front of me. Then it jerked my leg out, and I fell to the floor. The first jar knocked my knee in there, and the second jar struck my head against the back of the seat and my shoulder. Then it jerked me loose and threw me out on the floor. One lady in the car fell to the floor, that was standing up. She came back to where her husband was sitting with a baby in his arms, and tried to get the baby. She was thrown to the floor. A woman sitting up on the front seat, a colored woman, was thrown to the floor right off the seat. The driving of my leg in there between the edge of the seat and side of the car, and then wrenching it out and throwing me on the floor, twisted my hip loose, made a little lump on my head. My shoulder struck the hardest on the seat. The car was at a right angle with the tracks, and the end of the car was partly across the south-bound tracks. It projected far enough to prevent cars from going southward; blocked the traffic at that point until after that train went

up (the 11:20 train from Bel Air). I looked at the track. The roadbed there was torn up. In between the tracks was torn up. The cobble stones and the track at that point was torn up, just below where the car was standing towards Baltimore, I suppose, six feet, probably eight, something like that. They were torn up on both sides of the rail. One end of the rail was sticking about that far above the other rail (indicating about four inches). I suppose it was a joint. I don't know whether it was broken or not. A pile of timber was in front of the car — long timbers. I couldn't say positive what they were — whether they were ties, or what they were. The car was jammed up tight against it, and the fender was mashed up to one side. There was a mark on the telegraph pole, and some one said at the time, "Look where she struck the telegraph pole."

Dr. Purnell F. Sappington testified that he was called to see the plaintiff after the accident, and that he found him suffering with pain in the hip and down the course of the nerve supply, the upper and lower leg. He diagnosed his injuries as a dislocation of the sacroiliac joint, and technically known as a sacroiliac subluxation. He also testified that the injury was permanent, would interfere with his ability to walk without inconvenience, and it would give him pain. Dr. Frederick H. Baetger, on the staff of the Johns Hopkins University, Baltimore, made an X-ray plate of the injured joint and confirmed the diagnosis of Dr. Sappington. The testimony of Dr. Howell Billingslea, who examined the plaintiff shortly before the trial, was to the effect that the diagnosis of Dr. Sappington was correct, and there was an injury to the sciatic nerve, and just such an injury as had been testified to by the plaintiff's witnesses.

The witnesses Quickly, Robinson, and Driver, who were on the car at the time of the accident, each testified to the excessive speed of the car as it approached Towson, and that it did not slow up when going through the reverse curve on the track; that two or three of the passengers were knocked from the seat when the car jumped the track and struck the pile of lumber.

The testimony on the part of the defendant tended to show that the car was running at the usual rate of speed; that it slowed up as it approached the curve; that the track was in good condition; and that the car had been inspected, before leaving the barn, on the day of the accident, and the car was in good order, except one of the side slides that carried the weight of the body on one side was bent, and the other one was broken. The witness Frazier testified, upon cross-examination, that both of the slides on that truck were out of order. "They are near the middle of the truck — pair of wheels here, and pair of wheels here; then it comes between the wheels. That is done to prevent the car rocking too much from side to side. If these slides were not there, the car would rock too violently from side to side. They are put there for that purpose."

There was also conflict in the medical testimony of the X-ray experts, Drs. Baetger and Cotton, as to their interpretation of the X-ray plates submitted as evidence in the case. Drs. Harrison, Fitzhugh, and Woodward, who testified on the part of the defendant, did not concur with Drs. Baetger, Sappington, and Billingslea as to their diagnosis, and could not convince themselves, after an examination of the plaintiff, "that he had a subluxation of the right sacroiliac joint, or that the injury was permanent."

Upon these and the other facts set out in the record, we think the case was one for the consideration of a jury. The alleged negligence of the appellant was not a question of law for the court, but one of fact to be determined by the jury, before whom the case was tried, upon proper instructions by the court.

This brings us to the law of the case, as presented by the plaintiff and defendant's prayers, and this, we think, was properly submitted by the plaintiff's and defendant's granted prayers. We do not understand that the plaintiff's first and second prayers are seriously questioned. They are the usual prayers in negligence cases like this, and have been repeatedly approved by this court. *B. & P. R. Co. v. Swann*, 81 Md. 409, 32 Atl. 175, 31 L. R. A. 313, and cases there cited.

The plaintiff's third and fourth prayers were granted in connection with the defendant's seventh and twelfth prayers, as modified. By the defendant's seventh prayer, the jury were told that even if they find for the plaintiff the jury are to allow him only such damages as, in their opinion, have been affirmatively proved with reasonable certainty to have resulted as the natural, proximate, and direct effect of the injury received by him and mentioned in the evidence.

The defendant's twelfth prayer, as modified, was as follows: "The court instructs the jury that, even if the jury shall find that the plaintiff is entitled to recover, and that the injury complained of is existing at this time, if the jury shall so find, yet, if the jury shall further find that the plaintiff could have prevented his present physical condition by promptly submitting to proper medical or surgical treatment, and shall further find that the plaintiff failed to use reasonable and ordinary care to avoid the continuation of the injury he suffered, if any, and shall further find that such failure on his part to exercise reasonable care and caution to prevent the continuation of his injury, if the jury shall so find, is responsible for his present physical condition, then the plaintiff cannot recover any damages for the pain and suffering, mental or physical, which he has endured, if any, by reason of his neglect in failing to have himself so treated."

These prayers fully and correctly submitted the law upon the measure of damages, under the facts of the case, and are free from the objections urged against them.

The defendant's second, third, fourth, fifth, sixth, and fifteenth granted prayers, together with the plaintiff's granted prayers, correctly stated the propositions of law applicable to the case, and presented the law in as favorable a light as the defendant had a right to ask.

We find no reversible error in the refusal of the court to grant the defendant's rejected prayers. Five of these related to the measure of damages, and the others were but repetition of the propositions of law, covered by the granted prayers, on the right of the plaintiff to recover. What we have said in discussing the granted prayers will dispose of the defendant's rejected prayers, and also the action of the court in overruling the defendant's special exception to the granting of the plaintiff's first and third prayers.

The second exception was taken to the following question, asked Dr. Baetger, the X-ray expert: "Doctor, take this plate which I hold in my hand — this plate with the single X mark. I want you to go before the jury and

show them and point out on that plate what it shows in reference to the bones of the plaintiff's body." The X-ray plates and photographs had been proven and also interpreted by Dr. Baetger, and it was competent for him to explain them to the jury. *Dorsey v. Habersack*, 84 Md. 125, 35 Atl. 96; *Harford Co. v. Wise*, 71 Md. 43, 18 Atl. 31; *Geneva v. Burnett*, 65 Neb. 464, 91 N. W. 275, 58 L. R. A. 287, 101 Am. St. Rep. 628.

The testimony objected to in the third exception was unimportant, and its admission could not have injured the defendant's case. Dr. Baetger had testified that from the condition of the plaintiff the slipping of the sacroiliac joint was not congenital; and whether it was produced by some cause since his birth, unknown to the doctor, could not have prejudiced the case before the jury.

The sixth and seventh exceptions present substantially the same questions. Dr. Sappington, the medical expert, was asked this question: "From the physical examination which you made of the plaintiff, and from the examination which you made of the X-ray plates taken by Dr. Baetger, what was your diagnosis of his condition?" The doctor had previously testified that the X-ray plates substantiated his diagnosis, and, having made the physical examination, he was clearly competent to give the result of that examination to the jury. There was no error in these rulings.

The eighth, ninth, tenth, and eleventh exceptions will be considered together. They embrace objections to questions propounded to Dr. Sappington, and answers given by him, as to the probable duration of the injury from which the plaintiff suffered, the duration of the bent condition of the leg, and the duration of the pain. There was no error in the ruling of the court upon these exceptions. The plaintiff was entitled to show the extent and duration of the injury, and whether it would be permanent or not, as a basis for the jury, and from which the jury could estimate the damages. Dr. Sappington had attended the plaintiff, diagnosed the injury, and understood the case. He was therefore qualified, both as an expert and as a physician, to give an opinion within his knowledge.

The twelfth and thirteenth exceptions relate to the testimony of Dr. Billingslea as to whether the plaintiff's injuries were permanent, or what character they were, as they impressed him. Dr. Billingslea was present and saw the other physicians make their examinations and take the measurements of the plaintiff. He testified: "I looked on and confirmed what they were doing. We put him upon the table, and he was stripped. We tried to relax his knee, and we were unable to entirely straighten his leg. I think the man was suffering from an injury to the sciatic nerve; there was pressure upon that nerve by the subluxation, by the change of position, in the pelvic bone." He saw the other physicians make their examinations and take the measurements, and participated in the investigation of the injured joint. Under such circumstances, he was clearly competent and qualified to form an opinion, and to state the nature and effect of the injury. There was clearly no error in the rulings in either of these exceptions. *Williams v. State*, 64 Md. 394, 1 Atl. 887; *United Rys. v. Seymour*, 92 Md. 431, 48 Atl. 850.

We have carefully examined the rulings of the court brought here on the fourteenth, fifteenth, sixteenth, eighteenth, twenty-first, and twenty-second bills of exceptions, in so far as they are properly before us, and, without dis-

causing them in detail, only deem it necessary to say that we find no such error on these rulings as would justify a reversal of the judgment.*

Finding no reversible error in the rulings of the court, either upon the prayers or the evidence, and, as the case was fully and fairly submitted to the jury, the judgment will be affirmed.

Judgment affirmed, with costs.

BIRMINGHAM RY., LIGHT & POWER CO. v. McDANIEL.

(Alabama — Court of Appeals.)

Passengers; Action for Failure to Let Passenger Off at Proper Destination; Complaint.

DEFENDANT appeals from judgment for plaintiff. Reported 59 So. 334.

The complaint is as follows:

"Count 1. Plaintiff claims of the defendant corporation the sum of \$1,000 as damages for that heretofore, to wit, on the 1st day of January, 1910, plaintiff was a passenger on a street car operated by the defendant corporation, for the common carriage of passengers for hire in Jefferson county, Ala., through its servants, agents, or employees, and plaintiff avers that, while so a passenger on one of defendant's cars so operated, she notified defendant's conductor in charge of said car that she desired to alight at Annie street, a point on said street car line, which was to be passed by said street car, which was a regular stopping place for taking on and letting off passengers on said street car, and plaintiff avers that she was wrongfully carried beyond said Annie street, and was wrongfully discharged and put off at another and different place in the nighttime, and that said place was strange to her, and that as a proximate consequence thereof she wandered in a strange place in the nighttime, and was greatly shocked, and suffered great mental anxiety, inconvenience, and annoyance, and was greatly delayed in her journey, all to her great damage as aforesaid; and hence this suit.

"Count 2. Plaintiff claims of defendant corporation the sum of \$1,000 as damages for that heretofore, to wit, on the 1st day of January, 1910, the plaintiff was a passenger on a street car operated by the defendant through its agents, servants, or employees, acting within the line or scope of their employment, for the common carriage of passengers, and was wrongfully discharged in the nighttime, at a place that was strange and unusual to her, and at a different place to Annie street, the place of plaintiff's destination, and as a proximate consequence thereof plaintiff suffered great mental anxiety, and physical pain, and inconvenience and annoyance, and was compelled to walk for a long distance in the nighttime, and was delayed in her journey to a sick relative to whom she was going, to her great damage as aforesaid; hence this suit.

"Count 3. Plaintiff claims of the defendant corporation the sum of \$1,000

* Portion of opinion not material to street railway law omitted.

as damages for that heretofore, to wit, on the 1st day of January, 1910, plaintiff was a passenger on a street car operated by the defendant corporation, through its servants, agents, or employees, for the common carriage of passengers for hire, and defendant's conductor in charge of the car upon which plaintiff was a passenger wilfully, wantonly, or intentionally directed plaintiff to alight, in the nighttime, at a place that was strange to the plaintiff and that was not the place of her destination, and said conductor knew and was conscious of the fact, at the time, that if plaintiff was put off, in the nighttime, at a strange place, she would suffer great mental distress, inconvenience, and annoyance, but, notwithstanding such knowledge and consciousness on the part of the conductor, he wilfully, wantonly, or intentionally caused the plaintiff to alight at a different place to the place of her destination, to her great damage as aforesaid; and hence this suit."

Opinion by PELHAM, J.:

The averments of the first and second counts of the complaint can be construed as alleging the relation of passenger and carrier between the parties to the suit in such a way as to show the duty owing from the latter to the former growing out of such a relationship to have been breached by a wrong done by the defendant, or its conductor, and under the established rule in this State permitting general averments of the breach or wrong complained of in terms but little short of legal conclusions, where a relationship out of which a duty arises is shown to exist, the demurrers interposed to these counts were properly overruled. *Birmingham Ry. Co. v. Adams*, 146 Ala. 267, 40 South. 385, 119 Am. St. Rep. 27; *Southern Ry. Co. v. Burgess*, 143 Ala. 364, 42 South. 35; *N. & C. R. R. Co. v. Martin*, 117 Ala. 367, 23 South. 231; *Armstrong v. Montgomery Street Ry. Co.*, 123 Ala. 233, 26 South. 349.

The third count of the complaint, however, was clearly subject to the demurrers interposed to it. Construing the allegations of this count most strongly against the pleader, the act of the conductor complained of in putting the plaintiff off at another place than her destination could have been induced by a request upon her part to be put off at that place. The act of the conductor in putting the plaintiff off at this place is not alleged to be wrongful, nor will the averment that it was wilfully, wantonly or intentionally done carry with it such an allegation, by inference or otherwise, when the count is being tested by demurrer and its allegations to be construed most strongly against the pleader. This count makes no averment and contains no facts disclosing the plaintiff's right to be carried by the defendant company to the particular place styled in the complaint as "the place of her destination," and it is not averred, nor is it shown by the facts stated, that any duty rested upon the defendant to carry the plaintiff to the point of her destination. It is not shown or alleged that the plaintiff's destination was on the defendant's line of railroad, or that the defendant's conductor had any information or knowledge with respect to the plaintiff's destination, or that such want of information or knowledge was due to negligence on the part of the defendant or its conductor. It does not appear from the allegations of this count of the complaint that the plaintiff paid her fare to this place alleged as her destination, or informed the conductor of it, or of the place she desired or intended to make the end of her journey, or at which she wanted to disembark from

the car. For aught that appears from the allegations of this count of the complaint, it may be that the plaintiff's destination referred to was not on, but off of or beyond, the defendant's car line, and that the plaintiff was directed to get off or was put off by the conductor at a point on defendant's line of railroad of her own choice and at her own request. It does not appear but that plaintiff was carried to the point on defendant's car line nearest to the place of her destination, and was put off there, even though a strange place to her, because of her desire to be put off at that place. The allegation that this was a strange place and known by the conductor to be strange to the plaintiff, and that the conductor intentionally (wilfully or wantonly adds nothing as used in this connection) put the plaintiff off at this place, when no duty resting upon the defendant is averred or shown to carry the plaintiff to the place of her destination, and that place is not so much as shown to be known to the conductor or to have been on the defendant's railroad, does not state facts showing a breach of duty by the defendant or a wrongful act of its conductor, and, in the absence of any general allegation that the act was wrongful, is insufficient. There being no allegation that the act complained of was wrongful, and no facts stated showing a wrong or breach of duty, or from which such a conclusion could be drawn under the recognized rules of construction, the defendant's demurrers to this count should have been sustained.

This case is before us on the record without a bill of exceptions, and no errors are assigned except those we have discussed.

Reversed and remanded.

BIRMINGHAM RY. LIGHT & POWER CO. v. LEACH.

(Alabama — Court of Appeals.)

Instructions; Separate Requests; Bill of Exceptions; Evidence; Question for Jury; Duty of Motorman to Look Out; Wanton Negligence; Collision with Pedestrian Crossing Street at Night.

DEFENDANT appeals from judgment for plaintiff. Reported 59 So. 358.

The caption in the bill of exceptions referred to in the opinion is as follows: "That at the conclusion of the court's oral charge the defendant in open court, and in the presence of the jury, and before it retired, requested the court separately and severally in writing to give to the jury each of the following charges. The court thereupon separately and severally refused to give each of said written charges so requested by the defendant, and indorsed on it the words: 'Refused. C. C. Nesmith, Judge.' And the defendant then and there in open court, in the presence of the jury, and before it retired, separately and severally excepted to the refusal of the court to give each of the charges requested by it." The fourth charge is as follows: "The court charges the jury that, if they believe the evidence, the motorman in charge of the car which struck plaintiff was not required to stop his car before crossing Twenty-fourth street. (5) The court charges the jury that the mere

fact, if it be a fact, that the car which struck plaintiff was running at twenty miles an hour as it was crossing Twenty-fourth street, is simple negligence only." "(7) The fact, if it be a fact, that the said car which struck plaintiff was running at twenty miles an hour at the time of the accident, does not in and of itself constitute wantonness."

Opinion by PELHAM, J.:

The appellee brought his suit in the trial court to recover damages of the appellant for personal injuries, and the case was submitted to the jury on the second count of the complaint alone, alleging wilful, wanton or intentional conduct on the part of the defendant, its servants or employees in charge of defendant's street car in running the same against and injuring appellee, who was attempting to cross one of the streets in the city of Birmingham in the nighttime at or near the intersection of two public streets.

The assignments of error are based on the court's refusal to give certain charges requested in writing by the appellant, and overruling a motion for a new trial. The appellee insists in two briefs filed by counsel that no separate exception is shown to have been reserved to the refused charges, and that therefore the appellant is in no position to complain of the court's action in refusing the charges. Under the statute separate exceptions to written charges given or refused are presumed. Code, § 3016; Choate v. Ala. Gt. So. R. R. Co., 170 Ala. 590, 54 South. 507; O'Connor v. Dickson, 112 Ala. 304, 311, 20 South. 413.

Charges must be *requested* separately, and if requested in bulk the court cannot be put in error for refusing all if one of them is bad. Stowers Furniture Co. v. Brake, 158 Ala. 639, 48 South. 89; Jones v. State, 150 Ala. 54, 43 South. 179.

The case relied upon by appellee (Town of Vernon v. Wedgeworth, 148 Ala. 490, 496, 42 South. 749, and the authorities cited there, which are also cited by appellee) is to the same effect, and these authorities do not hold, as contended by appellant, that the trial court cannot be put in error for refusing charges unless an exception to each separate charge is shown, but only that if not requested separately the court will not be put in error if one of the charges is erroneous.

The recitals in the bill of exceptions in this case clearly show that the charges were requested separately, and that each was separately considered and marked "refused" by the presiding judge (Ala. S. & W. Co. v. Griffin, 149 Ala. 423, 42 S. W. 1034), and there can be no question but that the action of the trial court in refusing each of these charges is properly presented to this court for review. (The reporter will set out in the statement of the case the caption immediately preceding the refused charges shown by the bill of exceptions on page 20 of the transcript.)

The appellant insists that the evidence as shown by the bill of exceptions contains no proof that the defendant owned or operated the railroad, or the car that struck the plaintiff, or that the motorman was an employee of the defendant company. This point does not seem to have been disputed on the trial, and the entire course of the trial and the charges requested by the defendant plainly show that the ownership and operation of the car by the defendant was not questioned or challenged in any way, but was treated

throughout as matter over which there was no controversy. The witness Stewart was asked about the equipment of the cars of the Birmingham Railway, Light & Power Company with reference to the time of the injury, and the defendant's counsel, among other objections, objected to the question on the ground that the condition of the particular car causing the injury was not shown to be known to the witness. The defendant requested charges in which it referred to the car in question as the defendant's car, and to the person operating the car as the motorman in charge of the car. In passing upon a similar objection in a comparatively recent case, and made by this same appellant, the Supreme Court has said: "It occurs to us that the objection is too technical to be meritorious. The course of the trial, the questions propounded by the defendant's counsel, and the charges asked by the defendant, all indicate that the point now raised was not disputed. The ownership and operation of the cars by the defendant company was not raised on the trial, but appears to have been unquestioned." *B. R. L. & P. Co. v. Taylor*, 152 Ala. 105, 109, 44 South. 580, 581. What was said in that case applies equally, and with as compelling force, to the instant case.

There was sufficient evidence to submit to the jury the question of the plaintiff's right to recover on the second count, alleging wanton, wilful or intentional injury. There was evidence that the plaintiff, while attempting to cross a street in the city of Birmingham at a street crossing in a populous section of the city, where people frequently crossed the street, was run against by a street car running at a rate of speed of about twenty miles an hour; that this injury occurred at night; that plaintiff did not see the car until it struck him; that there was a street light overhead near by the place where plaintiff was struck, which was giving a good light, and the car had a headlight that was burning, and an object could be seen on the track for a distance of half a block or more in front of the car; that the track was straight for some distance (about two blocks) in the direction the car approached the place of striking the plaintiff, and the view unobstructed; that the car could have been stopped in twenty-five or thirty feet, but was not stopped after striking plaintiff until it had gone the distance of about half a block; that no signal or warning was given before the car struck the plaintiff, knocking him several feet from the track.

There was no direct proof that the motorman was keeping a lookout, but this he is required to do by law (*Anniston Electric & Gas Co. v. Elwell*, 144 Ala. 317, 42 South. 45), and, it being at a populous crossing in a city where people were likely to be crossing, it must be presumed the motorman was conscious of the surroundings and conditions (*L. & N. R. R. Co. v. Davener*, 162 Ala. 660, 50 South. 276), and this inference or presumption is a proper matter to submit to the jury to determine whether he did know of such conditions (*C. of G. Ry. Co. v. Partridge*, 136 Ala. 587, 34 South. 927), and if he did know of them, and knew that his conduct in the running, operation or management of the car would likely or probably result in injury, and through reckless indifference to consequences, or consciously and intentionally, on his part, the injury was inflicted, it would be such an act as would entitle the plaintiff to recover under the second count of his complaint, alleging wanton, wilful or intentional injury.

Under the evidence in this case it was properly left to the jury to say

whether the motorman did any act or omitted to do any act with reckless indifference or disregard of the natural or probable consequences with the consciousness from knowledge of existing circumstances and conditions that his conduct would probably result in injury; and, if the jury arrived at such a conclusion, this would be wantonness for which the plaintiff could recover under the second count, alleging a wanton, wilful or intentional injury, even though the jury should also believe there was no intention to inflict the injury. *B. R. L. & P. Co. v. Landrum*, 153 Ala. 192, 45 South. 198, 127 Am. St. Rep. 25; *L. & N. R. Co. v. Anchors*, 114 Ala. 492, 22 South. 279, 62 Am. St. Rep. 116. See also the case of *B. R. L. & P. Co. v. Oldham*, 141 Ala. 195, 200, 37 South. 452, 3 Ann. Cas. 333, in which it was said, under somewhat similar facts to those presented in this case, that a recovery under the count alleging wanton, wilful or intentional negligence was properly submitted to the jury.

The fourth charge requested by the defendant was properly refused. It could be construed to mean that no duty rested on the motorman to stop his car before crossing Twenty-fourth street, even though he saw the plaintiff on the crossing and could have stopped the car in time to have prevented the injury, and knew that by not stopping he would strike and injure the plaintiff.

The court cannot be put in error for refusing the charges requested by the defendant seeking to instruct the jury that the rate of speed at which the car was run did not constitute wanton negligence, or that it was but simple negligence. While probably these charges may have correctly stated abstract propositions of law, as applied to this case the charges were decidedly misleading, as it depended entirely upon the surrounding conditions and attendant circumstances and what the jury believed from the evidence as to these matters whether this running at the rate of speed shown by the evidence was but simple negligence. If the jury believed from the conditions surrounding and causing the injury as shown by the evidence that there was a likelihood of peril to the plaintiff known to the motorman, and through reckless indifference to consequences he consciously and intentionally caused the car to run over the crossing at such a reckless rate of speed that it would be impossible or impracticable to prevent striking the plaintiff, this would amount to wantonness. *N. J. & K. C. R. R. Co. v. Smith*, 153 Ala. 127, 45 South. 57, 127 Am. St. Rep. 22. Running a car across a public thoroughfare at such a high rate of speed as that injury cannot be prevented after discovering the peril may constitute wanton negligence. 4 *Mayfield's Dig.*, p. 300, § 93, and authorities there cited. No error can be imputed to the court in refusing charges having a misleading tendency, even though they assert a correct proposition of law. *Atlanta & Birmingham A. L. Ry. Co. v. Wheeler*, 154 Ala. 530, 46 South. 262; *So. Ry. Co. v. Hobbs*, 151 Ala. 335, 43 South. 844.

The court was not in error in overruling the defendant's motion for a new trial, and, as no reversible error is presented by the assignments of error, the case will be affirmed.

Affirmed.

MURRAY v. RHODE ISLAND CO.

(Rhode Island — Supreme Court.)

Injuries to Passenger While Attempting to Alight; Evidence.

DEFENDANT brings exceptions from refusal of trial court to grant new trial after verdict for plaintiff. Reported 82 Atl. 1.

Opinion PER CURIAM:

The plaintiff testified that she stood up when the car started from Peace street, and signaled to the conductor to let her off at Whitmarsh street; that she sat down until the car came to a full stop, when she arose, and, stepping out by two people who were seated at her right, was stepping on the running board, just in the act of stepping onto the sidewalk, when the car started with a sudden jerk and threw her onto the sidewalk. Her sister, who was with her, but who, not having reached her destination, remained on the car, corroborated the plaintiff as to the signal and her sitting down again. As to the plaintiff's leaving the car, this witness testified: "I was sure the car stopped, and she stood up to get out." She said that she took no notice of her getting out past two people in the seat; that then she did not see her until she saw her falling off to the sidewalk; that she did not hear any signal given to start after the car stopped for the plaintiff to get off; that when she saw her falling off the car was going. In answer to a question she said: "Yes; when I saw her falling off I realized the car was going." There was no further corroboration of the plaintiff's statement that the car was still when she stood up to get off.

The trial judge, in denying the defendant's motion for a new trial, said: "The testimony strongly preponderates to the effect that she left the car while it was in motion. If her right to recover turned upon her leaving the car while it was in motion, the verdict could not be sustained." He said, however: "The place where her key was picked up in the morning indicates pretty well where she went off the car. As she sat about middle of the car, the rear end of the car, when she went off, must have been about at the white post, corner of Whitmarsh street, where she desired to alight. According to the conductor's testimony the car was then 'merely crawling' and 'coming to a stop.' The jury was warranted from the evidence in finding that she went off the car at that point. It cannot be said as a matter of law that she was guilty of negligence in leaving the car in these circumstances. She testified that the car started with a sudden jerk just as she was stepping onto the sidewalk. The conductor testified that at this white post, after the two men left the car, he struck the bell to go ahead. If the car had slowed down to a mere crawl, and was coming to a stop, and two passengers had left it before the conductor gave the signal to go ahead, he should have ascertained whether some other passenger was also in the act of leaving the car before signaling for the car to go ahead. This he did not do. It is probable from the evidence that the plaintiff, attempting to alight before the car stopped, was thrown by the sudden starting up of the car upon the conductor's signal, and the jury was warranted in so finding."

The theory that the car had slowed down to a mere crawl and was coming to a stop when the plaintiff started to alight is not supported by the testimony of any of the witnesses for the plaintiff. Upon an examination of the testimony of the other witnesses, we find a general agreement that the car was not slowing down when the plaintiff arose to get off; that the slowing down had taken place before; and that the car was not only in motion at that time, but that it was proceeding at a considerable rate of speed. Witnesses testify variously that it was going quite fast; that it was going at a moderate speed; that it was proceeding at not a very quick rate of speed, but was under quite a little headway; that it was in fairly rapid motion, and gaining in speed. We do not, therefore, find in the evidence, either of witnesses for the plaintiff or for the defendant, any support for the theory that the plaintiff was thrown by the sudden starting up of the car while it was merely crawling and coming to a stop.

We think that the evidence as to the place where the plaintiff's key was found the next morning cannot avail to overcome the evidence that the plaintiff fell off the car further along toward Princeton avenue. The key might well bound somewhat from the place where it struck in falling, and might easily have been moved from the place where it fell by contact with the feet of travelers upon the sidewalk. The finding of the key near the place where the plaintiff said she fell from the car was an incident to be considered, but we do not think it can be regarded as conclusive. In our opinion the verdict failed to do justice between the parties. The motion for a new trial should have been granted.

The defendant's exception to the decision of the Superior Court denying its motion for a new trial is sustained. The defendant takes nothing by its other exceptions.

The case is remitted to the Superior Court for a new trial.

AMBRIDGE BOROUGH v. PITTSBURG & B. ST. RY. CO.

(Pennsylvania — Supreme Court.)

Bond Conditioned to Lay Tracks Within Specified Time; Recovery of Penalty of Bond; Liquidated Damages.

DEFENDANT appeals from judgment for plaintiff. Reported 82 Atl. 1105.

Opinion in Court of Common Pleas per SWEARINGEN, P. J.:

"The borough of Ambridge, a municipal corporation of Beaver county, Pa., brought this action against the Ecobridge Street Railway Company, the French Point Street Railway Company and the Liberty Land Company, corporations organized and existing under the laws of Pennsylvania, to recover the sum of \$5,000, with interest from November 16, 1906. At the trial, there being no dispute as to the facts, the jury, by direction of the court, rendered a verdict in favor of the plaintiff and liquidated the amount at \$6,225. The defendants then moved the court to grant a new trial, and took a rule for judgment *non obstante veredicto*. On May 15, 1905, the borough of Ambridge entered into

a written agreement with said Ecobridge Street Railway Company and the French Point Street Railway Company, wherein said borough granted to them the right to construct tracks upon certain streets of said borough; the contract, however, being subject to approval by the council of said borough. A copy of said contract marked 'Exhibit A' is attached to the plaintiff's statement of demand. Subsequently, on May 26, 1905, the borough council did ratify and approve said contract upon condition that the bondsmen in a certain action brought by J. D. Martsof *et al.* against said Ecobridge Street Railway Company should be released from liability, and the costs and expenses in relation thereto paid. Said bondsmen were released and said costs and expenses were paid.

"At the time said contract of May 15, 1905, was executed, said Ecobridge Street Railway Company and the French Point Street Railway Company, as principals, and said Liberty Land Company, as surety, entered into a joint and several bond to said borough of Ambridge in the sum of \$5,000, wherein, after reciting and referring to said contract, the following appears: 'Whereas, it is the intention of said principals, as specified in their said contract, to construct and operate by electric power within one year, a street railway on Merchant street in the borough of Ambridge, and likewise that the said street railway shall be of double track from Fourteenth street to Charles street and double track on said Fourteenth street, and further, that the said principals, or one of them, shall construct and operate or cause to be constructed and operated a street railway by electric power within eighteen months from this date through the property of the Liberty Land Company to the line of the borough of Baden; and in consideration of the ratification and the approval of the above-mentioned contract by the council of the borough of Ambridge, this bond is executed and delivered to take effect and be binding on the principals and surety immediately upon the ratification and approval of said contract by the said council. Now, the condition of the above obligation is such that if the above-named principals, or either of them, construct and operate or cause to be constructed and operated within one year a street railway on Merchant street of double track from Fourteenth street to Charles street, and also construct and operate, or cause to be constructed and operated within eighteen (18) months a street railway from Merchant street to the line of the borough of Baden (double track on Fourteenth street) then this obligation to be void, otherwise it is to remain in full force and virtue.' A copy of said bond, marked 'Exhibit C,' is attached to the statement of demand.

"That portion of said line of railway which was to be constructed within the borough of Ambridge was completed within the time named. But neither of said principals in said bond constructed and operated, within eighteen months from the date thereof, a line of street railway through the property of the Liberty Land Company from the borough of Ambridge to the borough of Baden, as provided in said bond. The borough of Ambridge lies upon the right bank of the Ohio river in the county of Beaver, and the borough of Baden lies about two miles further down the said river. The latter borough was at the time the bond was given connected by a line of street railway with the other boroughs and towns upon that side of the Ohio, including Rochester and Beaver, and with New Brighton and Beaver Falls upon the Beaver river, which empties into the Ohio river at Rochester. December 3, 1906, after the said period of

eighteen months had expired, the council of the borough of Ambridge delivered said bond to the borough solicitor and instructed him to collect the same. This suit was filed May 1, 1907. The said line of railway from Ambridge to Baden was afterwards completed, to wit, about August 1, 1907.

"The plaintiff introduced no evidence of the damages sustained by it on account of the failure to complete said railway within the time named in the bond. It alleged that the sum of \$5,000 named in the bond was a liquidation of the damages, and therefore it sought to recover that amount. The defendants denied that the said sum was a liquidation of the damages, and averred that it was but a penalty. It therefore claims that the court should have directed a verdict in favor of the defendant, and that the court should now enter judgment in favor of the defendant *non obstante veredicto*.

"This question is always difficult, for the reason that the courts have not adopted a definite rule upon the subject. What the parties themselves name the sum specified is not controlling. The best statement of the rule we have been able to find is that given in *Emery v. Boyle*, 200 Pa. 249, 49 Atl. 779, where Justice FELL quotes with approval from *March v. Allabough*, 103 Pa. 335, as follows: 'The question * * * is to be determined by the intention of the parties, drawn from the words of the whole contract, examined in the light of its subject-matter and its whole surroundings; and in the examination we must consider the relation which the sum stipulated bears to the extent of the injury which may be caused by the several breaches provided against, the ease or difficulty of measuring a breach in damages, and such other matters as are legally or necessarily inherent in the transaction.' And the justice further declares: 'The difficulty of measuring the damages which would result from a breach of contract is always an important element, if not a controlling one, in determining whether the intention of the parties was to fix a sum certain as the just amount to be recovered, instead of leaving the question to the uncertain estimate of a jury.'

"In the case now before us it is clearly impossible to establish by evidence the actual damages which resulted from the breach of the contract in question. The borough was granting the right to enter upon and occupy its streets and the principal defendants were engaging to connect these tracks with others two miles away, so that the residents of Ambridge might reach with ease the boroughs and towns hereinbefore enumerated. It is true the borough does not ride upon street railways, but its residents do; and in making the agreement the borough was acting as the representative of its people. The parties themselves considered, as shown by their agreement, that it was important to have the lines completed at a date certain, and ample time was given to do so. The failure to construct the line within the time stipulated was a breach of the bond, and the injured party became entitled to the damages resulting. By no standard of which we have knowledge could such damages be ascertained with any degree of certainty. And it must be assumed that this difficulty was in the contemplation of the parties when the bond was executed. They knew it would be impossible to prove the actual damages in case the line was not completed as agreed. This is therefore a reason for naming a sum to be paid in case of a breach.

"The case at bar is similar to the very recent case of *York v. York Railways Company*, 229 Pa. 236, 78 Atl. 128, in which our Supreme Court affirmed a judg-

ment for \$25,000 in favor of the city of York. The company had given a bond in that sum conditioned for the completion of tracks upon certain streets of said city within three years after the date. Work had been promptly commenced, but the tracks were not all completed within that time. The court there held that the amount named was a liquidation of the damages. We can see no distinction between that case and the one at bar."

Opinion PER CURIAM:

The judgment is affirmed on the opinion of the learned presiding judge of the Common Pleas.

INDIANA UNION TRACTION CO. v. DOWNEY.

(Indiana — Supreme Court.)

Collision with Vehicle; Injury to Driver; Unlawful Obstruction of Street by Company; Sufficiency of Complaint; Evidence as to Unlawful Obstruction; Instructions.

DEFENDANT appeals from judgment for plaintiff. Reported 98 N. E. 634.

Opinion by COX, C. J.:

Appellee recovered a judgment against the appellant for damages for personal injuries alleged to have been received by him in a collision between a horse-drawn vehicle which he was driving and one of the passenger cars of appellant on a street crossing in the city of Kokomo. Appellant unsuccessfully demurred to the second and third paragraphs of the complaint, and issues were joined thereon by answer of general denial. With a general verdict for appellee the jury returned answers to special interrogatories.

As the first cause for reversal, it is contended that neither paragraph of the complaint states a cause of action, and that therefore the trial court committed error in overruling its demurrer to each paragraph upon which the case was tried.

The second paragraph reads as follows: "And for a second and further paragraph of plaintiff's complaint, Omer Downey, plaintiff, says: That the defendant is a corporation duly organized and doing business under the laws of the State of Indiana, and owned and operated a street and interurban railway along and upon Union street and the southern extremity of said street north to a point where Taylor street crosses Union street in the city of Kokomo, county of Howard, State of Indiana, on the 13th day of April, 1906, and for a long time prior thereto. That from a point where Sycamore street crosses Union street, in said city, north past defendant's station where the defendant company's cars stop for the purpose of letting passengers on and off and for loading and unloading of freight, and on north past Walnut street to a point where Taylor street crosses Union street, the company had on the aforesaid date double tracks upon which said defendant operated their cars by electricity. That on the 13th day of April, 1906, the defendant by its servants, agents, and employees, negligently caused one of

their cars to stand on the west track at a point where Walnut street crosses Union street, and that said car was standing in such a position that the north end of said car was at a point, to wit, ten to twenty feet south of the south curb of Walnut street, and that said car was under the care, control, and management of the defendant. That said car standing on said west track was about sixty feet in length and fourteen feet high and obstructed the view of plaintiff so that he could not see another car of defendant company then standing on defendant's east track and immediately south of said car on the west track. That on the aforesaid date the defendant had certain trucks for the purpose of conveyance of freight to and from their cars, and that on the date the defendant negligently and carelessly permitted by its agents, servants and employees, said trucks to remain on the street between the cars aforesaid mentioned and the west curbing of Union street, at a point, to wit, thirty feet south of the north end of said car, thereby carelessly, negligently and unlawfully obstructing and hindering the passing of teams and vehicles on the west side of said car and on the west side of Union street. That on the date aforesaid the plaintiff was employed as a cab driver and was lawfully upon said Walnut and Union streets, and was engaged in an effort to pass with his team and cab from Walnut street, coming from the west, into Union street going on the west side of the track and car aforesaid mentioned. That it was 8 o'clock on said date, and the night was dark, and it was raining. That plaintiff with his team and cab was in the act of turning to the south on the west side of said car on said Union street when he saw that the passageway was blocked by the trucks and in the manner aforesaid mentioned on the west side. He then turned to the east, and without any knowledge that a car was standing on the east track of said defendant company, and unaware of any approaching car on the east track, and using every means at his command to determine whether a car was approaching, by listening for a gong or other signal, by looking to the north, by looking through the windows of the car standing on the west track, to the south, and hearing no gong or sound of approaching car, started his team from practically a walk across the east track. That his only means of getting to his point of destination was to cross to the east of said company's tracks on Walnut street and immediately north of said car standing on said west track as aforesaid, and as he reached the east track (at all times using the above-mentioned precautions), the defendant caused the large interurban car standing on said east track, as aforesaid, to suddenly start north and approach said crossing at Union street, and negligently and carelessly omitted, while approaching said crossing, to sound the gong, ring the bell, or sound the whistle, or to give any signal or warning whatever of its approach, by reason of which negligence on defendant's part said interurban car ran down and struck the plaintiff's horses and cab with great force and throwing the plaintiff with great violence upon the front fender of said car, thereby cutting, lacerating, bruising and injuring this plaintiff's back and shoulders and injuring him internally, in this, breaking four of the lower ribs and injuring his spine to such an extent that great pain and suffering and soreness has continuously been located in this part of the back; the exact nature and extent of these injuries is to this plaintiff unknown at this time. That all of said injuries were caused by the negligence of the defendant aforesaid and without any fault or negligence of the

plaintiff." These allegations are followed by allegations of special damages and prayer for judgment.

The third paragraph is materially different from the second only in allegations concerning the position of the car standing on the west track, and of the truck between it and the curb. In the third paragraph it is alleged that the north end of the standing car was flush with the south curb of Walnut street, and that the truck was ten feet south of the north end of the car.

If, as contended by counsel for appellant, the complaint does not connect the alleged negligent acts of leaving the car standing on the west track and the truck between it and the curb with appellee's injuries as a proximate cause, it does not follow therefrom that the complaint must succumb to appellant's demurrer. If as a matter of fact it must be said that neither of them can be said to be a concurring proximate cause leading to appellee's injury, they still have a relation to the accident and the duty of appellant which made them proper facts to be alleged in the complaint. It is said in section 1399, Thompson's Commentaries on the Law of Negligence: "Obviously, the rule of reasonable care which the law puts upon the drivers, gripmen and motormen of street cars at all times, imposes on them a more exacting attention when they approach street crossings, in a crowded city where vehicles and pedestrians may always be expected in front of them. The failure, under such circumstances, to ring the bell, sound the gong, or give other proper warning, is *negligence per se*, where there is a city ordinance requiring such precautions, and is undoubtedly *evidence of negligence* to be submitted to a jury under all circumstances, whether there is such an ordinance or not."

Again, the rule is stated that, as a part of their duty to exercise ordinary care to avoid injury, it is the duty of the employees in charge of a street car to give timely warning, as by sounding a bell or gong, or otherwise, on the car's approach to a place where, under the circumstances, there is danger of a collision with persons or vehicles, such as on its approach to a street crossing. 36 Cyc. 1483.

The relation between the car standing on the west track near the street crossing and the truck in the street between that car and the curb to appellee's injury is this: They not only interrupted the journey of appellee to his destination along the west and proper side of Union street in which he would not have been required to cross the tracks of appellant, but the car, standing where it did, obstructed the view of persons having a right to use the street crossing of any car on the east track approaching the crossing. And the presence of the truck must, it seems clear, have increased the amount of travel over the crossing, or at least over the tracks, by diverting vehicles traveling south on the west side of Union street and compelling them to pursue their course by crossing the tracks at the crossing and then turning south upon the east side of the street. To the ordinary hazards of the crossing appellant had added in these two particulars. It must be clear, then, that, under these conditions, the employees of appellant in charge of the car on the east track were under the duty to appellee and other users of the crossing, under the circumstances alleged in the complaint, of giving warning and signal before running the car past the standing car on the west track and over the crossing. This, the complaint alleges, they negligently failed to do, and that appellee

was injured thereby. This was a charge of actionable negligence which it was alleged caused appellee's injuries. It was not necessary, as contended by appellant, to allege that appellee would have heard the signals if given. *Greenawaldt v. Lakeshore, etc., R. Co.*, 166 Ind. 219, 74 N. E. 1081; *Pittsburgh, etc., R. Co. v. Terrell*, 95 N. E. 1109. The court did not err in overruling the demurrer to either paragraph of the complaint in question.

Under the assignment of error based on the action of the court in overruling appellant's motion for a new trial, it is first claimed that the court erred in admitting testimony concerning the location and description of the trucks at the time of the accident. As the conditions at the crossing had a relation to appellant's duty to give signals or warning before running its cars over the crossing, this evidence was relevant, and the court did not commit error in admitting it.

The court gave twenty of the twenty-two instructions tendered by the appellee, and sixteen of the twenty requested by appellant, and none of its own motion. The giving of each of a number of the instructions given at the request of the appellee was made cause for a new trial and is here relied upon for reversal. The first of these is instruction No. 3, which was as follows: "The streets of a city are for the use of the public, and no person or corporation can have the right to permanently divert a street, or any part thereof, for private purposes. A public street is a public highway, and as such belongs from side to side and from end to end to the public." As an abstract proposition this instruction is doubtless a correct statement of the law. But it was not applicable to any issue presented by the pleadings and evidence in the case, and no attempt was made to connect it with any particular obstruction or diversion of the street. There was no explanation or qualification accompanying it which would have prevented the jury from applying it to the tracks and cars of appellant in the street which would, of course, have been both erroneous and harmful to appellant.

By instruction 19, given at the request of the appellee, the court undertook to instruct the jury on the doctrine of last clear chance. The complaint did not present any such issue, nor was the instruction applicable to any evidence given in the cause, and the giving of his instruction was for that reason error.

There is some ground for the complaint of appellant that instruction 18, given at appellee's request, is contradictory of instruction 12, given at the request of the appellant. We think that the terms of the two instructions, if not in the final analysis contradictory of each other, were so apparently so as to confuse the jury.

The result reached in the trial court is not so clearly right on the evidence that we can say that the appellant was not harmed by the errors indicated, and they require the reversal of the case. Other questions are raised which are not likely to arise on another trial, and it is not necessary, therefore, to give them consideration.

Judgment reversed, with instructions to grant appellant a new trial.

PENNSYLVANIA STEEL CO. v. NEW YORK CITY RY. CO.

(U. S. District Court—S. D. New York.)

Lease of Street Railway Construed; Liability of Sublessee for Taxes; Covenant by Lessee to Pay Franchise Taxes.

Suit in equity. Exceptions to report of Special Master. Reported 194 Fed. 543. See also 194 Fed. 216.

Opinion by TURNER, Special Master:

Those claims were filed in pursuance of orders permitting such filing against the estates both of the Metropolitan and City Companies *nunc pro tunc* under the orders made in the beginning of the receiverships of the two companies, directing the filing with me of claims against those companies, meaning claims existing against each company as and of the date that receivers of each were appointed, which was September 24, 1907, for the City Company, and October 1, 1907, for the Metropolitan Company. These latter orders do not authorize the adjustment of controversies suggested either by agreements made with the receivers, or by their acts during the receiverships in the management of the property in their custody, but only of those claims which existed at the dates of their appointment. As the claims here urged for the rents, interest, and speculative damages for breach of covenants in the leases executed by the respective companies as lessees were not in existence on said dates, but have accrued since, they are not, I think, provable under said orders for reasons more fully stated in memoranda accompanying the reports on the claims of the Hemphill Committee and the National Conduit and Metropolitan Express Companies lately presented to the court for disposition.

The claims against the estate of Metropolitan Company for the allowance of payments of franchise taxes accruing on and prior to October 1, 1907, assumed by the covenant in the Central Crosstown lease to it, which are, I think, covered by the reservation in the correspondence which subsequently passed between the claimant and the receivers, stand upon a different basis. The obligation of the Metropolitan Company to make the payments arose under that lease and was in existence at the time receivers of its property were appointed, and, while by its covenant the lessee was not as between itself and its lessor required to pay a tax as long as it should in good faith contest its legality and validity unless the payment were necessary to protect the demised property from forfeiture, the obligation had nevertheless accrued at that time and was then *debitum in presenti, solvendum in futuro*, notwithstanding that the lessee was then in good faith litigating the assessments on which they were based. Nor do I think the facts that the Metropolitan Securities Company owns 5,028 out of 6,000 shares of the stock of the Crosstown Company, and that the former company has agreed with the Interborough Company not to participate directly or indirectly in any moneys in the possession of the Metropolitan receivers, prevent the Crosstown Company from asserting its claim to the allowance of all these taxes. It was not a party to this agreement, has its own creditors whose rights in any event could not be affected by agreements between others to which they had not assented, and is not bound by acts or agreements of its stockholders with

third parties. As finally adjusted against both the Crosstown and the Christopher and Tenth Street Companies, the franchise tax, with interest to October 1, 1907, should be allowed for the years 1904, 1905 and 1906 as payable against the Metropolitan estate; the year 1907 not being allowed, as under the charter the payment accrued on October 7, 1907, after the date of the appointment of its receivers.

Against the estate of the City Company I do not think the claim for franchise taxes provable, as it was clearly not an assignee of the lease from the Crosstown Company to the Metropolitan and liable as such, and as the language of its covenants either of assumption or of payment of taxes in the Metropolitan lease to it does not in terms broad enough for that purpose include such payments. The covenant of assumption in paragraph 3 of the City lease is of payment of charges arising under leases or contracts to which the lessor is a party (*i. e.*, in February, 1902), and the Metropolitan was not then a party to the Crosstown lease, for it had not then been entered into. So, too, the covenant for the payment of taxes contained in paragraph 2 cannot be invoked because it refers to taxes imposed only on the property thereby demised and extensions and additions thereto, and not to railroad franchises then in existence and subsequently leased. The words "extensions" and "additions," as used in the statutes and contracts relating to railway lines and franchises, have a more or less definitely fixed meaning, which is hardly broad enough to govern an acquisition by lease of existing systems of railway.

Counsel for receivers may submit a proposed report in accordance herewith on or before June 23, 1911, and the claimant will file with me, within three days after service upon it of a copy of my proposed draft report, its objections thereto and proposed amendments thereof.

Opinion by LACOMBE, Circuit Judge:

The first proposition contended for, viz., that the Crosstown Company is entitled to prove a claim against the Metropolitan Company for damages resulting from a breach of the lease occurring six months after the appointment of receivers, has been already disposed of in decisions touching other claims. Claim of Met. Ex. Co., (C. C.) 188 Fed. 339; Claim of Nat. Conduit Co., (C. C.) 188 Fed. 343; Claim of Second Ave. Bondholders, (C. C.) 189 Fed. 661. It is conceded on the brief that if these decisions stand the present claim cannot be distinguished from them. The special master's disposition of it is therefore sustained; it will come up for review with the other appeals already pending.

So far as concerns the City Company, it seems entirely clear that it is not an assignee of the lease from Crosstown to Metropolitan, but only a sublessee. The lease from Metropolitan to City was by its terms limited to expire about two years before the expiration of the lease from Crosstown to Metropolitan. How assignment can be worked out in the face of that incontrovertible fact it is difficult to understand. I concur with the special master in his construction of the covenants of assumption in the City Company's lease.

The Metropolitan receivers except to so much of the report as sustains the claim against the estate of that road for special franchise taxes of the years 1904, 1905 and 1906. The special master's reasoning and conclusions on this branch of the case are concurred in.

The exceptions are overruled, and report confirmed.

FRIEDEL v. BROOKLYN HEIGHTS R. R. CO.

(New York — Appellate Division, Second Department.)

Injury to Passenger; Negligence of Motorman in Driving Car Through Flooded Street So That Trap Door Sprang Open, Admitting Water; Question for Jury.

PLAINTIFF appeals from judgment in favor of defendant. Reported 135 N. Y. Supp. 3.

Opinion by CARR, J.:

This action was brought in the County Court of Kings county to recover damages for personal injuries to the plaintiff while a passenger in one of the trolley cars of the defendant on the night of August 24, 1907.

At the close of the plaintiff's testimony her complaint was dismissed, on the ground that she had failed to make out a cause of action. Taking the evidence offered by the plaintiff in its most favorable aspect, her proofs go to show that while she was a passenger on one of the trolley cars of the defendant on Cypress avenue in the borough of Brooklyn, a trap door in the floor of the car sprang open and a volume of water poured in and splashed over plaintiff and other passengers, and that she thereupon became frightened, arose in her seat, and in her fright fell into the space previously covered by the trap door, and suffered more or less physical injuries. It appeared likewise, as a part of her proof, that on the night in question it had been raining heavily and that that portion of the street where the accident took place was below grade, and because of lack of proper sewer facilities was subject to flooding whenever there was a considerable rain storm; that this condition had existed for a very long time, and that when the trolley car approached the spot in question it was operated at such a rate of speed that it rocked from side to side.

It seems to us that under these circumstances it was a question of fact for the jury whether the motorman should not have anticipated the presence of a large body of water at this spot in view of the fact that water did accumulate there after every heavy rain storm, and whether with such anticipation it was not negligent for him to run his car into such a body of water at such a rate of speed as to bring the floor of his car in very violent contact with the water and thus produce the result which happened. The presence of the trap door was not in itself an act of negligence, nor might the fact that water came into the car constitute negligence on the part of the defendant. But it seems quite plain that the cause of the trap door springing up so violently was the great force with which the car was brought in contact with the body of water then flooding the spot in question. If the motorman was bound to anticipate the presence of water on the street at that place, as it usually happened after a heavy rain storm, then it is a question whether it was the exercise of due care for him to drive his car into that body of water under such circumstances as to bring about a violent contact with it.

The judgment should be reversed and a new trial ordered, costs to abide the event.

JENKS, P. J., THOMAS, WOODWARD and RICH, JJ., concurred.

Judgment of the County Court of Kings county reversed and new trial ordered, costs to abide the event.

TROUZZO v. SUTHERLAND.

(New York — Appellate Division, Second Department.)

Injuries to Passenger Driven from Car by Threats and Hostile Demonstrations of Conductor; Boarding Car from Wrong Side; Evidence.

DEFENDANT appeals from judgment in favor of plaintiff. Reported 135 N. Y. Supp. 184.

Opinion by JENKS, P. J.:

The action is for negligence. The court charged, without exception or request for other instruction: "The only ground upon which a verdict can be given to the plaintiff, and the only charge that the plaintiff makes against the defendant, is that after the plaintiff had reached a safe place upon this car, and was about to take his seat thereon as a passenger, that the conductor wrongfully, intentionally, recklessly, wantonly, by threats and hostile demonstrations, drove him from the car, and caused him to fall." The plaintiff is a man twenty-eight years old. The scene of the accident was a street in the city of Yonkers, and the time was about 6 o'clock, September 10, 1910. There is no dispute that the plaintiff as a passenger boarded the open or summer car of the defendant on the so-called "off side," that nearest to the track for cars coming in the opposite direction. At that time the running board was down. The plaintiff's version is as follows: When he boarded the car it was at a standstill. The side rail was "standing way up high" so that he passed into the car under it without interference therefrom. When he was about to take a seat, or had taken it, the conductor, who was inside of the car and had been looking towards the station, turned and saw him, whereupon the conductor jumped towards him, called him the vilest names and ordered him to "jump right off now." At that time the plaintiff was sitting down, and the conductor was standing up, with a seat or an aisle between them, and as the conductor approached the plaintiff with his fists up, the plaintiff drew himself back towards the outside of the car, holding on to the bar rail and avoiding the conductor's fists, when one foot slipped down, followed by the other, as he was still clinging on to the bar, then the board fell right under his feet and he went down with his face up. The conductor testifies that he was on the rear platform, that the plaintiff ran and jumped upon this off side of the car while it was in motion, and hung on to the side rail which was down; that he called out to the plaintiff, asking him why he did such thing, but the plaintiff paid no attention and remained in the said position; that he saw the oncoming car, with its danger to the plaintiff; that thereupon he rang an emergency bell to stop the car, called to the plaintiff to get in under the rail, crossed to him, took hold of him, attempted to pull him into the car but failed, as the plaintiff released his hold and fell from his grasp. He denies the language and any threatening words or actions. There is no question but that the position of the plaintiff outside of the body of the car was perilous, in that the oncoming car probably would have struck him, for the space was very narrow between passing cars.

There are some strange features in the plaintiff's story. The conductor and

the plaintiff were unknown to one another. Although the plaintiff says he entered the car at the wrong side, yet he also says that he had passed from the running board under the raised side rail and had taken his seat; only after he had done this the conductor, who had not been looking in his direction when he boarded the car, turned to see him and thereupon assailed him with vile language, threatened him with assault, made menacing motions and ordered him to "jump right off" the car.

On the other hand, the version of the conductor has earmarks of probability. If the plaintiff had run after a moving car and had jumped on the off side, when the side rail was down, it was natural that the conductor would ask him why he did so. If he remained clinging on to the rail in a position of peril in view of the oncoming car, it was natural that the conductor would attempt to avert the danger by calling to him to get under the rail into the car and would seek to save him from the danger by taking hold of him to pull him into the car. When, therefore, I find that the plaintiff is supported by but a single witness, a fellow-workman who is but slightly acquainted with English, and that the conductor is corroborated by a large number of witnesses who contradict the plaintiff in almost every detail, I think the verdict is against the evidence.

The support of the plaintiff is Fiuro, who corroborates the plaintiff save with respect to the position of the handrail, and who qualifies somewhat a previous statement that the conductor ordered the plaintiff to get off the car. Fourteen witnesses were called by the defendant. Outside of the motorman and conductor of the car, the motorman of the approaching car and an employee off duty who was riding beside the latter motorman, they appear as respectable persons with entire indifference between the parties. One was riding upon the front platform of the approaching car, two were passengers on the car itself, and the others were wayfarers in the city street, but observers close at hand. Not every witness contradicts each detail of the plaintiff's version, not every witness corroborates every feature of the story of the conductor, but the contradictions of the plaintiff are made in every instance by several, as are the corroborations of the conductor. There are witnesses who testify that the car was in motion when the plaintiff boarded it, that the side rail was down at the time and remained down, that the plaintiff never entered the car at all but remained clinging to the side rail, that the conductor asked him why he thus boarded the car, that the conductor rang the emergency bell, that he cried out to the plaintiff to "get in under the rail," and that he tried to help him into the car but could not. There is also evidence from some of the witnesses that there was neither vile nor abusive language used by the conductor, and that there was neither threat nor act of any threatened violence on his part. And further there is evidence that the plaintiff's sole witness was not on the car until after the accident, in flat contradiction of his testimony. It is true that under the sharp cross-examination of the learned counsel for the plaintiff some of those witnesses qualified their direct testimony in some respects, and were shown inconsistent with respect to their testimony upon a former trial, and that the conductor admitted that a former statement made to some outside inquisitor that there were two of the countrymen of the plaintiff on the car (Fiuro being referred to, in all probability) was an untruth. But the witnesses were not shaken in the essentials of their evidence.

On the other hand, as I have said, the plaintiff was contradicted in every detail by several and often by many of the witnesses. But it may be said that, although the conductor actually did not intend to commit any violence or to make him leave the car under threat of violence, yet if in the exercise of reasonable care the plaintiff mistook the conductor's words and acts, believed he was in danger of violence, and under such duress put himself in a place of peril, the defendant might be liable for the consequences. For the plaintiff was not bound to realize that the conductor's purpose was humane, but was justified to act upon appearances. The answer to that proposition in this case is that the preponderance of the evidence fails to show any ambiguous words or acts. The conductor undoubtedly asked the plaintiff why he thus boarded the car, but the overwhelming evidence as to the conductor's language and acts thereafter did not justify the plaintiff in his subsequent actions even if we credit his version.

The verdict is against the weight of evidence, and under the rule of *Kaare v. Troy Steel & Iron Co.*, 139 N. Y. 369, there must be reversal and a new trial, costs to abide the event.

HIRSCHBERG, THOMAS, CARR and WOODWARD, JJ., concurred.

Judgment and order reversed and new trial granted, costs to abide the event.

CITY OF COVINGTON v. SOUTH COVINGTON & C. ST. RY. CO.

(Kentucky — Court of Appeals.)

Franchises Requiring Payment of Bonus and Tax on Cars Used; Contract to Make Certain Payments in Lieu of Amount Required under Franchise; When Payments Due; Interest.

DEFENDANT cross-appeals and city appeals from a judgment granting insufficient relief. Reported 144 S. W. 17.

Opinion by HOBSON, C. J.:

The city of Covington, by an ordinance of December 15, 1864, provided for the granting of the franchise for street railways, and prescribed how the franchise should be exercised. Among other things, it was provided that all contracts made under the provisions of the ordinance should be for a term of twenty-five years, and that the company that would pay into the city treasury the largest bonus should have the franchise. Under this ordinance, the bid of the Covington Street Railway Company was accepted on February 3, 1865; that company agreeing to pay into the city treasury the sum of \$250 a year as a bonus. By an ordinance of December 13, 1869, the city granted to E. F. Abbott and his associates the right to construct and operate a street railway on certain streets of the city not occupied by the Covington Street Railway Company. One of the conditions upon which this grant was made was that the grantees would pay into the treasury of the city on the 1st day of January in each year the sum of \$25 as a license tax for every car run on its road. Abbott and his associates deeded their property to the Covington and Cincinnati

Street Railway Company on May 1, 1875; and it deeded the property to the South Covington and Cincinnati Street Railway Company on December 20, 1876. About the year 1882, the Covington Street Railway Company failed. Its property was sold under a foreclosure and purchased by the South Covington and Cincinnati Street Railway Company. It was provided in both the franchises referred to that the grantees should pay for certain repairs of streets, and what this amounted to annually gave rise to some disputes between the city and the company. On July 7, 1887, the city passed an ordinance, which was accepted by the company, providing, in part, as follows: "Said company shall not be required to repair or pay for the repair of streets, but in lieu thereof it shall pay into the city treasury of Covington, annually, the sum of \$2,600 payable in equal instalments, two in number, between the first (1st) and fifteenth (15th) day of June and December of each year, provided that said company shall not be relieved from its obligations to repair and renew the streets of Covington, as in the ordinance provided, until the extensions herein named are made and in actual operation."

The franchise which had been granted the Covington Street Railway Company, being for twenty-five years, expired in the year 1890. It was insisted by the South Covington and Cincinnati Street Railway Company that its franchise under the Abbott grant was perpetual, and, the city controverting this view, a suit was brought by the company in the United States Circuit Court to obtain a judgment that it held a perpetual franchise. In this condition of things, an agreement was made between the city and the company on October 7, 1892, section 9 of which is in these words: "The said company shall pay to the said city of Covington each year during the first five years of the period of this contract the sum of \$2,500.00; and each year during the second five years of the period of this contract the sum of \$4,000.00; and each year during the third five years of the period of this contract the sum of \$5,000.00; and each year during the fourth five years of the period of this contract the sum of \$6,000.00; which yearly payments shall be in lieu of any and all car license or bonus." The agreement also required the company to do a number of things in addition to what it had done. The contract contained, among others, these provisions:

"The said street railway company shall, at its own expense, lay such foundation under its tracks over which cars are operated by electricity as aforesaid as have been recently under and along Madison avenue, from Fourth to State streets, and the work shall be done to the entire satisfaction of common council, and the said company shall put back any street from which its tracks are removed, or on which its tracks may be laid, in as good condition as the rest of the street. The city reserves the right to change the grade of the streets over which said railway routes are located, both as to curve and crown of the same, and the said railway company shall defray the expense, at any time the council may direct, of lowering or elevating such tracks so as to conform to said change of grade, and place a foundation such as is hereinbefore provided for.

"That the said street railway company shall release the city of Covington from any and all claims for damages, loss or expense incurred by it for or on account of the said street railway company in removing or relaying its tracks on the streets in the city of Covington, now being or hereafter to be made

with asphalt, under the provisions of a resolution passed by the common council of the said city on the 15th day of October, 1891, requiring said improvements to be made by said street railway company, and the said street railway company shall continue to remove and relay its tracks and place the foundation as required, at its own expense, under and over the streets now ordered to be improved with asphalt until the said work is complete.

"In consideration of the said street railway company removing its tracks from Scott street, Powell street, Seventeenth street, Cooper street, Banklick street, and Fifteenth street, and double tracking Greenup street and State street, as hereinbefore provided, the said city of Covington agrees and covenants with the said South Covington and Cincinnati Street Railway Company, its successors and assigns, that it will not grant to any other company or companies, corporation or corporations, association or associations, individual or individuals, any right, privilege or franchise to lay, maintain or operate its street railroad or street railroad track, or any other system of passenger traffic, on or over the streets so abandoned without giving to the said street railway company the same rights and privileges that are enjoyed by any other company, corporation, association or individual on the said streets, or any of them.

"The right to tear up the tracks, or have the same done, for the purpose of improving or repairing sewers or laying gas or water pipes, or repairing the same, or making house connections with the same, or making any improvements, or doing any work which necessitates the tearing up of tracks, or displacements of wire, or removing of poles, is reserved to said city, and may be exercised by it after a reasonable notice to said company, and the said company shall at its own cost, replace said tracks, wires, poles, etc.

"The said street railway company shall, before this ordinance takes effect and before said company acquires any rights under this ordinance, file with the city clerk a bond, to be approved by the common council, with resident state sureties, in the sum of \$25,000, that it will save the city harmless from any and all loss or damage or cost to persons or property by reason of the construction and operation of said railway, and also conditioned for the faithful performance and carrying out of all the provisions of this ordinance."

After the making of this contract, the company paid the city for five years annually \$2,600, and for the next five years \$4,000, and in the third five years \$5,000, with the exception of one payment of \$2,500, which will be noticed later. This suit was brought by the city against the railway company on February 9, 1907, or nearly fifteen years after the contract was made, claiming that the company owed it \$2,600 a year under the ordinance of July 7, 1887. The Circuit Court dismissed this part of the petition, and the city appeals.

It is insisted for the city that section 9 of the contract of October 7, 1892, provides that the payments therein provided for shall be in lieu of any and all car licenses or bonus; that this excludes pay for the repair of the streets, as provided in the ordinance of July 7, 1887; and that this much of that ordinance is therefore still in force. It is insisted that the word "bonus" will not include pay for the repair of streets. But the agreement which fixed the sum to be paid for the repair of streets at \$2,600 a year required the company to pay the money, although no streets were repaired, and, so far

as this sum was in excess of what was necessary to repair the streets, it was a bonus. In Webster's Dictionary, the word "bonus" is thus defined: "Premium given for a loan or for a charter or other privilege granted to a company." The requirement that the company should pay for the repair of the streets was a part of the premium it paid for the grant of its privileges.

A contract is to be construed as a whole, and not by a single word in it. The contract of October 7, 1892, is a very long one, and was, we think, intended to supersede all former contracts between the city and the company, and to be, as to the payment of money to the city, the entire contract between them. The company by that contract was required to make numerous improvements; and it was conceived that it would be better able to pay after these improvements were made, so the sliding scale of payments was agreed to. The \$2,600 per annum which it was to pay for the first five years is precisely the same, and payable at the same time, as it was paying under the old contract; and it is inconceivable that in a contract so minutely drawn the parties should have provided for the payment of one \$2,600 per annum, and should be silent as to another \$2,600 which they expected to be paid. Not only so, but the contract provides that the company shall pay for certain repairs of streets, and that the city may do certain things in repairing the streets at the expense of the company. When the contract of October 7, 1892, was made, the amount due under the old contracts was settled to that time and paid, and from that time until the bringing of this suit no claim was made by the city that any money was due it under the ordinance of 1887.

Lord Erskine once said: "If you will tell me what the parties have done under a contract, I will tell you what it means." Both parties here, for fifteen years, put the same construction upon this contract, and, taking it as a whole, we cannot see how a different construction can properly be put upon it; for it was manifestly intended to define with minuteness of detail what the street railway company was to do. The company was required to give a bond for the faithful performance of the contract, and the purpose of this bond was evidently to secure the city in the obligations which the company owed it. The franchise granted under the ordinance of December 15, 1864, expired in twenty-five years, or on February 2, 1890, two years before the contract of October 7, 1892, was made; so it is evident that the bonus provided for under that franchise could not have been referred to. In the second section of the contract of October 7, 1892, the city of Covington expressly reserves the right "to exact a bonus or consideration from this company as well as all others for the use of such streets as are now abandoned by this ordinance." It is evident here that the word "bonus" is used as equivalent to "consideration;" and, taking the contract as a whole, we are satisfied that the payments required by section 9, and which it is there provided shall be in lieu of any and all car license or bonus, were intended to be the full consideration the company was to pay, and in lieu of all former payments.

On the cross-appeal the railroad company complains of the judgment against it in favor of the city for \$2,500, with interest. The judgment came in this way: The company paid the ten payments of \$1,300 each. It also paid ten payments of \$2,000 each, but, on December 15, 1902, it skipped a payment, conceiving the idea that under the contract it was not required to make this

payment until June 15, 1903. It paid this money on June 15, 1903, and made after this nine payments of \$2,500 each. It has since made semi-annual payments of \$3,000 each. The contract being made on October 7th, the payments were due, by the terms of the contract, as follows: "These sums shall be paid one-half on the 15th day of June and one-half on the 15th day of December in each year." The first payment was due on the 15th day of December in the year 1892. The company made the payment then, and continued to pay on this construction of the contract for ten years. It then conceived the idea that it had been paying six months in advance. We do not so construe the contract. The old contract required this money to be paid on December 15, 1892. It was not the intention of the parties to release the company from this payment. The new contract did not change the existing liability. Both the parties at the time and for years thereafter so construed the contract. The first payment was due on December 15, 1892. The \$2,500 that was due on December 15, 1902, has not been paid, and judgment was properly rendered against the company for this sum, with interest from the time it was payable. The case would not be different if the company had executed ten notes each for \$2,500, and had failed to pay the note falling due December 15, 1902. On December 15, 1907, the company should have paid \$3,000, and not \$2,500. It also owes the city this \$500, with interest. But this sum, not having been sued for, as the court well held, could not be included in the recovery. The judgment in this case, however, will not bar an action by the city to recover the money, as it was not sued for here.

There is no force in the insistence of the company that it should not pay interest on the money which it owed and did not pay. The money was due under a written contract, and, not being paid, it, by virtue of the statute, bears interest.

The judgment is affirmed on the original and on the cross-appeal. Whole court sitting.

SHELLMAN v. LOUISVILLE RY. CO.

(Kentucky — Court of Appeals.)

Passengers; Action for Injuries Sustained While Boarding Car; Negligent Starting of Car; Instructions; Contributory Negligence.

PLAINTIFF appeals from a judgment for defendant. Reported 144 S. W. 1060.

Opinion by LASSING, J.:

This suit was instituted in the Jefferson Circuit Court by appellant for the purpose of recovering damages for personal injuries alleged to have been sustained by him on May 18, 1910, while boarding one of appellee's passenger cars at Fifth and Market streets. The petition charges that the car had stopped at Fifth and Market to permit appellant and others to become passengers thereon, and that while he was in the act of getting upon the car, which was known as a "summer" car, with the side next to the street en-

tirely open and a running board along the entire length thereof, the car started suddenly with a jerk and threw him against the seat, either in front or behind him, it is not entirely clear which, and injured his knee and strained his back; that his injury was caused by the negligence of those in charge of the car in starting it before he had had opportunity to enter. The company denied liability, and pleaded contributory neglect. Upon these issues the case was tried out, with the result that the jury returned a verdict in favor of the defendant company, and the plaintiff appeals.*

It is complained that the court erred in instructing the jury. The instructions for plaintiff are criticised because the court therein used this language: "If you shall believe from the evidence that the plaintiff attempted to board the car," etc.—thus putting in issue the question as to whether or not he did attempt to board the car, when all the evidence showed that he did and there was no evidence at all to the contrary; and any injury received by him was sustained while making this attempt. It is argued that this instruction was misleading. Technically speaking, this criticism is fair; but it is apparent that it in no wise affected the verdict and was not misunderstood by the jury, for by this instruction the court plainly told them that if, while plaintiff was attempting to board the car, those in charge of it negligently started the car, and he was thereby thrown forward and injured, they should find for him against the company. This was the ground upon which he based his right to recover—that the car was negligently started, causing him to strike his knee against the bench and wrench his back. The jury understood it. No question but what he boarded the car. But from his conduct at the time he is alleged to have been injured—the way and manner in which he testified—and his previous ailment, there was a doubt as to whether he was injured at all, and the jury evidently did not believe that he was.

Complaint is also made because the court gave an instruction on contributory negligence. Under the evidence introduced none should have been given, as there was no evidence tending to show that, in getting into the car, the plaintiff was guilty of any negligence. It is apparent that the verdict of the jury was not rested upon this instruction, and we have repeatedly held that, although an erroneous instruction is given, the case would not be reversed on that account where it was apparent that it was not prejudicial. *Louisville Ry. Co. v. Byer's Adm'r*, 130 Ky. 442, 113 S. W. 463; *C. & O. Ry. Co. v. Ward's Adm'r*, 145 Ky. 736, 141 S. W. 72.

Finding no error in the conduct of the trial prejudicial to appellant's substantial rights, the judgment is affirmed.

* Portion of opinion not material to street railway law omitted.

SMALL v. SAN ANTONIO TRACTION CO.

(Texas — Court of Civil Appeals.)

Injury to Woman Thrown While Alighting from Car; Evidence; Instinctive Caution of Pregnant Woman; Instructions.

PLAINTIFFS appeal from judgment for defendant. Reported 148 S. W. 833.

Opinion by MOURSUND, J.:

Appellants Wm. Small and Margaret Small sued appellee, San Antonio Traction Company, to recover damages for personal injuries alleged to have been sustained by said Margaret Small, through the negligence of said company and its employees, while alighting from a street car of said company. Plaintiffs alleged that the car was brought to a stop for the purpose of permitting said Margaret Small to alight, that it did not stop long enough to permit her to alight, but when she was in the act of alighting defendant's servants in charge of the car negligently caused or permitted it to suddenly move, lurch, and jerk, and by reason of this negligence said Margaret Small was thrown violently to the ground. The case was tried before a jury, which returned a verdict for the defendant, and judgment was entered accordingly, from which plaintiffs have appealed.

By their first assignment of error appellants complain because the court refused to permit the witness Dr. H. D. Barnitz to testify that a pregnant woman is by nature and instinct much more cautious in undertaking anything that involves the risk of any hurt to her person than is a woman who is not pregnant. Objection was made that the evidence was irrelevant and incompetent, that the witness was not qualified to give an opinion, that it was not a proper subject for expert testimony, and was immaterial. Mrs. Small had testified, "At the time I had the fall I was pregnant;" and again: "I was advanced about two months in pregnancy. I expected that I was pregnant when I was on the car." She and her daughter testified that the car had stopped, and as she was alighting the car gave a lurch or forward motion of some kind, and she fell to the ground. Six other witnesses testified that the car was still in motion when Mrs. Small started to get off; their testimony varying only in regard to the distance the car moved after she fell. The witness Perez testified, on direct-examination: "The car did not go over a foot after she stepped off, because she fell on her back." And on cross-examination he said: "The car did not move over three feet after Mrs. Small stepped off." Upon being recalled, he testified: "The car went but three feet after the lady fell on her back." He admitted that in a statement signed by him he gave the distance as five or six feet. The witness Gothard was conductor of the car from which Mrs. Small stepped. He testified the car moved eight or ten feet after she jumped off, but admitted that in a statement made shortly after the occurrence he gave the distance as less than a foot. Other witnesses stated the distance the car moved was from six feet to as much as a car's length.

Appellants contend there is a very narrow margin between the evidence of Perez and Gothard, and that of Mrs. Small and her daughter, who testified

the car had actually stopped before she fell, and that therefore the slightest additional evidence was calculated to turn the scale; that consequently the evidence relating to the instinctive caution of pregnant women should have been admitted as tending to show that Mrs. Small would not have undertaken to alight while the car was in motion — in other words, to show that it was unlikely or improbable that Mrs. Small would undertake to alight while the car was in motion. Appellants' counsel admit that they have found no decision directly in point upon this proposition, but contend ably and ingeniously that instinctive caution is very similar to habitual caution; that habitual caution has been held admissible, and therefore evidence tending to show instinctive caution should be admitted.

Evidence that either the plaintiff or the defendant was ordinarily of either careful or careless habits is generally inadmissible. Elliot on Evidence, Vol. 1, § 186. The weight of authority is against the admission of such evidence on the question of contributory negligence. Cyc., Vol. 29, p. 619. Exceptions to the rule have sometimes been made when no witness was present, and the exact manner in which the accident happened is not shown. Note 67, Cyc. Vol. 29, p. 619.

When the question is as to how a person conducted himself at a particular time, it is not competent to show that prior thereto he was generally careless or the reverse. Gillett on Indirect and Collateral Evidence, § 68. The reasons for the exclusion of such evidence are that it is only of slight value to establish any fact in issue, and it is calculated to lead the jury into collateral inquiry which will confuse and obscure real issues.

Our Supreme Court, in the case of *M. K. & T. Ry. Co. v. Johnson*, 92 Tex. 382, 383, 48 S. W. 569, says: "We think the rule is well settled that, when the question is whether or not a person has been negligent in doing or in failure to do a particular act, evidence is not admissible to show that he has been guilty of a similar act of negligence or even habitually negligent upon a similar occasion. * * * In *Tenney v. Tuttle*, above cited [1 Allen (Mass.) 185], the court says: 'When the precise act or omission of a defendant is proved, the question of whether it is actionable negligence is to be decided by the character of that act or omission, and not by the character for care and caution that the defendant may sustain.' The principle has been frequently recognized and sometimes applied in this court. *Railway v. Evansich*, 61 Tex. 3; *Railway v. Scott*, 68 Tex. 694 [5 S. W. 501]; *Railway v. Rowland*, 82 Tex. 166 [18 S. W. 96]; *Cunningham v. Railway*, 88 Tex. 534 [31 S. W. 629]. * * * The principle, as applicable to this class of cases generally, is that when the habit of care or negligence, as the case may be, has no connection with the specific facts in evidence bearing upon the question of care, evidence of such care or habit is without sufficient probative force to effect the determination of the question."

In the case of *Mayton v. Sonnefeld*, 48 S. W. 609, the court held that it was not competent to prove the plaintiff was a careless, reckless man, that he had been careless upon some other occasion, for the purpose of establishing contributory negligence on his part.

In the case of *T. & P. Ry. Co. v. Frank*, 40 Tex. Civ. App. 86, 88 S. W. 383, the Court of Civil Appeals of the Third District said: "No error was committed in refusing to permit the engineer and fireman who were running the

train on the occasion in question to testify that it was their habit or custom to ring the bell and blow the whistle at the place where the accident occurred."

We think it is clear, from the authorities referred to, that plaintiffs could not have been permitted to strengthen the testimony of Mrs. Small by evidence that she was habitually very cautious in anything that involved the risk of any hurt to her person. Yet this testimony, we think, would have a greater probative force than the testimony that pregnant women, by nature and instinct, are very much more cautious than those not pregnant, because the latter evidence would only, at most, show that Mrs. Small at this time was naturally much more cautious than at a time when not pregnant, but leaves the matter uncertain as to whether or not under normal circumstances she was naturally reckless or prudent, and to what extent her habits of caution have been strengthened by her condition. The evidence excluded does not purport to prove that pregnancy will make any woman very cautious with reference to her physical welfare, but only that it will make her much more cautious than she would have been if not pregnant. If the evidence had shown that a woman, by reason of such condition, became, by nature and instinct, a very cautious person with reference to her physical welfare, it would not have been of any greater probative force than direct evidence that she was habitually very cautious in all such matters. We are of the opinion that this evidence was correctly excluded.

Nor can we agree that the evidence, if admitted, would have been calculated to change the result in the least. Mrs. Small was permitted, without objection, to testify: "I am always exceedingly careful about getting on and off cars, because we had an accident before." The evidence of a number of disinterested witnesses is to the effect that she was considerably incensed and excited at the time of her fall because the car had not stopped at the place she wanted to stop, and that she refused to be restrained. This was contradicted by her and her daughter. Not a witness testified to any lurch or sudden movement of the car, except Mrs. Small and her daughter, and while the evidence of the witnesses varied on estimates of the distance the car moved after she fell, yet all who saw the occurrence, except her daughter, are positive the car had not stopped when she stepped off or prior thereto, but that it was slowing up at the time. This being the condition of the evidence, we cannot agree that there was a narrow margin of conflict, and that the evidence excluded would have probably led the jury to accept the version of Mrs. Small and her daughter.

Appellants' second assignment of error complains of the following paragraph of the charge: "If you do not find from a preponderance of the evidence that the car stopped, and was started up or lurched while Mrs. Small was in the act of alighting, but believe from the evidence that she stepped off the car while it was in motion and before it stopped, you will return a verdict for the defendant." The first proposition, in substance, is: That it was wholly immaterial to the maintenance of plaintiffs' cause of action whether the car stopped or not before being suddenly jerked or moved while Mrs. Small was alighting therefrom; hence the charge made the case turn upon an immaterial question and was erroneous. The second is as follows: "The questions whether the car stopped and was started up or lurched while Mrs. Small was in the act of alighting, and whether she stepped from the

car while it was in motion and before it stopped, were material only upon the issue of contributory negligence." The third, in substance, is that it would not have been contributory negligence *per se* for Mrs. Small to step from the car while moving slowly, and that the charge required a verdict for defendant regardless of whether she was guilty of contributory negligence. The fourth, in substance, is the charge was misleading in that, even though the jury might have believed the fall was caused by a sudden jerk or motion, they might have understood such motion to be included in the motion of the car spoken of in said charge which, if found under said charge, would require a verdict for defendant. The fifth, in substance, is that the charge unduly emphasized that the burden of proof and the preponderance of the evidence devolved upon plaintiffs.

Under the first two propositions appellants contend that the allegation in their petition to the effect that the car was standing still when Mrs. Small sought to alight was merely by way of inducement, and that plaintiff could make out a case, even if the car had not stopped, by showing that it was jerked or suddenly moved as she was alighting. In other words, while no witness testified to a jerk or sudden movement of the car except Mrs. Small and her daughter, who swore the same took place after the car stopped, yet that the issue was in the case whether the car was jerked while still moving and while Mrs. Small was alighting; and this defensive charge precluded a recovery on such issue. If this theory is correct, the court could have submitted such issue in his charge, but had he done so, and the verdict have been against plaintiffs, we dare say their brief would have presented reasons why the court erred in submitting such issue. One would have been that it was calculated to create the impression upon the minds of the jury that the court thought the car did not stop before Mrs. Small sought to alight. Another would have been that there were no pleadings and no evidence to authorize its submission, and that it was calculated to confuse the jury. The decisions of the courts of this State are against appellants' contention. In the case of *El Paso Electric Ry. Co. v. Boer*, 108 S. W. 201, this court said: "The only ground of negligence alleged was that the car was standing still when plaintiff started to alight therefrom, and that while in the act of alighting it was suddenly started forward without warning, and he was thereby caused to fall on the ground and was injured. This allegation would not admit of proof or authorize the submission as an issue that the car was in motion when plaintiff started to alight from it and that its speed was suddenly increased." See, also, *Haralson v. San Antonio Traction Co.*, 53 Tex. Civ. App. 253, 115 S. W. 876; *Railway v. Johnson*, 100 Tex. 238, 97 S. W. 1039; *Dallas Oil & Refining Co. v. Carter*, 134 S. W. 418.

The third proposition cannot be sustained, because not applicable to the facts of this case. If Mrs. Small fell by reason of alighting from a moving car, then she could not have been injured in the manner alleged and testified to by her, and should not recover. For discussion of this question, see *Haralson v. San Antonio Traction Company*, *supra*.

We do not think the fourth proposition shows reversible error. The contention is that the jury would construe the word "motion" to mean the jerk or motion testified to by Mrs. Small as having taken place after the car stopped, and would therefore decide that if the jerk or motion was made, and

Mrs. Small stepped off just at the time it was made, she could not recover. We think the jury would naturally understand the word to refer to the motion of the car while it was slowing down, and not to the motion when the car was suddenly moved, if they should find it was suddenly moved. To construe the charge as contended for by appellants would require the ignoring of the remainder of the charge, which was very specific, and we think appellants' construction would never occur to a jury. We therefore hold that the charge was not misleading.

The charge did not give undue emphasis to the burden of proof and the matter of preponderance of the evidence. Before applying the law to the facts, the court gave a general charge on burden of proof, credibility of witnesses, and that the jury must receive the law from the court. In applying the law the words were used throughout, "if you believe from the evidence," until the part now complained of is reached, wherein the jury is instructed that if they do not believe from a preponderance of the evidence that the car stopped, etc. The matter of burden of proof is mentioned only once, and the matter of preponderance of evidence twice, so far as we can find, the first time in a general charge, the second in applying the law to the facts in a defensive charge.

We are of the opinion that the charge of the court, taken as a whole, fairly submitted the issues, and that the objections made by appellants should be overruled.

We find no error in the record, and the judgment is affirmed.

MAYNE v. NASSAU ELECTRIC RAILROAD CO.

(New York — Appellate Division, Second Department.)

Abutting Owner; Suit by, to Enjoin Operation of Street Railway.

DEFENDANT appeals from judgment for plaintiff. Reported 136 N. Y. Supp. 375.

Opinion PER CURIAM:

We think that this case was well decided at Special Term, and that in view of the opinion of PUTNAM, J., who presided, any extended discussion is unnecessary. It may be quite true that the plaintiff as a mere abutter had no cause of action when the railroad was laid down and when its working began, and we may concede safely that the value of the fee of the street in front of that abutter's premises might have been nominal to the separate owner thereof, and yet it would not follow that when the abutter had acquired that fee and thereupon presented himself to a court of equity as an abutter who owned that fee, he could not recover substantial damages, for the court was not bound to consider that the value of the said fee to the former separate owner determined the value thereof to the abutter. CULLEN, Ch. J., in *Rasch v. Nassau Electric Railroad Co.*, 198 N. Y. 389, says: "In that discussion we did say that the owner of the fee was entitled to no more than nominal damages. But the ownership of a fee of a street disconnected with adjoining

land and subject to the easements of abutting owners is a very different thing from the fee of a street in connection with other property which abuts on the street. It is just this distinction which is pointed out by Judge GRAY in *City of Buffalo v. Pratt*, 131 N. Y. 293, where he said: 'It is unquestionable, however, that the ownership of the fee of the land in a street has a substantial value to the abutting property holder, in the degree of control it gives to him over the uses to which the street may be put. It vests him with the right to defend against and to enjoin a use of, or an encroachment upon the street, under legislative or municipal authority, for purposes inconsistent with those uses to which streets should be, or have been ordinarily subjected, unless just compensation is provided to be made.' (P. 299.)" And the question was as to the position of the owner at the time he came into the equity court. *Koehler v. N. Y. El. R. R.*, 169 N. Y. 218. See, too, *Stevens v. N. Y. El. R. R. Co.*, 130 N. Y. 95; *Chanler v. N. Y. El. R. R. Co.*, 34 App. Div. 305. None of the rulings upon the evidence is fatal, for the old chancery rule applies in this case, that a ruling to be effective must substantially affect the judgment. *De St. Laurent v. Slater*, 23 App. Div. 70; *Townsend v. Bell*, 167 N. Y. 462, 470; *Young v. Valentine*, 177 id. 347, 358.

The judgment is affirmed, with costs.

JENKS, P. J., BURR, THOMAS, CARR and WOODWARD, JJ., concurred.

Judgment affirmed, with costs.

HOLLON v. BROOKLYN HEIGHTS R. R. CO.

(New York — Appellate Division, Second Department.)

Pedestrian Struck by Car at Crossing; Evidence; Contributory Negligence; Failure to Call Witness.

DEFENDANT appeals from judgment for plaintiff. Reported 133 N. Y. Supp. 206.

Opinion by RICH, J.:

The plaintiff has recovered in an action against the defendant for injuries received in consequence of her being run over at a street crossing by one of defendant's cars.

August 17, 1908, at about nine P. M., plaintiff says that as she started to cross Fulton street, in the city of Brooklyn, she looked down the street and saw a car approaching about two hundred feet away. It was thirteen feet and eight inches from the curb to the first rail of defendant's track. She testified: "Then when I got near the first rail I looked again. The car was then about to the wine store." It was undoubtedly about seventy-five feet away. She noticed that the car was lighted, but did not observe its speed. She says: "I kept on and I got in the track going uptown, in the middle of the track, I looked again and the car was so near on me I tried to step back and I felt a blow, and that was all." The car was going fast, and if

her evidence is true she was not guilty of contributory negligence as matter of law in going upon the track.

The judgment must be reversed, however, because of the error of the justice presiding at the trial in refusing to instruct the jury that they might infer from the failure of the plaintiff to call her daughter as a witness that her testimony might be unfavorable to the plaintiff. The daughter was with the plaintiff at the time of the accident and was present in court during the trial. The motorman of the car had testified, and his testimony was corroborated by two witnesses, that he saw plaintiff and her daughter approaching the track and cut off his speed; that before reaching the track they stopped, whereupon he put the speed on again, and when the car was within ten or twelve feet of the crosswalk the plaintiff attempted to cross in front of the car; that her daughter took hold of her arm and tried to pull her back; that she was not on the track but was hit by the corner of the car. The question as to whether plaintiff stopped before reaching the track and whether she was upon the track when the car hit her were important questions of fact, and the testimony of the daughter upon this subject was not merely cumulative but substantive. The daughter possessed the knowledge which was important. She was under the control of plaintiff and the failure to call her is not explained.

The refusal to charge as requested was reversible error, and it follows that, upon this ground and without considering the other exceptions, the judgment and order must be reversed and a new trial ordered, costs to abide the event.

JENKS, P. J., BURR and WOODWARD, JJ., concurred; THOMAS, J., dissented.

Judgment and order reversed and new trial granted, costs to abide the event.

PFOHL v. INTERNATIONAL RAILWAY CO.

(New York — Supreme Court, Special Term.)

Abutting Owners; Right to Restrain Construction and Operation of Street Railway.

DEFENDANT moves to vacate temporary injunction. Reported 136 N. Y. Supp. 175.

Opinion by BROWN, J.:

The plaintiffs are the owners of lots 67 and 68 on the south side of Burnett road, the north bounds of the lots being the south line of the highway. The plaintiffs do not own to the center of the highway, they are owners of lots abutting on the highway. The plaintiffs claim that as such owners they have an easement and vested rights in the highway and that the operation of the street surface railway by the trolley system will irreparably injure this easement and vested right, for which they have no adequate remedy at law, and that they are entitled to restrain such operation of the street surface railway until compensation is paid them for such injury.

The defendant has a franchise for such occupation of the highway. The authorities relied upon by the plaintiff are *Falkner v. New York, W. S. & B. R. Co.*, 17 Abb. N. C. 279; *Story v. New York E. R. R. Co.*, 90 N. Y. 122; *Peck v. Schenectady R. Co.*, 170 id. 298.

In the *Falkner* case the plaintiff was an abutting owner, and the proposed railroad through the street was a steam railroad operated by locomotives; it was held that the occupation of the street by a steam railroad was inconsistent with the use of the street as a public highway. In the *Story* case the plaintiff owned to the center of the street, and it was held that the erection of columns and iron posts in front of plaintiff's premises upon which to construct and operate an elevated steam railway interfering with plaintiff's rights to air, light and access to the street, etc., was an infringement upon plaintiff's rights. In the *Peck* case plaintiff was the owner of the fee of the street subject to the public use thereof as a highway, and it was held that the operation of a street surface railroad by electric power imposed an additional burden upon the property rights of the owners of the fee, subject to the public easement for street purposes.

It is clearly the law that an abutting owner who has no title to the fee of a street cannot complain of the construction and operation of a street surface railway operated by horse or electric power through the street. As was said by Judge ANDREWS, in *Reining v. New York, L. & W. R. Co.*, 128 N. Y. 163, the distinction is made to rest on the location of the fee. When the abutting owner is also the owner of the fee of the highway the taking of such fee for street railroad purposes imposes an additional burden upon such ownership of the street. *Kennedy v. Mineola, H. & F. Traction Co.*, 77 App. Div. 484; *Reining v. New York, L. & W. R. R. Co.*, 128 N. Y. 157; *Peck v. Schenectady R. Co.*, 170 id. 298.

The temporary injunction must be vacated. The defendant's motion for judgment dismissing plaintiff's complaint on the pleadings must be granted.

Ordered accordingly.

LOGRE v. GALVESTON ELECTRIC CO.

(Texas — Court of Civil Appeals.)

Collision with Vehicle; Injuries to Horse and Wagon; Evidence; Discovered Peril.

PLAINTIFF brings error from judgment for defendant. Reported 146 S. W. 303.

Opinion by PLEASANTS, C. J.:

This suit was brought by plaintiff in error to recover the sum of \$165 damages for injury to a horse and wagon, the property of plaintiff, alleged to have been caused by the negligence of the defendant.

Defendant answered by general demurrer and general denial, and specially pleaded "that the loss to plaintiff in error, if any, was caused by the negligence and fault of the driver of the wagon to which said horse was attached at the time the collision occurred, in that he drove the wagon and horse in

front of the moving car without any care or precaution for his own safety or for the safety of said horse and wagon, and at an excessive and dangerous rate of speed; that said driver saw or should have seen the moving car before driving the horse and wagon in front of it, and thereby causing the collision; and that the driver was thereby negligent, which negligence of the driver was the proximate cause of any damage sustained by plaintiff in error." The trial in the justice court in which the suit was originally brought resulted in a judgment in favor of the plaintiff for the full amount claimed by him. Upon appeal and trial *de novo* in the County Court with a jury, a verdict and judgment were rendered in favor of defendant. The injury to the horse and wagon of which appellant complains was caused by collision with a street car which was being operated by defendant on its track in the city of Galveston. At the time of the collision, which occurred on October 12, 1907, the street car was going east on Broadway avenue in the city of Galveston, and the horse and wagon, which was driven by Louis Schembre, was going south on Tremont street, which crosses Broadway at right angles. The evidence sustains the finding that the driver of the wagon failed to use any care to discover the approach of the car before driving upon the railway track, and that the operators of the car gave the proper signals and used due care in crossing Tremont street, and the collision was not caused by any negligence on their part. These conclusions dispose of plaintiff's assignment of error complaining of the judgment on the ground that the verdict of the jury is not supported by the evidence.

We do not think the evidence raised the issue of discovered peril, and therefore the court properly refused the charge requested by plaintiff submitting that issue to the jury. The undisputed evidence shows that, as soon as the motorman discovered that the driver of the wagon would attempt to cross the track in front of the car, he used every means in his power to prevent the collision. No circumstances are shown by the evidence from which the motorman might reasonably have anticipated sooner than he did that the driver would not stop before reaching the track, but would whip up his horse and attempt to cross in front of the car, and it cannot be said from the evidence that the motorman failed to use proper care to prevent the injury as soon as he realized the danger. This case is easily distinguished from that of *Gehring v. Galveston Electric Co.*, 134 S. W. 288, in which this court held that the evidence was sufficient to sustain the finding that the operatives of the car realized the perilous position of the deceased, and, instead of using every means in their power to prevent striking him, negligently delayed using such means until too late to prevent the accident. In the case cited the evidence tended to show that the deceased was seen by the motorman in a perilous position apparently oblivious to the approach of the car and heedless of the warning given by the motorman, and under these circumstances it was held that the motorman could not wait until he was certain that the deceased would not get out of danger, but was required, as soon as he realized the probability that the deceased would not protect himself, to use every means in his power to prevent the injury. The evidence in this case does not call for the application of this rule.

The failure of the trial judge to charge the jury more fully as to the duty of the operatives of the car to use care in crossing the street, and to define

negligence on the part of said operatives as applied to the facts of this case, if it be conceded that the charge was deficient in this regard, not being affirmative error, cannot be complained of by the plaintiff because he did not request any further charge on these issues. We think the evidence raised the issue of whether the property injured was owned by the plaintiff, and the court did not err in submitting that issue to the jury. There is no merit in the assignment complaining of the charge on the ground that it is upon the weight of the evidence, in that it gives too much prominence to the defense of contributory negligence. That defense is only mentioned in the charge when the grounds for recovery by plaintiff are submitted to the jury, and this mention of the defense does not occur so often or in such manner as to have improperly influenced or misled the jury.

There was no error in refusing the testimony offered by the plaintiff which tended to contradict the testimony of one of defendant's witnesses, who was on the car at the time of the collision, as to where he got on the car. It was wholly immaterial to any issue in this case as to where the witness got on the car. From the statement in the bill of exceptions, it does not appear that the rejected testimony would have impeached or contradicted the statement of the defendant's witness, but, if such contradiction was shown, we do not think the evidence was of any value and its exclusion could not have injured plaintiff.

The letter written by plaintiff's attorney in which he refers to the property for injury to which this suit was brought as the property of Mr. Louis Schembre was admissible as a circumstance tending to show that plaintiff was not the owner of the property.

For the same purpose, the advertisement in the Galveston Tribune by Schembre was admissible. The probative force of this evidence was very slight, but we cannot say it was wholly immaterial and irrelevant.

We have considered all of the assignments of error presented in the brief of plaintiff, and we think no error is shown by any of them which would authorize a reversal of the judgment of the trial court.

It follows that the judgment should be affirmed, and it has been so ordered.

STRAUSS v. METROPOLITAN ST. RY. CO.

(Missouri — Kansas City Court of Appeals.)

Collision with Vehicle; Humanitarian Doctrine; Contributory Negligence; Negligence of Motorman.

DEFENDANT appeals from a judgment for plaintiff. Reported 148 S. W. 209.

Opinion by ELLISON, J.:

Plaintiff's action is for damages, alleged to have been caused by defendant running into his wagon with one of its street cars, throwing him out, and inflicting painful injury. He recovered judgment in the Circuit Court.

The action is founded on the humanitarian rule. Plaintiff was approach-

ing defendant's street car track with his horse and wagon. He was driving, and his son sitting beside him. The evidence tends to show that he could have seen the approaching car for as much as 200 feet from the crossing; and the motorman saw him, or could have, had he been looking, when he was 125 feet away, as the view was not obstructed. Plaintiff drove along, in a walk, without stopping or urging the horse. He testified that the last time he saw the car it was about 100 feet away, and he thought he had plenty of time to cross ahead of it. And upon that testimony defendant insists that if the plaintiff, knowing of the approach of the car, thought he had time to cross he cannot blame the motorman for the same error of judgment.

But can we declare, as a matter of law, that, if a plaintiff thinks he has time to cross a track before an approaching car can reach him, the motorman cannot be charged with negligence in failing to attempt to stop? That question is answered in the negative in *Heintz v. St. Louis Transit Co.*, 115 Mo. App. 667, 671, 92 S. W. 353. In that case Judge BLAND well says the fact that a motorman honestly believes with the plaintiff that the latter will be able to clear the track before the car reaches him will not excuse the company, as a matter of law; for the motorman knows the speed of his car and the distance from the crossing, while the other party, looking into the end of the approaching car, cannot gauge its speed with any such accuracy. The two persons are not on equal ground; and the mistake of the person attempting to cross the track will not, as a matter of law, justify the motorman in the same mistake.

We are cited to *Roensfeldt v. St. Louis & S. Ry.*, 180 Mo. 554, 568, 79 S. W. 706, as stating a different rule. We think it does not. It is said in that case, where there was no evidence to show that the motorman could have stopped the car, that what was reasonable judgment for the plaintiff would be reasonable judgment for the motorman. But in the case at bar it ~~was~~ shown that the motorman could have stopped this car within forty feet.

Nor is it true, as seems to be contended by defendant, that in this case, founded upon the humanitarian rule, plaintiff's prior contributory negligence in getting himself into a perilous position will relieve the defendant, whose servants saw him, or by ordinary care could have seen him, in that position in time, in the exercise of ordinary care, to have saved him by stopping the car. *White v. Railway*, 202 Mo. 539, 101 S. W. 14; *King v. Railway Co.*, 211 Mo. 1, 109 S. W. 671; *Ellis v. Met. St. Ry. Co.*, 234 Mo. 657, 138 S. W. 23; *Shipley v. Met. St. Ry. Co.*, 144 Mo. App. 7, 128 S. W. 768; *Williams v. El. Ry. Co.*, 149 Mo. App. 489, 131 S. W. 115.

The foregoing disposes of defendant's objection to plaintiff's instructions in submitting the case on the humanitarian rule and omitting any hypothesis of plaintiff's contributory negligence. Under the humanitarian rule, contributory negligence is admitted, and not in issue. *Johnson v. Railway Co.*, 203 Mo. 381, 101 S. W. 641; *O'Farrell v. Met. St. Ry. Co.*, 157 Mo. App. 618, 138 S. W. 693. Nor do we see any ground for stating the instruction to be in conflict with others.

Refused instruction No. 9 does not present the question decided in *Kinlen v. Railway Co.*, 216 Mo., loc. cit. 164, 115 S. W. 523. The instruction submits whether plaintiff knowingly drove across the track "in such close prox-

imity as to be struck," but does not submit that he drove across *knowing he would be struck*.*

We do not think the verdict excessive, and on the whole record see no reason for reversal. The judgment is therefore affirmed. All concur.

FULTS v. METROPOLITAN ST. RY. CO.

(Missouri — Kansas City Court of Appeals.)

Injury to Person Attempting to Board Moving Car; Invitation to Board Car; Starting Car with Jerk; Evidence; Instructions.

DEFENDANT appeals from judgment for plaintiff. Reported 148 S. W. 210.

Opinion by ELLISON, J.:

Plaintiff's action is for injuries received by him in attempting to board one of defendant's street cars in Kansas City, Kan. He recovered judgment in the trial court.

It appears that defendant's car had a vestibule entrance at each end, so that in going either way on its double tracks the outside entrance would be at the rear and the front entrance would open next to the other track. Plaintiff, a lad about fourteen years old, with his mother and two or three others, were at the corner of a street to take passage. As a car was approaching, plaintiff crossed over one track, walked between the tracks about a car length, so that, when the car should stop for the others to get on at the rear, it would throw the front entrance near him at his place between the tracks. He signaled the motorman, whom he knew, to stop, and in response thereto the car began to slow down, and as it got to him it was going very slow — about as fast as a walk — and the motorman said to him: "Get on, kid." He attempted to do so, and had gotten a handhold on the railing, one foot on the step and the other off the ground, when the car was suddenly started forward with a jerk, which threw him onto the street, one leg getting under the car wheel, crushing it so that it was afterwards amputated just below the knee.

Defendant's first objection is not supported by the evidence, as the testimony in plaintiff's behalf tends to show the facts to be. It claims that the undisputed evidence shows the car did not stop "at the corner where plaintiff attempted to board it," and that, therefore, there was no invitation to plaintiff. But it appeared that plaintiff had frequently got on in the same way with the consent of the persons in charge of the car, and that in this instance the motorman asked him to get on.

The second point relates to the admission of evidence that a negro boy got on the car at the other end after it had slowed down. We do not see any objection to the evidence. The negro boy was with those who were intending to get on at the rear vestibule. The witness stated that as the car was coming to a stop a negro boy and two other parties were in front of her, and that the negro boy got on, but before the others could get on the car started

* Portion of opinion not material to street railway law omitted.

up with a jerk. The tendency of this was to show the truth of plaintiff's theory of the case.

The only question presenting any substantial objection to the judgment relates to two of plaintiff's instructions. They submit to the jury whether the car was moving at such slow rate of speed that a person of ordinary prudence and caution would have attempted to get on. In doing this, the instructions read that, if it be found from the evidence that the car was moving so slowly as to "permit" a person of ordinary prudence, etc., to get on. The idea advanced in criticism is that a condition might be such as that it would permit a person of prudence to do it, and yet not be such a condition as that a prudent person *would* do it. We think it unfortunate that departures from the well-known and continuously used paths of direction to juries on this head should be made. At the same time we cannot say, in view of *all the instructions* as to the care required of plaintiff, that the jury was misled, and we therefore feel disinclined to disturb the judgment. We find that the same word was used in an instruction approved in *Spencer v. Transit Co.*, 111 Mo. App. 653, 663, 86 S. W. 593, though that part of it is not discussed.

We think the court properly refused defendant's instruction No. 4. The petition states facts making the inference plain that the motorman saw plaintiff in getting on the car. The criticism of the court's action is not well made.

On the whole record we see no cause justifying our interference, and the judgment is therefore affirmed. All concur.

DROUILLARD v. DETROIT UNITED RY.

(Michigan — Supreme Court.)

Injuries to Conductor Through Sudden Movement of Car; Contributory Negligence; Failure to Ascertain Presence of Power Before Placing Trolley on the Wire.

PLAINTIFF brings error from judgment for defendant. Reported 136 N. W. 373.

Opinion by MOORE, C. J.:

In September, 1908, while in the employ of defendant as a conductor, plaintiff was directed to take from the Warren avenue car house a car. He asked the car house foreman which car he should take out for his run. The foreman told him to take the car on track No. 7. After plaintiff received this direction he went to track No. 7, untied the trolley pole which was tied down at the front end of the car, and turned the trolley around to the back end of the car. The car which plaintiff was to take out, and the one immediately behind it, were about five feet apart. He stepped on the fender of the rear car and adjusted the trolley to the wire. The instant the trolley touched the wire the car jumped back and injured the left leg of the plaintiff between the hip and knee. Suit was brought to recover damages for these injuries. No witnesses were sworn on the part of defendant. The trial judge directed a verdict in favor of the defendant. The case is brought here by writ of error.

It was the claim of the plaintiff, and he gave evidence tending to show, that

the car house foreman was invested with complete control of the car house, car yard, and the cars therein placed from time to time; that he was invested with authority to order and direct conductors what cars to take out, and when to take them; that it was his duty, when he directed a conductor to take out a car, to see to it that the car was in a safe and proper condition to be taken out, and that the apparatus in the motor end of the car was so adjusted that the current of electricity brought to said car by contact of the trolley with the overhead wire above the car would not set the car in motion while the conductor was adjusting the trolley to the overhead wire preparatory to taking the car out of the yard. We quote from the brief: "Plaintiff was entitled to go to the jury upon the question as to whether or not defendant was negligent in ordering plaintiff to take out the car in its then condition without previous inspection. * * * (1) Upon the theory that the car house foreman was a vice-principal and represented the master in this respect. (2) Upon the ground that the matter of the safety of the materials and appliances could not be delegated by the principal to another so as to relieve the master of any defect or want of safety therein."

Before the claims can be properly understood it is necessary to refer further to the record. The plaintiff had been in the employ of the defendant for a series of years as conductor. He was furnished with a copy of the rules and was familiar with them. Among them were the following:

"Rule 144. Whether going ahead or backing, do not attempt to place the trolley on the wire until car has been brought to a standstill. A trolley wheel should never be taken off or put on the trolley wire while the controller is turned on."

"Rule 148. You are required to exercise the greatest precaution when backing cars, to prevent injury to persons or damage to the car or overhead wires, and under no circumstances must the car be moved backward until the trolley rope has been untied and the conductor is on the rear platform holding it in position to promptly signal to avoid collision."

"Rule 180. After running the car into the car house or yard, motorman must throw off the overhead switch, move reverse lever to the off position and release brake. Conductor will remove trolley from the wire and place it in the trough, or tie it clear of the wire; also see that all doors and windows are closed, and that fires are properly regulated before leaving the car."

The record shows that plaintiff did not wait for the appearance of the motorman before throwing the trolley against the live wire. It discloses that the switch in the front end of the car which is operated by the motorman for the purpose of controlling the movements of the car could be seen from the ground. The conductor made no effort to inform himself of whether the overhead switch had been thrown off and the reverse lever had been put in the off position. The conductor knew that, if these things had not been done, the moment the trolley was put in place the car would do just what it did do. Without waiting for the motorman, and without informing himself whether it was safe to put the trolley against the wire, and in violation of the instructions contained in the rules, he put the trolley wheel against the wire, and the accident happened. Under these circumstances, we think it must be held that he was guilty of such contributory negligence as to preclude recovery.

Judgment is affirmed.

FLYNN v. PITTSBURGH RYS. CO.

(Pennsylvania — Supreme Court.)

Injuries to Pedestrian Crossing Track; When Guilty of Contributory Negligence as Matter of Law; Effect of Nearsightedness of Pedestrian.

DEFENDANT appeals from judgment for plaintiff. Reported 83 Atl. 207.

Opinion by BROWN, J.:

The contributory negligence of the plaintiff below was so clear that the defendant's motion for a nonsuit should have prevailed, or, at the close of the testimony, a verdict ought to have been directed in its favor. After leaving a street car on California avenue, in the city of Allegheny, the appellee, with several others, walked down an alley to Beaver avenue, for the purpose of boarding a car on the south side of that avenue. There were two tracks of the defendant company upon it, and to reach the one on the south side it was necessary to cross over the one on the north. The testimony of the appellee is that after she had passed out of the alley she stepped down from the curb of the pavement, and looked and listened for an approaching car, and, having neither seen nor heard one, passed over the space between the curb and first track — less than eight feet in width — continuing to look and listen for a car. The day was clear and bright, and there was nothing to obstruct a view of the track for more than a mile in the direction from which the car came that struck her, for it was straight and level for that distance. She was struck just as her feet were upon the track, though the coming of the car could have been seen for the distance stated. That she was struck the instant she got upon the track is not to be questioned. William Hines, a witness to the accident, who was called by the plaintiff, testified as follows: "Q. Where was the car when she stepped on the track? A. The car was very near on top of her when she stepped on the track. * * * Q. And the car was on top of her when she stepped on the first rail, wasn't it? A. Yes, sir. Q. And she practically stepped in front of that moving car, didn't she? A. Yes, sir." Her own daughter, Mrs. Lillian Mulroy, who witnessed the collision, stated that as soon as her mother stepped across the first rail the car struck her about the center of the track. In *Crooks v. Pittsburgh Railways Company*, 216 Pa. 590, 66 Atl. 142, we said: "Where a foot passenger walks or steps directly in front of an approaching car, and is struck at the instant he sets his foot between the rails, there is but one inference which can reasonably be drawn from that fact, and that is the inference of contributory negligence. * * * The testimony is undisputed as to the manner in which this most unfortunate accident occurred. As we have seen, one step, or at the most two, carried the deceased from a point outside the line of the track into collision with the car. It must have occurred in less than a second of time. The facts speak for themselves. The action of the deceased can only be characterized as contributory negligence." And so here the act of the appellee in stepping on the track when the car which struck her was but a few feet from her, and which she must have seen and heard if she had been looking and listening, must be regarded as

contributory negligence, barring her right to recover, even if the defendant company was negligent.

But it is urged that the appellee ought not to be adjudged guilty of contributory negligence as a matter of law, for two reasons: First, she was nearsighted; and, second, as there was a safety stop a few feet from the alley, in the direction from which the car came, she had a right to presume it would stop there. These two circumstances were not sufficient to send to the jury the question of her contributory negligence. Though nearsighted, she admitted that she could see, for she says she looked to see whether a car was coming, and, even when protesting her nearsightedness, she again admitted that she could see a moving object across the street from her. If she had looked when she was about to put her foot on the track she would have seen the car, which was then nearer to her than the width of the street. If she was nearsighted there was the greater reason for caution on her part in crossing the street. Her nearsightedness, instead of relieving her from the duty of ordinary care, imposed upon her the duty of greater precaution to avoid injury. *Central Railroad Company of New Jersey v. Feller*, 84 Pa. 226; *Mark's Administrator v. Petersburg Railroad Co.*, 88 Va. 1, 13 S. E. 299; *McKinney v. Chicago & Northwestern Railway Co.*, 87 Wis. 282, 58 N. W. 386. "Those who are deficient in any one of their senses must all the more diligently use the others. Thus a deaf man should look up and down the track even more closely than might be necessary if he could hear well; and one whose eyesight is defective ought to listen all the more carefully for trains." *Shearman & Redfield on the Law of Negligence* (5th Ed.), § 481. If the appellee had looked before she stepped upon the track she would have known that the car had not stopped at the safety stop. The learned trial judge correctly instructed the jury that she could not escape the charge of contributory negligence by reason of being nearsighted nor relieve herself of that charge under a belief that the car would stop at the safety stop; but he should have gone further, and, in view of her clear contributory negligence, to which we have referred, affirmed defendant's point.

The first assignment is sustained, and the judgment reversed.

BREEN v. BOSTON ELEVATED RY. CO.

(Massachusetts — Supreme Judicial Court.)

Death of Child Struck by Car While Crossing Street; Evidence; Exercise of Care by Child; Negligence of Motorman; Questions for Jury.

Opinion by MORTON, J.:

By its argument the defendant in effect concedes, and rightly, we think, that in view of the age, intelligence and experience of the child, she could properly be sent unattended on errands that would take her into and across the street. But it contends that, on the evidence, she was not, as matter of law, in the exercise of the care required of a child of her age and experience. We think that that was a question for the jury.

The accident happened about 5:30 P. M., August 7, 1908. The afternoon was bright and clear. There was evidence tending to show that the child stood on the curbstone and looked up and down the street "to take," as one witness testified she supposed, "precaution;" that while crossing she looked up the street again, that being the direction from which the car came; that when she was about six feet from the track the car was from four to five car lengths away, a distance we assume of 120 to 150 feet; and that when she was struck she was on the track and nearer the further rail than the rail that she first crossed. There was evidence, which bore both upon her due care and the negligence of the defendant, that tended to show that no gong was sounded, that the car was coming fast — twenty miles an hour one witness testified — that as bearing on the speed of the car it ran after the accident about 100 feet before the motorman could stop it, and that the street was straight and there was nothing to obstruct the view of the motorman. There were inconsistencies and contradictions in the evidence, but those were matters for the jury to deal with. In almost any view of the evidence it is plain, we think, that the child attempted to exercise some care in crossing the street. Cases like *Murphy v. Boston Elevated Ry.*, 188 Mass. 8, 73 N. E. 1018, where it was held that no care was shown, do not therefore apply. Whether the care and judgment that were exercised were such as naturally might be expected of such a child, and, as bearing upon that, to what extent, if any, she might rely upon the motorman's seeing her and slackening his speed and so enabling her to cross in safety, were matters which we think rendered the question of due care, as already observed, one for the jury. See *McDermott v. Boston Elevated Ry.*, 184 Mass. 126, 68 N. E. 34, 100 Am. St. Rep. 548; *Purcell v. Boston Elevated Ry.*, 211 Mass. 79, 97 N. E. 626; *Lunderkin v. Boston Elevated Railway*, 211 Mass. 144, 97 N. E. 743; *O'Toole v. Boston Elevated Ry.*, 98 N. E. 510.

The defendant has not argued that there was no evidence of negligence on the part of the motorman, and we think it plain, from the matters already referred to relating to the speed of the car and his failure to slacken it and his unobstructed view, to say nothing of his alleged failure to sound the gong or give any warning, that there was such evidence.

In accordance with the terms of the report the entry will be: Case to stand for trial on the merits.

So ordered.

O'TOOLE v. BOSTON ELEVATED RY. CO.

(Massachusetts — Supreme Judicial Court.)

Injuries to Pedestrian at Street Crossing; Evidence; Contributory Negligence; Question for Jury.

PLAINTIFF appeals from judgment for defendant. Reported 98 N. E. 510.

Opinion by SHELDON, J.:

Taking as we must that view of the evidence which is most favorable to the plaintiff, it could be found that before starting to cross the street he looked in each direction and saw the car that afterwards struck him coming towards

him upon the further track. The car was then about 300 feet distant from the crosswalk by which he undertook to cross the street. He formed the opinion that he had sufficient time to pass, and attempted to do so, walking not very rapidly, at less than three miles an hour, without paying further attention to the car. The street was unobstructed. He was struck by the car and injured.

Upon these facts the question of his due care was for the jury to determine. It was not manifestly careless for him to presume that a car 300 feet away, from which he was in plain sight, would run so rapidly as to hit him in crossing a street about fifty feet wide, as was indicated by the plan in evidence. The case comes within the rule of *Lunderkin v. Boston Elevated Ry.*, 211 Mass. 144, 97 N. E. 743 (Suffolk, March 1, 1912); *Mullen v. Boston Elevated Ry.*, 209 Mass. 79, 95 N. E. 391; *Albee v. Boston Elevated Ry.*, 209 Mass. 6, 95 N. E. 110; *Hunt v. Old Colony Street Ry.*, 206 Mass. 11, 91 N. E. 883, and *Jeddey v. Boston & Northern Street Ry.*, 198 Mass. 232, 84 N. E. 316. The circumstances differ from those which appeared in the decisions relied on by the defendant. In *Holian v. Boston Elevated St. Ry.*, 194 Mass. 74, 80 N. E. 1, 11 L. R. A. (N. S.) 166, the car which hit the plaintiff was very much nearer to her when she started to cross the street, and she stepped in front of the car. In *Hall v. West End Street Ry.*, 168 Mass. 461, 47 N. E. 124, the plaintiff, who was very deaf, looked neither to the right nor the left and did not see the car that struck him, although it was in plain sight for a distance of three or four hundred feet.

There was evidence of negligence of the defendant's motorman, which might have caused the injury. Indeed there has been no argument to the contrary.

New trial ordered.

KOUYOUMJIAN v. BOSTON ELEVATED RY. CO.

(Massachusetts — Supreme Judicial Court.)

Injuries to Pedestrian Crossing Street; Failure to Look and Listen.

PLAINTIFF excepts to verdict for defendant. Reported 98 N. W. 585.

Opinion by BRALEY, J.:

It is stated in the exceptions that the parties agreed that if, in the first case, the plaintiff was not entitled to recover the actions cannot be maintained, and the question is, whether at the time of the injury there was any evidence for the jury of the due care of Helen Kouyoumjian. Accompanied by her daughter and two grandchildren of tender years, the plaintiff stood on the sidewalk, in the forenoon of a clear day, where for a substantial distance she had a full and unobstructed view of the defendant's tracks. The group intended to pass over the crosswalk to the other side of the street, and having seen, as she testified, only an outward bound car approaching, the plaintiff waited until it stopped just beyond the crosswalk. While the car was at rest the plaintiff, leading one of the grandchildren by the hand, and followed by her daughter with the other grandchild, started to go over the crosswalk. The

inward tracks where cars might be expected to pass at frequent intervals was before her, and she must have been aware that her view of a coming car would be obstructed to some extent by the stationary car. It appears from her testimony that, after leaving the sidewalk, and with nothing to distract her attention, or to interfere with her freedom of movement, she proceeded on her way, without again looking for approaching cars, and from the uncontradicted evidence of her daughter, that seeing the oncoming car as her mother came to the inward track she called to her "don't go." But in disregard of the dictates of ordinary prudence, and in despite of the warning, she seems to have taken no thought whatever for her own safety, and stepped upon the track, when almost immediately she was struck and injured by an in-bound car. The plaintiff's conduct under these conditions precludes recovery, and the verdicts for the defendant having been rightly ordered, her exceptions must be overruled. *Haynes v. Boston Elevated Railway*, 204 Mass. 249, 90 N. E. 419; *Kennedy v. Worcester Consolidated Street Railway*, 210 Mass. 132, 96 N. E. 78. So ordered.

CONETON v. OLD COLONY ST. RY. CO.

(Massachusetts — Supreme Judicial Court.)

Injuries to Passenger Alighting from Street Car; Sudden Starting of Car; Lurch; Negligence; Evidence.

PLAINTIFF brings exceptions from verdict for plaintiff. Reported 98 N. E. 602.

Opinion by MORTON, J.:

This is an action of tort to recover for injuries sustained by the plaintiff while alighting from one of the defendant's cars at or near the division line between Quincy and Braintree. At the close of the plaintiff's evidence the presiding judge directed a verdict for the defendant. The case comes here on the plaintiff's exceptions to the ruling thus made, and to the exclusion of certain evidence.

The accident happened on August 19, 1904, between 8 and 8:30 in the evening. The place where the plaintiff attempted to alight was on a switch or turnout near a signal box. It was the duty of the conductor to throw the signal, and the car came to a stop on the turnout to enable him to do so, and he left the car for that purpose. While the car was stopped and the conductor was at the signal box the plaintiff attempted to alight. She gave no notice to the conductor or the motorman that she wanted to get off the car at that place, and there was no evidence that either one knew or had reason to know of her intention or desire to alight. As she was getting off the motorman started up the car, and she was thrown to the ground, receiving the injuries complained of. The line between Quincy and Braintree was a fare limit. The turnout was near the line, and there was evidence that passengers got on and off the cars at that point. There was no white post there to indicate, if that is material, that it was a regular stopping place. The plaintiff offered to show that conductors had been in the habit of calling out and announcing the limit of the car fare, and that people had been accustomed to leave the car at

that place where it stopped when the accident occurred. The court excluded the evidence thus offered and the plaintiff duly excepted. There was no evidence tending to show that any such announcement had been made at the time of the accident. But, as has been already stated, it appeared from other testimony in the case that passengers got on and off the car at the place where the accident occurred, and no harm was therefore done by the exclusion of the evidence that people were accustomed to leave the car at that place.

It is plain, we think, that there was no evidence of negligence on the part of the conductor. He did not know and had no reason to know that the plaintiff desired to get off the car, and if he did he gave no signal to start the car and did not in any way cause it to be started or contribute to the accident. Neither do we think that there was any evidence of negligence on the part of the motorman. He likewise did not know and had no reason to know when he started the car that the plaintiff was attempting to alight, or that she wished to alight. Although, as the plaintiff testified, the place was a stopping place, it was a stopping place of such a nature that those in charge of the car cannot be held to be to blame for starting the car while a passenger was alighting, in the absence of any signal from the passenger that he or she wished to alight or of any knowledge or reason to know that the passenger was attempting to alight or wished to alight. *Spaulding v. Quincy & Boston Street Railway*, 184 Mass. 470, 69 N. E. 217; *Oddy v. West End Street Railway*, 178 Mass. 341, 59 N. E. 1026, 86 Am. St. Rep. 482. If neither the conductor nor the motorman was negligent in starting the car, the fact, if it was a fact, that it started with a "lurch" or "gave a lurch," as the plaintiff testified, would not help the plaintiff. The manner in which the car started could be material only in case the circumstances were such as to show that the conductor or motorman knew or had reason to know that she was attempting to alight or desired to alight and owed a duty to her not to injure her by an improper starting of the car.

Evidence that it was the custom or habit of conductors to announce or call the limit of the car fare was immaterial. There was, as already observed, no evidence of any such announcement or call on the evening in question, and it appeared independently of such evidence that passengers got on and off at the place where the car had stopped when the accident occurred.

Exceptions overruled.

GEIGER v. PITTSBURGH RYS. CO.

(Pennsylvania — Supreme Court.)

Person Attempting to Board Car from Wrong Side Struck and Killed by Another Car; Such Person Not a Passenger; Instructions.

DEFENDANT appeals from judgment for plaintiff. Reported 83 Atl. 367.

The circumstances of the accident are stated in the opinion of the Supreme Court.

The defendant presented the following points:

"Third. A person attempting to board a car by climbing over the guard rail on the blind side of an open car is not a passenger, and the mere fact that

he gets into the body of the car in safety does not make him a passenger." Answer: "Refused."

"Fourth. The deceased, Michael Geiger, in attempting to board an open summer car on the blind side, placed himself in a dangerous position, and was guilty of contributory negligence; therefore the plaintiff in this case is not entitled to recover." Answer: "This point is affirmed, if you find that this accident arose from the facts that this point will cover, namely: That this man placed himself in a dangerous position, where he ought not to have placed himself, and where he took the risk; and, if he lost his life there, that then he was guilty of contributory negligence and she could not recover in this case."

The court charged in part as follows: "And if you arrive at the conclusion from the weight of the evidence that this Michael Geiger was a passenger or an intending passenger, and did not go to that front platform for the purpose of renewing this altercation, then there could be a recovery in this case. And then you come to the question of damages."

Opinion by POTTER, J.:

This was an action of trespass brought by Adam Geiger and Mary Geiger, his wife, against the defendant company, to recover damages for the death of their son, Michael Geiger. The latter was the driver of a beer wagon. On the evening of September 6, 1909, he stopped his wagon and two-horse team in front of a saloon on the corner of Twenty-seventh and Carson streets, Pittsburgh. Geiger went into the saloon, leaving the team standing between the curb and the street railway track. An open summer car came along, and, owing to the narrow space between the track and the curb, was unable to pass. Geiger was called out of the saloon, and, instead of promptly starting his team and clearing the way for the car, he engaged in an altercation with the men in charge of the car. He attempted to board the car, as appellant claims, for the purpose of assaulting the motorman; but counsel for appellee maintain that it was for the purpose of riding to the car barn, in order to make complaint against the motorman and conductor. Geiger was prevented from getting on the car at the side nearest the curb by the motorman of another car which had also been stopped, and he went around in front of the car, falling over the fender as he passed, and tried to board the car from the inner side. He got up on the running board and put one leg over the chain or bar that prevented access to the front platform on that side. The evidence indicates that while in this position he was struck by a car coming from the opposite direction on the other track, and so injured that he died in a short time. It was contended on the part of plaintiff that the motorman either struck or struck at Geiger while he was attempting to get upon the platform.

The trial judge refused binding instructions for the defendant, and submitted the case to the jury, who found a verdict for the plaintiff. The defendant has appealed, and in the fourth assignment of error counsel have alleged the inadequacy of the charge, in that the jury were instructed that if they found the decedent was a passenger or an intending passenger, and did not go to the front of the platform for the purpose of renewing the altercation, there could be a recovery in this case. This instruction to the jury gave no intimation whatever as to what was necessary under the circumstances to constitute Geiger an actual or intending passenger. It was also inadequate

in that it ignored the question of contributory negligence, and permitted the jury to infer that the case might turn entirely on the question of whether Geiger was or was not a passenger or intending passenger at that time. This error is repeated and emphasized near the conclusion of the charge, where the court says: "So that, as the court has said to you, the first question for you to determine in this case is whether this Michael Geiger was ever a passenger upon that car or an intending passenger. If he was not, then there can be no recovery in this case."

It is very difficult, under the evidence in this case, to reconcile the verdict of the jury in favor of the plaintiff with any proper understanding by the jury of what was required to constitute a passenger. If Geiger was hurt while forcing his way into the car from the wrong side, and at an unusual and improper place, he should not have been properly regarded as a passenger at the time, and the jury should have been plainly so instructed. If Geiger was attempting to get upon the car by climbing over the guard rail from the wrong side, just before he collided with the other car, the mere fact that he had succeeded in getting his feet upon the running board, or even upon the body of the car, would not be sufficient to constitute him a passenger.

The learned trial judge also left it to the jury to say whether or not Geiger's injury resulted from his being struck by the motorman. It does not appear, however, that the jury was given any instructions as to the scope of the motorman's employment. If his alleged action in striking at Geiger was not within the line of his employment, or if it was in self-defense, in attempting to protect himself from the unprovoked assault of Geiger, the defendant company should not have been held responsible. The circumstances of the accident were most unusual. As disclosed by the evidence, the conduct of Geiger in attempting to mount the car at the time and place and in the manner in which he did was apparently without any valid reason or excuse. The case called for unusually complete and careful directions to the jury in order to insure a just verdict. We feel that the charge did not adequately cover the essential questions involved.

The fourth assignment of error is sustained, and the judgment is reversed, with a *venire facias de novo*.

CLEVELAND v. BOSTON ELEVATED RY. CO.

(Massachusetts — Supreme Judicial Court.)

Injury to Traveler by Falling into Excavation in Street; Duty of Street Railway Company to Guard Excavation in Street Dug by Contractor of Abutting Owner; Question for Jury; Negligence of Watchman.

PLAINTIFF brings exceptions from verdict for defendant. Reported 97 N. E. 623.

Opinion by DE COURCY, J.:

The plaintiff's due care is conceded. Upon all the evidence the negligence of the defendant was also a question for the jury. Primarily it was under no obligation to guard this trench in the street. *Leary v. Boston Elev. Ry. Co.*,

180 Mass. 203, 62 N. E. 1. But if the railway company entered into an arrangement with the city, or with the contractor who was responsible to the city, to guard the trench, the duty of protecting travelers from the danger of an unguarded trench became the defendant's business. *Phinney v. Boston Elevated Ry.*, 201 Mass. 286, 87 N. E. 490, 131 Am. St. Rep. 400.

The trench extended from the side of the street to about two feet under the nearest car track. The earth taken from the excavation was heaped along both sides of the trench, and extended from the building through the sidewalk and street to within two or three feet of the nearest rail. The space between the end of these piles of dirt and the end of the trench within the rails could not be guarded by barriers without preventing the passage of the electric cars. Consequently the defendant's interests suggested the adoption of some method whereby the opening in the public street should be made safe for travelers without compelling it to remove and replace barriers every time that one of its cars passed. It was in evidence that the watchman whose duty it was to guard the trench had been sent there by the defendant in consequence of a conversation held between the contractor and some person representing the defendant company. And it further appeared that the railway company also provided, for use in guarding the trench, two wooden horses, two red lanterns and some planks. Upon all the evidence it was a question of fact for the jury whether the defendant had agreed to relieve the city and contractor from guarding the excavation at the place of the accident and had assumed the duty of protecting travelers from the danger. *Boucher v. N. Y., N. H. & H. R.*, 196 Mass. 355, 358, 82 N. E. 15, 13 L. R. A. (N. S.) 1177.

There was evidence of negligence on the part of the watchman. He saw the plaintiff approaching the unguarded excavation, but was away from his post and his lantern was extinguished.

Exceptions sustained.

ROBINSON v. SPRINGFIELD ST. RY. CO.

(Massachusetts — Supreme Judicial Court.)

Collision of Motorcycle with Street Car; Negligence; Contributory Negligence; Evidence.

DEFENDANT brings exceptions from verdict for plaintiff. Reported 98 N. E. 576.

Opinion by LORING, J.:

The evidence warranted the jury in finding the following to be the facts in this case: The plaintiff going east on a motorcycle came down Lebanon street in the city of Springfield and turned into Hancock street, intending to go north on that street. Hancock street is forty to fifty feet wide, with an electric car track in the middle of it. As the plaintiff "came along up Lebanon street" he listened and looked to see if a car was coming, and shut off the power "right at the corner," and was then going six miles an hour. There is a house on the southwest corner of Lebanon and Hancock streets which ob-

structed the plaintiff's view of a car coming from the south (as the car here in question was coming) up Hancock street. The gong of the car was not sounded. As soon as the plaintiff got into a position where he could see down Hancock street to the south, he saw the car here in question coming at the rate of twenty miles an hour; it was then about forty feet away. Realizing that he could not cross to the right-hand side of Hancock street ahead of the car, the plaintiff turned his cycle and "pedaled" to get between the car and the left side line of Hancock street. He testified that he "went within probably a foot or such a matter of the car track before I turned my machine." But before he succeeded in getting clear, and when he was about fifteen feet north of the crosswalk on Hancock street opposite the north line of Lebanon street, the car struck him "right in the shoulder, the shoulder and side, caught the machine and threw me [him] on the ground." The part of the car which struck him was just back of the vestibule, where the side of the car "swells" out. The motorman of the car testified that he never saw the plaintiff until he backed his car after the accident to the place where the plaintiff then was. Under these circumstances there is no question of the defendant's negligence.

The circumstances of the case so far as the plaintiff's contributory negligence is concerned are substantially the same as those in *Robbins v. Dartmouth & Westport Street Railway*, 203 Mass. 546, 89 N. E. 1039, with two exceptions: In that case the car was or could have been found to be going forty in place of twenty miles an hour and the motorcycle was going four in place of six miles an hour. In both cases, when the plaintiff turned the corner and the car was seen, it was too near to admit of the plaintiff's going in front of it, and the jury could find that each plaintiff (who took the same course of action) did what a reasonably prudent man would have done under the circumstances. Further, in our opinion it could not be ruled as matter of law that the plaintiff was negligent in allowing himself to get into the place of danger in which he found himself. The case at bar is stronger than *Robbins v. Dartmouth & Westport Street Railway* in that, although the plaintiff there testified that he heard nothing as he approached the corner, he did not testify that he listened (as the plaintiff did in the case at bar) before he came to the corner. For other cases which support the conclusion reached in this case see *Hatch v. Boston & Northern Street Railway*, 205 Mass. 410, 91 N. E. 523; *Le Baron v. Old Colony Street Railway*, 197 Mass. 289, 83 N. E. 674; *Green v. Haverhill & Amesbury Street Railway*, 193 Mass. 428, 79 N. E. 735; *Halloran v. Worcester Consolidated Street Ry.*, 192 Mass. 104, 78 N. E. 381; *Williamson v. Old Colony Street Railway*, 191 Mass. 144, 77 N. E. 655, 5 L. R. A. (N. S.) 1081. We have examined all the cases cited by the defendant; they are all of them distinguishable from the case at bar on grounds which are apparent and therefore need not be specifically pointed out.

2. After a long cross-examination as to details, the plaintiff was recalled by the defendant. At the end of this further cross-examination his counsel was allowed to put this question to him: "Was there anything, Mr. Robinson, you could have done that you didn't do to have avoided this collision?" To this the defendant took an exception.

The defendant's counsel has assumed in his argument that this question called for the plaintiff's opinion upon the issue whether he did all that could have been done to avoid the collision. If that had been the true meaning of

the question it would have been incompetent. Of that there is no doubt. *Short Mountain Coal Co. v. Hardy*, 114 Mass. 197; *Providence Tool Co. v. United States Mfg. Co.*, 120 Mass. 35; *Spillane v. Fitchburg*, 177 Mass. 87, 58 N. E. 176, 83 Am. St. Rep. 262; *Whipple v. Rich*, 180 Mass. 477, 63 N. E. 5; *Meehan v. Holyoke Street Ry.*, 186 Mass. 511, 72 N. E. 61. On the other hand it is equally free from doubt that it would have been competent for his counsel to have asked the plaintiff whether he recalled any further fact bearing upon the question of his having done all that could have been done to avoid the collision.

The question asked and allowed did not in terms ask for the plaintiff's opinion on the one hand, nor on the other hand did it in terms ask if there were further facts bearing on this matter. The question was so framed that its true character is not perfectly clear. But we are of opinion that it must be taken to have called for further facts and not for the plaintiff's opinion. Its framework is not unlike that of the question allowed where the mental condition of a person is in issue. In such a case it is settled that a witness who saw the person can be asked what, if anything, he saw which indicated that the person was of unsound mind. This question is allowed because, properly construed, it seeks to get facts which bear upon the unsoundness of the mind of the person in question, and does not seek to get the witness' opinion upon the significance of the facts he saw. See *Clark v. Clark*, 168 Mass. 523, 47 N. E. 510; *Hogan v. Roche*, 179 Mass. 510, 61 N. E. 57; *McCoy v. Jordan*, 184 Mass. 575, 69 N. E. 358; *Gorham v. Moor*, 197 Mass. 522, 84 N. E. 436.

Exceptions overruled.

HENNESSEY v. BOSTON ELEVATED RY. CO.

(Massachusetts — Supreme Judicial Court.)

Injury to Child Struck by Car While Passing Around Obstruction on Sidewalk; Contributory Negligence; Question for Jury.

DEFENDANT excepts from judgment for plaintiff. Reported 98 N. E. 578.

Opinion by MORTON, J.:

This case comes here on exceptions by the defendant to the refusal of the court to rule that there was no evidence that the plaintiff was in the exercise of due care or that the defendant was negligent. We think that the questions thus presented were both rightly submitted to the jury.

1. At the time when the accident happened the plaintiff was between eleven and twelve years of age. The sidewalk of the street along which he was passing was obstructed for about 125 feet by building operations. At each end of the obstruction was a fence extending several feet into the street. The plaintiff testified that when he reached the obstruction he turned from the sidewalk into the street for the purpose of passing along by the obstruction, and that as he passed by the first fence he looked to see if a car was coming and saw none, and went along between the obstructions and the track

until he got to the other fence, when as he turned out to go round it he was struck by a car and thrown against the fence, breaking his left leg. He also testified that when about midway between the fences he looked round to see where the boys who were with him were and that they were right behind him, but did not look for a car, and that before he was struck he heard no gong or bell. There was nothing to show how often the cars ran through the street. The plaintiff lived near the scene of the accident and was familiar with the locality. It was for the jury to say whether the plaintiff exercised such care as he was bound to exercise and as naturally would be expected from a boy of his age, and whether he should have looked again to see if a car was coming, and whether he might not rely, though unconsciously perhaps, upon being warned by the motorman and the boys with him if a car did come along. See *Howland v. Union Street Railway*, 150 Mass. 86, 22 N. E. 434. It was also for the jury to say whether he was hit by the front of the car or by the runningboard, and whether the accident occurred in consequence of the plaintiff and his companions attempting to steal a ride or in the manner in which the plaintiff testified that it did.

2. There was evidence that the motorman's view of the street was unobstructed and that the car ran from 200 to 250 feet after the accident before it was stopped. The testimony of the motorman and that of other witnesses for the defendant tended to contradict that of the plaintiff and his witnesses as to the manner in which the accident happened. But it was for the jury to say, taking all the circumstances into account, whether the motorman exercised due care. See *Mullen v. Boston Elevated Ry. Co.*, 209 Mass. 79, 95 N. E. 391.

Exceptions overruled.

SILVA v. CITY OF NEWPORT.

(Kentucky — Court of Appeals.)

Validity of Ordinance Requiring Stool for Motorman.

PLAINTIFF appeals from judgment for defendant. Reported 150 S. W. 1024.

Opinion by SETTLE, J.:

This action was instituted by the appellant, Albert Silva, a resident and taxpayer of the city of Newport, against that city and Wm. Buten, its police judge, to test the validity of the following ordinance adopted and made a law July 22, 1912, by the city's board of commissioners:

"An ordinance requiring stools for motormen," etc., "to be provided upon all street railway cars.

"Be it ordained by the board of commissioners of Newport, Ky.,

"That every street car owned and operated by any person, company or corporation, maintaining or operating street railway within the limits of the city of Newport, Ky., shall be provided by such person, company or corporation with a stool, upon the forward platform, as a seat for the driver or motorman or gripman or other person in control of said car.

"That each and every person, company or corporation now maintaining or operating any such street railway within the city of Newport, Ky., shall within thirty days from the passage of this ordinance, comply with the provisions, and for each day's failure so to do, each and every person, company or corporation so failing, shall, upon conviction in the police court, be fined not exceeding \$100.00.

"This ordinance shall be in force and effect from and after its passage.

"Adopted by the Board of Commissioners July 22, 1912."

A demurrer was sustained to the petition as amended, and, appellant failing to plead further, the action was dismissed at his cost. To obtain a review of the judgment manifesting these rulings he prosecutes this appeal.

The ordinance is assailed by the petition upon the grounds, first, that it is unreasonable and an unwarranted and arbitrary interference in and with the "business of all persons, companies or corporations, owning or operating street railways within the limits of the city of Newport;" second, that the board of commissioners of the city of Newport were without power to pass or adopt it. Newport is a city of the second class, and its power, if any it has, to pass such an ordinance as the one under consideration, is conferred by section 3058, subsecs. 1, 20, 25, Kentucky Statutes; but it mainly relies upon subsection 25, which empowers it "to pass all such ordinances, not inconsistent with the provisions of this act or the laws of the State, as may be expedient in maintaining the peace, good government, health and welfare of the city, its trade, commerce and manufactures, and to enforce same by fines and penalties; and any enumeration of subjects and matters herein to be regulated shall not be construed as a limitation upon this general power."

In no aspect of its meaning or effect can it be said that the ordinance is not a reasonable regulation. In *So. Cov. Ry. Co. v. Berry*, 93 Ky. 43, 18 S. W. 1026, 13 Ky. Law Rep. 943, 15 L. R. A. 604, 40 Am. St. Rep. 161, an ordinance which required the street railway company to have both a conductor and driver on each of its cars, was held to be a reasonable police regulation under the provision of the then existing charter of the city of Newport, which authorized its city council to pass all ordinances "that may be necessary for the due and effectual administration of right and justice in said city and for the better government thereof," and "to cause the removal or abatement of any nuisance." Moreover, that it was no objection to such an ordinance that it contained a provision directing the police of the city to cause any car without a driver and conductor to be returned to the stables; such removal of the cars from the streets not being a taking of the company's property without due process of law, as the company was not thereby divested of its property. In the same case it was also held that the mere granting of a charter to operate a street railway did not deprive the city government of the power to make reasonable regulations for the enjoyment of the privilege in such a way as would be consistent with the safety of the public.

In *C. & O. Ry. Co. v. City of Maysville*, 69 S. W. 728, 24 Ky. Law Rep. 615, the validity of an ordinance of that city compelling the railway company to erect and maintain gates at certain crossings in the city, was attacked upon the ground that it was unreasonable in its requirements, and that the city council was without power to pass it, but we rejected both these contentions,

and held the ordinance valid. In *L. & N. R. R. Co. v. City of Louisville*, 141 Ky. 131, 132 S. W. 184, we sustained the validity of an ordinance of the city of Louisville which fixed the grade of Roberta avenue and directed that it be extended across the railroad track to connect with Frankfort avenue, the grade of the latter street being three feet higher than the railroad track, upon the ground that it could not be assailed as invalid by the railroad company because it might be considered as unreasonable or as working a hardship to it in that case, and that it is only in extreme cases that the power to declare a municipal ordinance passed pursuant to legislative authority invalid can be exercised by the courts on the ground that it is unreasonable, arbitrary or oppressive. It is a well-recognized rule of law that, where the municipal legislature has the power to act, it must be governed, not by the discretion of the courts, but by its own discretion; for which reason the courts should not be hasty in convicting them of being unreasonable in the exercise of it. Our meaning can be better expressed by the following excerpt from the opinion in *State v. Clarke*, 54 Mo. 17, 14 Am. Rep. 471: "It is naked assumption to say that any matter allowed by the legislature is against public policy. The best indications of public policy are to be found in the enactments of the legislature. To say that such a law is of unusual tendency is disrespectful to the legislature, who, no doubt, designed to promote the morals and health of the citizens. Whether the ordinance in question is calculated to promote the object is a question with which the courts have no concern when the legislative will has been plainly expressed." *Crowley v. Christensen*, 137 U. S. 86, 11 Sup. Ct. 13, 34 L. Ed. 620; *Ex parte Hayes*, 98 Cal. 555, 33 Pac. 337, 20 L. R. A. 701; *Commonwealth v. Reinecke C. M. Co.*, 117 Ky. 885, 79 S. W. 287, 25 Ky. Law Rep. 2027.

The attitude of the courts with respect to this question is thus expressed in *L. & N. R. R. Co. v. Kentucky*, 161 U. S. 677, 16 Sup. Ct. 714, 40 L. Ed. 849: "Whatever is contrary to public policy or inimical to the public interest is subject to the police power of the State, and within legislative control, and in the exercise of such power the legislature is vested with a large discretion, which, if exercised *bona fide* for the protection of the public, is beyond the reach of judicial inquiry." We are also clearly of the opinion that the object of the ordinance is a proper subject for police regulation. In other words, it is within the police power of the State to protect any class of its citizens which stand in need of such protection. And it is not wide of the mark to say that the motormen who operate street cars are in need of such protection if, as argued by counsel for appellee, they "are required to stand so steadily and in the same position that they are subject to impaired circulation of blood vessels, swelling of the legs, varicose veins, ulcerated legs, and contract diseases of the kidneys, incapacitating them for any kind of work and causing premature death." It may also be observed that the effect of enforcing the ordinance will be to protect the traveling public, because if motormen can by the use of stools be relieved of the necessity of constantly standing upon their feet in one position, and as well perform their work while using the stools (of which there seems to be no doubt), it would prevent the congestion of the lower limbs, to which they seem to be peculiarly subject, and enable them in case of an emergency or accident to be alert and competent, to prevent injury to passengers on the cars.

The right of railway employees, whether engaged in operating steam or elec-

tric railways, to such protection as the ordinance contemplates, has been recognized by Congress in the enactment of the humane law, and its several amendments, commonly known as the "Employer's Liability Act," which, among other things, provides that no common carrier engaged in interstate commerce shall require or permit its employees to be or remain on duty for a longer period than sixteen consecutive hours. The application of this provision in allowing the recovery of damages for the death of an employee engaged in interstate commerce was approved by us in the case of *St. L., I. M. & S. Ry. Co. v. McWhirter's Adm'r*, 145 Ky. 427, 140 S. W. 672, and in concluding the opinion we said: "In conclusion we are moved to say that the salutary object designed by the enactment of the statute, *supra*, would in our opinion be defeated if we should hold its provisions inapplicable to a case like the one at bar. Its aim is the protection of the lives of employees of railroad companies, and also the lives and property intrusted to the railroads as common carriers. It recognizes that there is a limit to human endurance, and that hours of rest and recreation, as well as the use of good machinery and appliances, are needful to the health and safety of men engaged in the hazardous work of railroading, and that the benefits it is intended to confer will better enable them to serve their employers and promote the ends of commerce. The application of the statute may sometimes bear harshly upon an offending railroad company, but, on the whole, their just enforcement, in all proper cases, is bound to be promotive of the public welfare." *Johnson v. Sou. Pac. Co.*, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363; *Schlemmer v. Buffalo R. & P. Ry. Co.*, 205 U. S. 1, 27 Sup. Ct. 407, 51 L. Ed. 681; *Ellis v. U. S.*, 206 U. S. 246, 27 Sup. Ct. 600, 51 L. Ed. 1047, 11 Ann. Cas. 589; *B. & O. Ry. Co. v. Int. Com. Commission*, 221 U. S. 612, 31 Sup. Ct. 621, 55 L. Ed. 878; *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780; *Commonwealth v. Hillside Coal Co.*, 109 Ky. 47, 58 S. W. 441, 22 Ky. Law Rep. 559; *Godfrey v. Beattyville Coal Co.*, 101 Ky. 339, 41 S. W. 10, 19 Ky. Law Rep. 501; *Andrius v. Pineville Coal Co.*, 121 Ky. 724, 90 S. W. 233, 28 Ky. Law Rep. 704.

Having reached the conclusion that the ordinance is not an unreasonable or oppressive exercise of the police power, the only other question to be considered is that raised by appellant's second contention. Were the appellee city's board of commissioners without power to pass it? In our opinion this question must be answered in the negative. Subsection 25, § 3058, Kentucky Statutes, in unambiguous language, authorizes the board of commissioners "to pass all such ordinances * * * as may be *expedient in maintaining the peace, good government, health and welfare of the city, its trade, commerce and manufactures.*" The power here conferred is as broad as the police power of the State, as it authorizes the council or board of commissioners of cities of the second class to pass any ordinance which would be promotive of any of the ends mentioned in the statute. Therefore an ordinance like the one under consideration, which is intended to, and does, add to the comfort and safety of employees charged with the duty of operating the cars of the street railway using the city's streets, must necessarily be promotive of the comfort and safety of the citizens of the municipality who become passengers on the cars. In this way the ordinance, it may well be said, will serve to promote "good government, the health and welfare of the city," and also its "trade and commerce." As said in *Commonwealth v. Reinecke C. M. Co.*, *supra*: "The sub-

jects for the exercise of the police power are, first, preservation of the public health; second, preservation of the public morals; third, regulation of business enterprises; fourth, regulation of civil rights of individuals, and fifth, the general welfare and safety of the citizens. All business must be subject to reasonable regulations. * * *

It cannot seriously be contended that the courts may declare a municipal ordinance invalid merely because, in their opinion, the legislature should not have conferred the power exercised by the municipality in passing it. In order to declare the ordinance void it must clearly appear from the language of the legislative enactment that it does not confer the power exercised by the municipality, or that the power conferred is prohibited by the Constitution of the State.

If subsection 25 of section 3058, Kentucky Statutes, were less explicit as to the subject and matters with respect to which cities of the second class may exercise the powers it confers, the closing sentence thereof, "and any enumeration of subjects and matters herein to be regulated shall not be construed as a limitation upon this general power," would justify us in saying that the power conferred upon the municipalities is not confined to the subjects or matters therein enumerated, but may be exercised by it as to others of a like character not mentioned, which may come within the general scope of the police power of the State.

Being of opinion that the ordinance is not open to the objections made to it, the judgment is affirmed.

SOUTH COVINGTON & C. ST. RY. CO. v. BURNS.

(Kentucky — Court of Appeals.)

Injury to Boy Forced to Jump from Moving Street Car After Having Been Permitted to Board the Car and Ring the Gong; Damages.

DEFENDANT appeals from judgment for plaintiff. Reported 150 S. W. 343.

Opinion by NUNN, J.:

Appellee, Matthew Burns, brought this action by his next friend against appellant to recover damages for personal injuries received. The injuries were produced by one of appellant's cars running over and mashing one of his feet. There were two trials of the case in the lower court. The first terminated in a disagreement of the jury, but the second resulted in a verdict and judgment for appellee in the sum of \$7,100. Appellant asks a reversal of the judgment for three reasons: First, because of errors in the instructions given; second, because the verdict is flagrantly against the weight of the evidence; and, third, because the verdict is excessive.

The facts with reference to appellee's injuries are, in substance: Appellee, a boy seven years of age at the time of his injury, resided on Twenty-first street near Russell street in Covington, Ky., and he, with a number of other boys, was playing in the street at this point, when a street car belonging to appellant approached and stopped to allow two ladies to board it. When the car stopped, appellee and another boy near his own age approached the front

end of the car, and appellee asked the motorman to permit him to mount the front platform and ring the gong. The motorman granted his request, and opened the gate so that he could get on, and appellee got on the platform, rang the bell, and was then told by the motorman to get off, but, before he could do so, the motorman started the car, and appellee, who had started to alight, was holding to the top rail of the gate, and the conductor came up, told him to get off, and struck the hand with which appellee was holding to the rail, knocked it loose therefrom, and caused him to fall where the wheels of the car ran over and mashed his foot to such an extent that it had to be amputated. It appears that the car had moved ten or twelve feet forward before the conductor got to appellee, and, when the car was stopped, appellee was found on the ground near one of the rails of the track, three or four feet to the rear of the car. The physician who attended appellee, with the hope and intention of saving as much as possible of his foot, only amputated his four smaller toes, but later found that was not sufficient so he amputated the foot at the instep still hoping to save the remainder of it, but found afterwards that it would be absolutely necessary to sever all the foot except a part of the heel, which he did. The above are the facts as they appear in the testimony of appellee and physician. The testimony of the other boy, who was ten years of age at the time of the trial, which was had two years after the accident, differed with appellee's in this respect: He stated that, after appellee got upon the platform with the permission of the motorman and rang the gong, he then asked the motorman if he could ride a little ways, and the motorman told him, "Yes"; that in a few moments the conductor appeared and told appellee to get off the car, which was then moving; that the gate was opened for him to leave the car, which appellee started to do; that, when he reached the steps, he caught hold of the gate with one hand, and while occupying this position either the conductor or motorman struck his hand, knocked it loose from the gate, and caused him to fall.

Appellant's testimony was to the effect that neither the conductor nor motorman gave appellee permission to get upon the platform of the car to ring the gong or for any other purpose; that they did not strike his hand and knock it loose from the gate or anything; that they did not know of appellee being upon or about the car until they heard him scream when hurt. It appears that appellant's theory was that the boy was hanging to something on the side of the car, stealing a ride, and fell off and was run over by the rear wheel of the car. No one saw the boy swinging to the side of the car or to any other part of the car, other than as stated by appellee and his witnesses, and it appears that there was nothing on the side of the car that the boy could hold to. Appellant proved by one of the children that was on the street near the curb when the car came up and stopped that appellee said, "Here is a good chance for a hop," and started in the direction of the car. Neither this witness nor any of the other children who testified saw the acts and conduct of appellee or the officials in charge of the car at and immediately previous to the time appellee was injured. Three of the passengers who were on the car at the time of the accident were introduced by appellant. They testified, in substance, that they did not notice anything taking place on the front platform; that they did not notice appellee; that they did not see conductor pass from the rear end of the car, where he received the ladies who entered, to the

front platform. One of them stated that he was seated about the center of the car; that he heard the boy scream, looked out the window nearest to him, and saw the boy lying immediately below it. The steps of the car and the car itself were inspected by the jury. As before stated, there was nothing on the side of the car to which the little boy could swing, and, besides, the place at which he was seen immediately after he first screamed shows conclusively, if true, that his foot was run over by the front wheels of the car first. Appellant also introduced statements made by the boy Richardson on the first trial which contradicted some of his testimony on the second trial. It appears that he testified on the first trial that the car was stopped to allow two ladies to get off, and on the last trial he stated that the ladies either got off or on, he did not know which. There were several discrepancies in this witness' statements on the two trials, but they were all of an immaterial character. All this character of testimony was introduced in an effort to have the jury discredit the testimony of the boys upon the material facts. The jury were the triers of the question, and had a right to believe the testimony of the boys to be true, or to conclude that it was false. It is true that appellee was an interested witness, but the boy Richardson was not, so far as the record shows. It is also true that the conductor and motorman were interested in holding their positions, and, besides, if the accident occurred as the boys say it did, they committed a crime. The mere statement of the substance of the evidence is sufficient to show that the verdict was not flagrantly against the weight thereof, unless we usurp the functions of the jury and determine that the little boys committed perjury.

In the case of *L. & N. R. R. Co. v. Eckman*, 137 Ky. 331, 125 S. W. 729, this court said: "Our duty goes no further than to determine whether there was evidence to support the verdict, and our decision of that question is not to be controlled by our opinion as to whether the verdict is in accordance with or against the weight of the evidence."

Appellant's counsel claim that the court erred in permitting the jury to find for appellee if he was upon the front of the car with the knowledge or consent of the officials in charge, as the pleading and proof only showed that he was there by permission of the motorman, and that the court committed another error in the same instruction by allowing appellee to recover for the wrongful acts of the conductor, when the petition complained only of the conduct of the motorman. They contend that the court, by permitting recovery under the conditions above named, injected into the case issues which neither the pleadings nor proof justified. One of the allegations of the petition is as follows: "And while upon said car the said infant plaintiff was thrown, fell or jerked from said car through the gross and wanton carelessness of said defendant company, its agents and officers." The following excerpts are quoted from appellant's answer, to wit: "Defendant denies that its motorman or any other officer or agent permitted or requested or allowed plaintiff to come upon its car while it was moving or at all; * * * denies that he permitted, requested, or allowed plaintiff's presence upon the car; denies that the motorman consented to the plaintiff being upon the car; * * * denies that the plaintiff was thrown or jerked from the car; denies that he fell from the car; * * * denies that plaintiff was crippled by the negligence of this defendant or its officers or agents." Thus it appears that the pleadings and

proof fully authorized the court to give the instructions complained of. It was immaterial whether it was the motorman or conductor of the car that knocked appellee's hand loose from the gate while the car was in motion, as they were both officers and agents of the company in charge of the car. Nor does it matter whether they or either of them invited or consented for appellee to board the car and tap the gong. If they knew he was on the car and expelled him while it was in motion, they were guilty of negligence. If there were any errors in the instructions, they favored appellant rather than appellee.

The complaint that the verdict for \$7,100 is excessive is the only question left for consideration. Dr. Eckman, the physician who attended appellee, and who was at the head of the Covington General Hospital in the city of Covington, stated that he attempted to save the boy's foot and at first severed only the four smaller toes, but found later that two other operations had to be performed as before stated; that after the third operation none of the boy's foot was left except the back part of the heel. The boy was confined to his bed for six months, and must have suffered excruciating pain, especially while undergoing the three operations. The doctor testified that the loss of the foot had caused the leg to greatly diminish in size; that the muscles had become atrophied; that the calf of the leg had atrophied and disappeared because the muscles were not brought into play by the action of an instep; and that, as he had no foot to move the leg, it simply acted as a wooden leg. We cannot say, under these facts, that the verdict is excessive. Many larger verdicts in behalf of infants have been sustained by this court when their injury and suffering did not materially exceed that endured by appellee. See *Louisville R. R. Co. v. Bryant*, 142 Ky. 159, 134 S. W. 182. In the case of *South Covington & Cincinnati Ry. Co. v. Weber*, 82 S. W. 966, 26 Ky. Law Rep. 922, this court sustained a \$10,000 verdict in favor of a child five years of age.

For these reasons, the judgment of the lower court is affirmed.

MORIARTY v. CONNECTICUT VALLEY ST. RY. CO.

(Massachusetts — Supreme Judicial Court.)

Collision with Vehicle; Starting of Car When Horse Was About Opposite; Negligence; Contributory Negligence.

DEFENDANT brings exceptions from verdict for plaintiff. Reported 99 N. E. 946.

Opinion by DE COURCY, J.:

These actions of tort, tried together, are brought to recover for injuries resulting from a collision which occurred at the intersection of two streets in Northampton, between a car of the defendant and the horse and wagon of the plaintiff, John J. Moriarty.

Upon the evidence the jury could find the following facts: North street runs easterly from and at right angles with King street; and the North street car tracks curve to the south to connect with the King street tracks. It was dusk at the time of the collision, but the place was well lighted by an

electric lamp at the intersection of the streets and by the electric headlight on the car. The plaintiff John J. Moriarty and his employee occupied all the seat of the wagon, and his son Donald was seated upon one of the bags in the body of the vehicle. They were traveling northerly on the right-hand side of King street. As they approached the corner, the driver, Moriarty, saw this car on North street, coming towards King street, and he brought his horse to a halt within twenty feet of the curved track which crossed the roadway. The car then stopped at a white post on North street, with the fender about a foot over the crosswalk; and the driver, John Moriarty, seeing that his course was unobstructed, set forward. When the horse's head was about opposite the car, the starting bell was rung. The motorman, who was then facing the rear of his car, apparently talking with some one, turned around and immediately started the car in motion, without looking to the right or left along King street, for approaching travelers. Moriarty called out to him to stop, and endeavored to turn the horse to the left, but the car continued on, knocked down the horse, broke the wagon and harness and threw the plaintiff Donald to the ground.

From this summary statement of the facts in evidence it is manifest that the issues of the defendant's negligence and the due care of the plaintiffs were for the jury. *Smith v. Holyoke St. Ry.*, 210 Mass. 202, 96 N. E. 135.

Exceptions overruled.

CITY OF READING v. UNITED TRACTION CO.

(Pennsylvania — Supreme Court.)

Ordinance Granting Extension and Fixing Rate of Fare Construed.

DEFENDANT appeals from decree for plaintiff. Reported 84 Atl. 666.

ENDLICH, P. J., in the court below, found the facts to be as follows:

"(1) In 1906 the entire street railway system of the city of Reading, made up of a number of lines belonging to independent companies, was, under leases executed by them to the United Traction Company, operated as a whole by the latter, including a line on Front and certain other streets belonging to the Front and Fifth Street Railway Company, and another on Schuylkill avenue belonging to the Reading City Passenger Railway Company.

"(2) Complaints made to the city authorities by residents in the vicinity of a turnout on Schuylkill avenue near Buttonwood street about the noise occasioned at night by the reversing of cars were by those authorities brought to the attention of the United Traction Company, with a request to have the nuisance remedied.

"(3) In response to this the city was by Dr. Walter A. Rigg advised, not only that the cause of complaint would, as far as practicable, be abated, but that it might be entirely removed and at the same time the convenience of the traveling public greatly enhanced by the construction, with the city's permission, of a track connecting the two lines of railway above mentioned along

and upon two intervening blocks of Windsor street; the two lines thus connected forming a so-called 'loop.'

"(4) This suggestion being reported to the city councils, the matter was referred to the railway committee for consideration. Between it and Dr. Rigg as representing the railway companies interested there were various consultations and communications—among the latter a letter from Dr. Rigg to the chairman of the committee, dated October 6, 1906, and written upon the letter head of the United Traction Company, in which, in the event of the grant of permission to construct the 'loop,' it was stated (1) that the turn-out should be removed; (2) that there should be 'no increase of fare'; and (3) that the 'fare limit' should be Buttonwood street, a single fare carrying a passenger from any part of town to any point on Schuylkill avenue or around the 'loop' to Front and Buttonwood streets, and as to incoming passengers a single fare being good from Schuylkill avenue and Buttonwood street and points beyond, around the 'loop' to any part of the city, the fare charged at the time by the United Traction Company for a single trip on any part of its system being five cents or a ticket obtainable at the option of passengers by purchase from the conductors on the cars in strips of six tickets costing twenty-five cents.

"(5) The committee on October 7, 1906, largely actuated by the letter just adverted to, reported to councils upon the matter referred to it as one between the city and the United Traction Company, recommending the grant of permission to make the connection suggested as above detailed and the passage of an ordinance for that purpose. Accompanying the report was the draft of an ordinance handed to the committee by Dr. Rigg, and so drawn as to grant the privilege in question to the Front and Fifth Street Railway Company, it having been explained to the committee by Dr. Rigg that the United Traction Company was an operating and not a constructing company, and that, therefore, the grant must be made to the former. The ordinance was in due course passed with the addition of certain provisions, among which was that embodied in section 2 thereof, viz., 'that the rate of fare shall not exceed five (5) cents for a single fare, or six tickets for twenty-five (25) cents'—and as passed was approved December 8, 1906.

"(6) Within a few days thereafter the Front and Fifth Street Railway Company filed in the office of the city clerk its formal acceptance, required by the ordinance, of the same and 'all the conditions thereof.' Thereupon the connecting line was constructed and at once passed under the control and operation of the United Traction Company. The stipulations contained in the letter of October 6, 1906, relative to the removal of the turn-out on Schuylkill avenue, the fare limit, and the fare itself were carried out, the United Traction Company accepting for a single fare from Schuylkill avenue and Buttonwood street around the 'loop' to any part of the city five cents in cash or one of six tickets sold in strips for twenty-five cents.

"(7) Throughout the negotiations and transactions above detailed the city of Reading conceived itself to be dealing with the United Traction Company, as the company in control of the entire street railway system, representing the underlying corporations and in the operation of the system to be perfected by the 'loop' agreeing to be bound by the stipulations and conditions inducing and attached to the grant of permission to construct it.

"(8) The precise official connection of Dr. Rigg with the United Traction Company and its lessor corporations, including the Front and Fifth Street and the Reading City Passenger Railway Companies, is not established by the evidence. Whilst apparently not existing or defined by any explicit employment of him as an agent with designated powers of any of these companies, the fact nevertheless is that in the transactions and negotiations concerning the 'loop,' as well as in other previous matters, he, with their knowledge and acquiescence, acted as the general representative of the United Traction Company, and through it of its various lessor corporations, in their dealings with the city; that his authority in every instance and particular so to act was implicitly recognized by all said companies as well as assumed by the city; and that the United Traction Company and the Front and Fifth Street and Reading City Passenger Railway Companies accepted the benefits and advantages secured for them from the city by him upon the faith of the representations, stipulations, and conditions made or agreed to by him in their behalf.

"(9) About March 18, 1910, the United Traction Company discontinued the sale of strip tickets over its entire system, collecting a straight 5-cent fare from passengers, the fare limit above mentioned remaining unchanged. On March 21, 1910, the mayor of the city addressed to the president of said company a letter calling his attention to the alleged duty of the company to sell strip tickets over its entire system, requesting compliance therewith, and advising him of the city's purpose in the contrary event to institute proceedings to compel it. The answer of the president of the company to this letter, dated the same day, denied the existence of the duty on the basis of Dr. Rigg's letter of October 6, 1906. Thereupon, on March 30, 1910, the city filed a bill to compel the sale of tickets over all the railway lines in the city. After its dismissal by the Supreme Court, July 6, 1911, this bill was filed on September 22, 1911.

"(10) By a 999-year lease dated as of April 1, 1910, acknowledged May 5, 1910, and recorded August 17, 1910, the United Traction Company leased its entire street railway system, including the 'loop,' to the Reading Transit Company. At the date of the filing of this bill the company in actual control of the street railways in the city of Reading, and operating them, was the Reading Transit Company.

"(11) The operation of the 'loop' in connection with the remainder of the system is as follows: Cars leaving the car barn on North Ninth street come in Ninth to Penn, down Penn to Fourth, out Fourth to Washington, down Washington to Front and Schuylkill avenue, out Schuylkill avenue and around the 'loop' over the tracks of the Front and Fifth Street Railway Company to Front and Schuylkill avenue, in Washington to Second, in Second to Penn, up Penn to Tenth and out Tenth to the car barn, or from Second up Penn to Nineteenth and Perkiomen avenue, and thence starting another circuit down Penn to Fourth, etc. In either case the circuit covered by two fares is about seven miles, the trip in one direction covered by one fare being about three and a half miles, of which 5,850 feet are over tracks of the Front and Fifth Street Railway Company, and about 1,300 of this distance over the extension authorized by the ordinance of December 8, 1906.

"(12) The travel beginning and ending upon the Front and Fifth Street

line is insignificant, that beginning at Schuylkill avenue and Buttonwood street, or points beyond, and ending at points along Penn street or beyond, very heavy.

“LEGAL CONCLUSIONS.

“(A) The suggestion of the construction of the ‘loop’ as something to be permitted by the city of Reading having been made by Dr. Rigg in the interest, not only of the Front and Fifth Street Railway Company, but also of the United Traction Company as the company operating the entire street railway system of the city and with a view to its more convenient operation, the negotiations relative thereto with the city authorities having been conducted by him in the interest of both companies with their acquiescence, the city having treated him and with him as their authorized representative therein and acted upon his statements and promises as made in their behalf, said companies having accepted the fruits of his dealings and negotiations and representations with and to the city, and at the time and for a number of years thereafter treated them as binding, and the president of the United Traction Company having subsequently so recognized his undertakings, neither company can now be heard to dispute, on the ground of want of antecedent authority in him to represent said companies, either the fact that from the inception of said negotiations, etc., he did represent them and that through him as their representative they were both parties to said negotiations, etc., or the binding force as to both of any undertakings made by him on their behalf in the premises, which entered as an inducement into the grant of the privilege to construct the ‘loop.’

“(B) In the light of the nature and scope of said undertakings, the circumstances surrounding the introduction and passage of the ordinance approved December 8, 1906, the situation of the several parties concerned, and the manifest objects aimed at, the grant by the city of Reading of permission to construct the ‘loop,’ must be regarded as a transaction, not only between the city and the Front and Fifth Street Railway Company as the constructing company, but also between the city and the United Traction Company as the company operating the entire street railway system of the city including the ‘loop,’ and the terms and provisions of said ordinance are to be understood and given effect accordingly.

“(C) So understood, the grant of said permission and the acceptance of the terms thereof involved a contract between both said companies and the city to the effect that, in the operation of the railway lines including in the one circuit the extension perfecting the ‘loop,’ the fare limit should be the intersection of Schuylkill avenue and Buttonwood street; that a fare paid at that point or any point beyond should entitle the passenger to carriage to any part of the city reached by the car on which it was paid or any to which he might be transferred; that such fare should be, at the option of the passenger, five cents cash or one of six tickets to be sold him on the car for twenty-five cents; that payment of his fare by ticket should entitle him to the same transportation as payment by five cents in cash; and that this contract established a condition of the grant of the permission to construct the ‘loop,’ to be performed in its operation, as such accepted by the Front and Fifth Street Railway Company and impliedly assented to by and obligatory upon any company operating said line immediately or mediately

under the Front and Fifth Street Railway Company, in connection with any portion of the remainder of the street railway system of the city, with said 'loop' forming and operated as a continuous circuit, and therefore binding upon the Reading Transit Company.

"(D) The plaintiff is entitled to a decree enforcing the contract and condition mentioned in the foregoing conclusion in accordance with their terms and effect as there stated and with prayers 1 and 2 of plaintiff's bill.

"(E) The costs of this proceeding are to be paid by defendants."

Opinion by BROWN, J.:

The question before us in *Reading v. United Traction Company*, 232 Pa. 303, 81 Atl. 304, was whether the right of the Reading Transit Company, the successor of the United Traction Company, to discontinue the sale of strip tickets at the rate of six for twenty-five cents, good on all of its lines, had been taken from it by the ordinance of December 8, 1906, and it was held that such right had not been affected by the ordinance. In so holding we said that nothing in the letter from Dr. Rigg to the chairman of the railways committee of the city councils "nor in the ordinance can be construed into an agreement by the United Traction Company to continue the general sale of strip tickets, and its right was, and the right of the Reading Transit Company, its successor, is, to charge a fare of five cents for every passenger riding on its lines, except as it may be committed by the ordinance of December 8, 1906, to continue to sell six tickets for twenty-five cents, good to or from points on the Schuylkill avenue and Front and Fifth Street Railway lines. That question, however, is not to be passed upon until it is properly raised." The question which we declined to consider in that case, because it was not before us, was properly raised in this proceeding, and, in passing upon it, the learned chancellor below regarded it, as we intended it to be regarded, if raised, as an open one. He disposed of it just as we should have disposed of it, if it had been before us on the former appeal, and to his correct legal conclusions, following his properly found facts, but a word need be added.

The United Traction Company was bound by the provisions of the ordinance of December 8, 1906, and its lessee and successor, the Reading Transit Company, is now so bound. That ordinance provides that "the rate of fare shall not exceed five (5) cents for a single fare, or six tickets for twenty-five (25) cents." These words certainly mean something; but in their breach of good faith with the city of Reading those in control of the affairs of the Reading Transit Company now assert that they mean nothing. The ordinance related to the Front and Fifth Street and Schuylkill Avenue lines. At the time it was passed the rate of fare on these lines was five cents, or a passenger, at his option, could purchase six tickets for twenty-five cents, each of which gave to him the same transportation rights and privileges as were given by paying a 5-cent fare. The negotiations between Dr. Rigg and the chairman of the street railways committee of councils, which led to the passage of the ordinance related to the two lines just mentioned, and it is trifling with judicial patience to contend that both parties so negotiating did not understand and intend that, upon the completion of the loop, the mode of paying a fare should remain unchanged on the two lines and should continue to give

a passenger the same transportation rights. The ordinance passed in pursuance of these negotiations became a contract between the city and the two lines and their lessee, and a fare paid on either line by a passenger with one of six tickets issued to him, at his option, as provided by the ordinance, entitles him to the same transportation as if he had paid a cash fare of five cents.

No other conclusion could have been reached by the learned president judge below under the undisputed facts in the case, and the decree is affirmed at appellants' costs.

SEVERINO v. PHILADELPHIA RAPID TRANSIT CO.

(Pennsylvania — Supreme Court.)

Injury to Boy Who Ran Directly in Front of Car.

PLAINTIFF appeals from judgment for defendant. Reported 84 Atl. 694.

Opinion PER CURIAM:

This action was to recover for injuries sustained by a boy between eight and nine years old, whose foot was run over by a wheel of the defendant's car. The accident happened near the middle of a block and at least seventy-five feet from the nearest cross street. The boy ran or walked from the pavement directly in front of an approaching car, and when he reached the track he was within ten or fifteen feet of the car. There was no evidence of undue speed, nor of inattention on the part of the motorman. The car was stopped within five feet of the place where the boy was struck by the fender. The nonsuit was properly entered.

The judgment is affirmed.

TRUMBOWER v. LEHIGH VALLEY TRANSIT CO.

(Pennsylvania — Supreme Court.)

Head-On Collision with Vehicle; Imputation of Negligence of Driver to Passenger.

DEFENDANT appeals from judgment for plaintiff. Reported 84 Atl. 403.

Opinion by FELL, C. J.:

At the place of the accident in which the plaintiff was injured, the defendant's track was in the middle of a narrow but much used turnpike road. Snow had been thrown from the track on the sides of the road and was of a depth that made it difficult for vehicles to travel at the sides of the road or to turn from the track to the side when cars or vehicles going in an opposite direction were met. This condition had existed for several weeks,

during which time travel had been practically confined to the track. The plaintiff, a young woman, and two other persons who accompanied her, had been met at a railroad station by a friend, who was taking them in his carriage to his home as his guests. It was a bright, moonlight night, and there was an oil lamp on the front of the carriage. The road was straight for a long distance, but the undulations of its surface obscured at times the headlight of a moving car. The horse and carriage were struck by a car which approached from the direction in which they were going. The testimony in relation to the speed of the car, the condition of its headlight, the failure to give warning of its approach, the depth of the snow at the sides of the road, and of the care exercised by the driver and by the plaintiff, who was at his side, on the front seat of the carriage, to look out for their own safety, was conflicting. It was submitted to the jury by a charge which was full and fair to both sides and exceptionally clear and accurate, and to which the only error assigned is the refusal to direct a verdict for the defendant.

There was testimony which tended to show that the snow at the sides of the road was thirty inches in depth and packed and frozen so that vehicles could not pass through it or turn from the track, except at places where openings had been made; that all the occupants of the carriage were vigilant in looking for a car; that when they first saw one it was 200 or 300 feet in front, running at the rate of 35 to 40 miles an hour; that its headlight was very dim and no notice of its approach had been given; that the driver at once looked for a place where he could turn out; and that the collision occurred while he was in the act of turning into an opening at a gateway.

It may be, in view of all the testimony in the case, that the driver relied too much on the motorman looking out for him and failed to act with ordinary prudence. But with the driver's negligence we are not concerned unless it affected the plaintiff's right to recover.

The negligence of the driver of a private conveyance cannot be imputed to a passenger who has no control over him. *Carr v. Easton*, 142 Pa. 139, 21 Atl. 822; *Little v. Telegraph Co.*, 213 Pa. 229, 62 Atl. 848; *Walsh v. Railway Co.*, 232 Pa. 479, 81 Atl. 551; *Kammerdiener v. Rayburn Township*, 233 Pa. 328, 82 Atl. 464. A passenger is answerable for the consequences of his own negligence, and if he voluntarily goes into a patent danger that he could have avoided or joins the driver in testing a danger, he cannot recover. *Crescent Tp. v. Anderson*, 114 Pa. 643, 8 Atl. 379, 60 Am. Rep. 367; *Kunkle v. Lancaster County*, 219 Pa. 52, 67 Atl. 918. The plaintiff was a guest and had no control over the driver, and the danger in driving in the tracks was not so manifest that she can be said to have been negligent.

The judgment is affirmed.

KONKLE v. ST. PAUL CITY RY. CO.

(Minnesota — Supreme Court.)

Ejection of Passenger Who Tendered Fare in Canadian Money; Evidence that Coin Tendered was Received from Another Conductor.

DEFENDANT appeals from judgment for plaintiff. Reported 137 N. W. 738.

Opinion PER CURIAM:

No important or doubtful question is presented in this case. The evidence justified the court in finding that plaintiff was wrongfully ejected from defendant's street car for the alleged failure to pay his fare. No physical force was used; but plaintiff was peremptorily ordered to leave the car, and he did so. When plaintiff took passage upon the car he tendered to the conductor a Canadian quarter, which the conductor accepted and handed to plaintiff in change two dimes. A few moments later the conductor returned to plaintiff, and stated to him that the quarter was not good, and demanded a return of the dimes. A dispute arose as to whether the quarter was current money; but, upon the conductor's insistence, plaintiff returned the change, and, having no other money with him, on the order of the conductor left the car and walked to his home.

The question whether Canadian coins are legal tender or pass as current money in this State is not necessarily involved in the action. It, however, may be said that it is a matter of almost everyday experience to receive and pay in such coin in the city of St. Paul and other parts of the State. The conductor did not refuse the coin in question on the ground that it was Canadian money, but, as he testified on the trial, because he understood it to be a coin of the Province of New Brunswick. In this he was mistaken. The court found that it was a Canadian coin. Nor was there any evidence that the car company had given its conductors any directions to refuse such money in payment of fares. And, further, it appeared that the identical quarter was received by plaintiff from defendant through another conductor the preceding day as part of the change given him at that time. This evidence was proper. We hold that the findings are supported by the evidence.

Judgment affirmed.

RAASCH v. MILWAUKEE ELECTRIC RY. & LIGHT CO.

(Wisconsin — Supreme Court.)

Collision With Wagon Crossing Track; Gross Negligence of Motorman; Evidence.

PLAINTIFF appeals from judgment for defendant. Reported 138 N. W. 608.

Opinion by WINSLOW, C. J.:

The plaintiff's intestate was driving a horse attached to a milk wagon southward on Twentieth avenue, in the city of Milwaukee, at about 6 a. m. July 1, 1906. The wagon was covered, and the intestate was standing on the

westerly or right-hand step of the wagon. Just as the wagon crossed defendant's northerly track, running east and west on Greenfield avenue, one of defendant's street cars, west bound, ran into the rear of the wagon, tipping it over, and causing the death of the intestate. The plaintiff claims that the evidence was such as to justify the conclusion of gross negligence on the part of the defendant's motorman, but the trial court held to the contrary, and directed a verdict for defendant at the close of the plaintiff's evidence. It is not claimed that there is any ground of recovery save the ground of gross negligence. The question presented on this appeal is whether there was error in the direction of a verdict for defendant.

The testimony as to the speed of the car varied from six or seven miles to fifteen or twenty miles per hour. The motorman testified that he first saw the milk wagon when his car was about the middle of the block—i. e., about 150 feet east of the wagon—that he at once put on the brakes, rang the gong, and put on the reverse current; that the brakes did not take hold well, and the wheels slipped on the rail because it was dirty in spots. Another motorman who was on the front platform of the car at the time corroborated this testimony fully. Two disinterested witnesses, who were on the sidewalk, one directly opposite the car and the other some 200 feet distant, testified positively to the ringing of the gong, and they also testified to the fact that the car slowed up at once, and that they saw the motorman putting on the brakes; while a third passerby testified to the slackening of the speed and the putting on of the brakes. In addition to this, the weight of the evidence is to the effect that the car had nearly reached a stop before it struck the wagon.

As opposed to this mass of evidence, which entirely excludes the idea of wanton or reckless disregard of life on the part of the motorman, there is the testimony of one witness for the plaintiff, who stood on the sidewalk some 200 feet away, and testified that he did not hear the gong nor see the motorman attempt to stop the car, and of another witness, a block further away, who thought the speed of the car was about the same all the way until the wagon was struck. If the motorman sounded the gong as soon as he saw the wagon and attempted to stop the car at once, there can be no reasonable claim of gross negligence, even if in the exercise of due care he ought to have seen the wagon earlier.

The mere negative testimony of one witness who testified that he did not hear the bell nor see any effort to stop the car cannot be deemed sufficient to justify this court in reversing the decision of the trial court, especially when that decision is given the weight and deference to which it is entitled.

Judgment affirmed.

BYRNES v. BROOKLYN HEIGHTS R. R. CO.

(New York — Appellate Division, Second Department.)

Injury to Boy Struck by Car While Crossing Street; Negligence; Proof Not Justifying Recovery.

DEFENDANT appeals from a judgment for plaintiff. Reported 133 N. Y. Supp. 243.

Opinion by WOODWARD, J.:

The plaintiff, a boy between the age of ten and eleven years, stepped down from the curbstone on the right-hand side of Nostrand avenue, near Floyd street, in the borough of Brooklyn, and walked slowly in a diagonal line with the defendant's track, stepping upon the same, when he was struck by the right-hand corner of the fender, sustaining injuries for which the jury has awarded a verdict of \$100. The plaintiff testifies that just as he stepped down from the curb he looked and saw defendant's car approaching quite rapidly; that the car was then about half a block away, though upon cross-examination he reduces this distance to about thirty feet. He says that he then walked diagonally toward the car track, intending to reach his father on the opposite side of the street, and did not look or pay any further attention to the car until he was about to step on the first rail of the track, when he heard the motorman call; that he then tried to stagger back from the track, but was unable to do so until after the car fender had reached and hit him. It does not appear from the evidence just what the distance was between the curb and the car track; there was evidence that there was room for a truck to pass, but whether there was any considerable margin does not appear, nor is the evidence clear as to how far the plaintiff walked slowly along the track and diagonally toward it, but it is certain that the evidence does not show any degree of care on the part of the plaintiff, and the motorman in the middle of a block was not bound to anticipate that this boy of ten or eleven years of age, with an unobstructed view, was going to step upon the track in front of the advancing car. The boy does not claim that he did not see the car approaching; he says it was coming at a rapid rate, thirty feet or more away when he stepped down, and that he walked slowly in a diagonal line with the defendant's track without paying any further attention to the car until the motorman called to him, and it appears that the motorman called to him just as he was in the act of stepping into a place of danger, and at which time the car was only about twelve or fifteen feet away, which would bring the fender only about nine to twelve feet from the plaintiff at the time he stepped into the track of the car, and the evidence would seem to indicate that this distance was even less. There was no evidence that the plaintiff was engaged in exciting play, or that he was moving in such a manner as to indicate that he was oblivious to danger; he was walking slowly in the same general direction the car was running, gradually drawing toward the same, and the evidence neither discloses that the car was being recklessly run nor that there was anything which called upon the defendant's motorman to anticipate danger to the plaintiff. He could walk along the side of the track within eighteen inches to two feet of it without

danger to himself, and if street cars owe the duty of slowing down every time any one gets near enough to enable them to step into a position of danger public traffic would be seriously impeded. Pedestrians can and do stop just short of the danger line in thousands of instances every day, and unless there is something to indicate to the motorman that a different result is contemplated, there is no reason why he should not operate his car at the usual rate of speed at points other than street crossings. Of course if children are at play in the streets it is his duty to sound warnings and to take precautions against the pranks of children under such circumstances, but there were no special conditions shown here. A boy of ten or eleven years of age, who is not shown to be deficient mentally, must be presumed to know the danger to be anticipated from crossing in front of a moving car, and where the evidence shows that the plaintiff, without looking at any time when the obligation was upon him to look, and when the exercise of any degree of care would have obviated the accident, deliberately walks into a position of danger, under the circumstances shown here, it is not proper to submit to the jury the question either of the defendant's negligence or that of the plaintiff's lack of contributory negligence, for there is no evidence to support a verdict in his favor.

The judgment and order appealed from should be reversed and a new trial ordered, costs to abide the event.

JENKS, P. J., BURN and THOMAS, JJ., concurred; RICH, J., taking no part.

Judgment and order of the County Court of Queens county reversed and new trial ordered, costs to abide the event.

McGEEHAN v. EASTERN PENNSYLVANIA RYS. CO.

(Pennsylvania — Supreme Court.)

Collision With Vehicle Going in Same Direction as Car; Failure to Give Warning of Approach of Car; Negligence.

DEFENDANT appeals from judgment for plaintiff. Reported 84 Atl. 429.

Opinion PER CURIAM:

The only question presented by this appeal is whether, under all the evidence, a verdict should have been directed for the defendant. On a dark night the plaintiff was riding in a buggy on a country road, which for a distance of 1,200 feet was practically parallel with the defendant's tracks and but a few feet therefrom. At a point where the tracks curved and crossed the road, the defendant maintained an electric bell, which rang automatically when a car was within 500 feet of it. On the night of the accident the bell was out of order and did not ring, and this condition had been reported to the car dispatcher several hours before. The plaintiff was familiar with the crossing, and stopped when about twenty feet from it, and looked and listened for a car, and listened for the sound of the electric bell, and continued to look as he advanced to the crossing. His carriage was struck by a car running in the direction he was driving. The testimony on behalf of the plaintiff

was that the trees and underbrush at the side of the road interfered with a view of the tracks, that the car was running at a very rapid rate, and that no notice of its approach was given by gong or whistle. This made out a *prima facie* case of negligence by the motorman, without disclosing negligence by the plaintiff. The case was therefore for the jury.

The judgment is affirmed.

MULLEN v. CHESTER TRACTION CO.

(Pennsylvania — Supreme Court.)

Passenger; Liability of Company Issuing Tickets Good on Two Other Independent Railways for Injuries to Passenger Who Purchased Ticket from One of the Independent Railways.

DEFENDANT appeals from judgment for plaintiff. Reported 84 Atl. 429.

Opinion by MESTREZAT, J.:

The Southwestern Street Railway Company owns and operates a street railway running in a southerly direction from Philadelphia to Bow Creek, Delaware county. At this point the line connects with that of the Philadelphia & Chester Railway Company, which operates a street railway from that point to Third street in the city of Chester. The Chester Traction Company, the defendant in this case, operates a system of street railways in the city of Chester and other parts of Delaware county. The lines of the three companies are physically connected, so that a car can be run from the starting point of the Southwestern in Philadelphia to the car barn of the defendant company in the city of Chester.

All the stock of the three companies is owned or controlled by the Interstate Railways Company, a New Jersey corporation. They have the same general officers, but each company operates its own road. They have separate bank accounts, in which are kept the moneys belonging to each company. Each company has separate pay rolls and pays its own employees. The Philadelphia & Chester Railway Company with its own money pays the Southwestern Street Railway Company, which owns the cars operated by the former company, for the use of the cars. It pays both the Southwestern Street Railway Company and the Chester Traction Company for the power furnished by them to it. It also pays the Chester Traction Company for all repairs and maintenance of the cars which are used on its road, and pays the wages of the motormen and conductors operating the Southwestern Company's cars.

Passenger tickets for transportation over the three roads were issued by the Chester Traction Company in the following form: "Chester Traction Company. Good for One Five-Cent Fare. P. 207216. T. W. Grooket, Jr., Treasurer." They were issued in packages of six tickets, and sold for twenty-five cents. Each of the conductors on the several lines obtained a supply of tickets on beginning his day's work, giving his receipt for them, and at the end of the day he turned over all money received from the sale of the tickets and accounted for the unsold tickets. The money thus received by the Chester

Traction Company was deposited in its account, and at the end of each month it paid to each of the other two companies the actual amount of money received for tickets used on their respective roads. The only profit which the Chester Traction Company derived from the tickets used on the other two roads consisted in the use of these moneys during the month, and in the fact that, so far as the tickets sold were never used by the purchasers, the proceeds were retained by the Chester Traction Company.

On September 22, 1908, the plaintiff purchased a package of six tickets for twenty-five cents from a conductor of the Philadelphia & Chester Railway Company. He used two of them on that day in going to his home in Philadelphia, one on the Philadelphia & Chester Railway and one on the Southwestern Street Railway. On the following day he boarded a car of the Southwestern Street Railway Company in Philadelphia to go to his work at Eddystone, Pa., which is on the Philadelphia & Chester Railway. By arrangement between that company and the Philadelphia & Chester Railway Company the car which he entered ran through to his destination at Eddystone. He gave the conductor of the Southwestern Street Railway Company two of the tickets. When the car in which he was riding got beyond the Southwestern road, and while it was on the road of the Philadelphia & Chester Railway Company, it collided with a car of the latter company, and the plaintiff was injured. He brought this action against the Chester Traction Company, which issued the ticket on which he was riding, to recover damages for the injuries he sustained by reason of "the carelessness and negligence on the part of the servants, agents, workmen, or employees, who had been employed by the defendant in the execution of their contract for transportation with the plaintiff, and who were in charge of the car upon which the plaintiff was riding as a passenger at the time of the aforesaid collision, resulting in the injuries above described." The trial resulted in a verdict and judgment for the plaintiff, and the defendant company has taken this appeal.

The appellant company contends that there was no contract between it and the plaintiff because: (a) The ticket was not sold to the plaintiff by the defendant; (b) the defendant did not operate the Philadelphia & Chester Railway, on which the accident occurred, or the Southwestern Street Railway, and had no control over the operation of either; (c) that, while the defendant issued the tickets purchased and used by the plaintiff, it received no benefit from their sale and use.

The position of the appellee is that the defendant entered into a contract with him whereby it agreed to carry him safely to his destination; that it was bound to execute this contract, and the servants of the other two companies became, in the performance of the contract, the servants of the defendant; that the proceeds of lost and unused tickets and the use of the money received from the sale of tickets for the time it was retained by the defendant were a pecuniary benefit resulting from the sale of the tickets; that it is immaterial whether the defendant received any benefit from the sale of the tickets; and that there was nothing in the contract to notify him, and he did not know that the three street car lines were separately operated, or were not operated by the defendant company.

The learned court below instructed the jury "that if the Chester Traction Company [the defendant] did not know, when they delivered the tickets to

this conductor, that he would use them for passage over either the South-western or the Philadelphia & Chester Railway, that they are responsible for any negligent act concerning the carrying of this passenger, just as though it had happened upon their own line." This is the subject of the second assignment, and raises the important and controlling question in the case. In finding for the plaintiff, the jury found that the defendant company had such knowledge, and therefore the company sold the tickets to be used, not only on its own line, but on the line on which the plaintiff, while a passenger, was injured. The instruction complained of was not erroneous under the undisputed facts in the case. The ticket with which the plaintiff paid his fare was issued by the defendant company, purchased by the plaintiff, and, as disclosed on its face, was "good for one five-cent fare." It was accepted by the conductor as a fare or compensation for carrying the plaintiff to his destination. Under the finding of the jury, the defendant issued the ticket to be used on the Philadelphia & Chester Railway, and thereby contracted with the plaintiff that it would carry him over that route.

It is clear, we think, that the defendant's liability for the plaintiff's injuries is the same as though the ticket was being used and the plaintiff was being carried over a railway owned by the defendant company. The plaintiff contracted with the defendant to carry him over the railway on which he was traveling at the time he was injured, and, regardless of the real ownership of the railway, it must be considered, as between the plaintiff and the defendant company, the railway of the defendant. By the issuance and sale of the tickets, the defendant held itself out to the public that it had the means of transportation, and would, for the specified fare, carry passengers over this route. It is immaterial to the plaintiff as to what agreement the defendant had with the Philadelphia & Chester Railway Company to carry passengers. It is not alleged that the plaintiff knew of the existence of any such agreement, and hence its terms cannot relieve the defendant from the performance of its duty as a carrier under its contract with the plaintiff. In contracting for his transportation, the plaintiff knew the defendant and no other company, and relied solely on the defendant to carry him as required by its ticket. When he entered the car, and the conductor accepted the ticket, the plaintiff became the passenger of the defendant company, and it was responsible for his safe transportation over the railway to the destination to which passengers were carried for the stipulated fare. He is not concerned with the ultimate responsibility for the negligence resulting in his injuries, and need not look beyond the party obligating itself to perform the duties of a carrier in transporting him to his destination.

There is no merit in the contention that the ticket was not sold to the plaintiff by the defendant. The tickets purchased by the plaintiff were issued by the defendant company and in its name, were given to the conductors of the other two lines to sell, and at the close of each day they turned over the proceeds of the sales and the unsold tickets to the defendant company. The conductors were therefore the agents of the defendant for selling the tickets, and the sales must be regarded as being made by the defendant. There is no evidence that the conductors acted for themselves or their companies in selling the tickets; on the contrary, the undisputed facts show that they acted as the agents of the defendant in making the sales.

We regard it as immaterial whether the defendant company received any benefit from the sales of the tickets. If no benefit accrued to it from the sales, it is a matter with which the interested parties alone are concerned, and with which the purchasers of tickets have nothing to do. It could hardly be expected that the holder of a street railway ticket would, even at the risk of losing protection against the negligence of the carrier, investigate and determine whether the carrier, selling the ticket and agreeing to transport him, retained all or any part of the consideration for the service to be performed. No such duty is imposed on the passenger. Having paid full consideration to the company accepting his money and agreeing to carry him, the holder of the ticket is not affected by the ultimate destination of the passage money. It may be suggested, however, that it is not at all clear that the defendant company did not receive substantial benefits from the sales of the tickets. The conductors returned to the defendant each day the money received by them for the tickets, and it was retained by the defendant until the end of the month, during which time the company had the use of it. In addition to this, the defendant retained the proceeds of the sales of lost and unused tickets.

The ticket sold to the plaintiff by the defendant was for a continuous passage over the line on which it was used. It was not a coupon ticket, entitling the holder to ride over several separate and different railways; but each ticket was good for one fare over any one road on which the passenger desired to travel. The defendant company, in selling the ticket, was not acting as the agent of any other railway company, but for itself, and the road on which it was used was, *pro hac vice*, the road of the defendant company for the transportation of the holder of the ticket. If, as the jury found, the plaintiff was injured by the negligence of the carrier transporting him on a ticket issued by the defendant company and without any fault on his part, he is entitled, under the facts of the case, to recover in this action.

The judgment is affirmed.

SNOWDEN v. PHILADELPHIA RAPID TRANSIT CO.

(Pennsylvania — Supreme Court.)

Passenger; Sudden Starting of Car on Curve Throwing Standing Passenger from Body of Car to Platform and to the Street; Negligence.

DEFENDANT appeals from judgment for plaintiff. Reported 84 Atl. 591.

Opinion *PER CURIAM*:

This action was by children to recover the loss occasioned by the death of their mother, alleged to have been caused by the negligent operation of the defendant's car. The only question raised by the assignments of error is whether the case should have been withdrawn from the jury.

There was testimony tending to show that as the car approached a regular stopping place, and was running very slowly, it was suddenly halted and then

suddenly started forward on a curve, throwing the deceased to the platform, and from the platform to the street. The pivotal question of fact was whether she was standing within the body of the car, or had stepped from the front doorway to the platform. This question was submitted to the jury, with the clear and distinct instruction that, if she had stepped to the platform while the car was in motion there could be no recovery. Since there was testimony that would justify a finding that she was standing within the body of the car, and was thrown from her position by a violent and unusual motion of the car, the case was for the jury.

The judgment is affirmed.

FUNK v. HUMMELSTOWN & CAMPBELLSTOWN ST. RY. CO.

(Pennsylvania — Supreme Court.)

Rider of Horse, Which Became Unmanageable as Car Approached from Rear, Thrown Under Car and Killed; Negligence; Evidence.

DEFENDANT appeals from judgment for plaintiff. Reported 84 Atl. 578.

Opinion by MOSCHZISKEER, J.:

Sarah Funk brought this action in trespass against the Hummelstown & Campbellstown Street Railway Company on behalf of herself and her minor child, to recover damages for the death of her husband, Harry K. Funk, which she alleged resulted from the negligence of the defendant company.

On the evening of January 29, 1910, a stormy night, Funk was riding horse-back along a public highway called the Berks and Dauphin turnpike. It had been snowing and blowing the entire day and previous night, and the snow was thrown up in banks or drifts along the road. The testimony as to the height of these banks of snow varied; some witnesses saying that they were as high as three feet, and others that they were not more than eighteen inches. The defendant company operated a trolley line in the middle of the turnpike, and on the day of the accident had two employees clearing its right of way and shoveling the snow to the north and south of its tracks. The deceased had arrived in the town of Palmyra, and was riding between the rails as a car approached from the opposite direction. At that time his horse was unmanageable. When the motorman saw the deceased, he blew the whistle and brought his car to a stop; but the horse continued to rear and plunge, and Funk fell to the ground across the track and partway under the front of the car. An examination of his body disclosed an injury upon his head about the size of a dollar, from which he died shortly afterwards. There was no direct evidence that the car came in contact with the rider or the horse before Funk was unseated, or to explain precisely the immediate cause of the injury from which he died. The jury rendered a verdict for the plaintiff, and the defendant has appealed and assigns for error the court's refusal of binding instructions and judgment *non obstante veredicto* in its favor and the entry of judgment on the verdict.

A careful examination of the printed evidence fails to reveal any proofs which would justify a finding that negligence by the defendant company caused the injury complained of. The citation of authorities in cases of this character is of little or no avail, since each case must stand or fall on its own facts. As was truly said by President Judge Rice, in *Stanton v. Traction Co.*, 11 Pa. Super. Ct. 180, 200: "The width of the street, the amount of travel upon it, the grade, the climate, the depth of the snowfall, the depth of the snow already upon the ground, the kinds of vehicles in common use, and many other circumstances of minor importance are all to be considered in determining what is due care in the disposition of the snow which the company removes from its tracks. It is not possible to lay down a single rule applicable alike to a crowded thoroughfare of a populous city and to a little traveled road, where ample room is left on either side of the track for vehicles to pass and turn, and all the different roads of varying conditions lying between those two extremes. A case, indeed, may be so plain that it will be the duty of the court, taking a practical view justified by common knowledge and experience, to give the jury binding instructions that the company has exercised all the care in the removal and disposition of the snow that could reasonably be expected."

In the present case binding instructions should have been given for the defendant. The accident occurred on a stormy winter's night, when the wind was blowing and the snow driving and drifting, on a turnpike road in a rural community, where there were but few houses in the immediate vicinity. It appears that the horse was first seen rearing and plunging before it came to the cleared part of the defendant's right of way, and before the trolley car was in sight, and that it never went down, but the rider was thrown from its back. There was not any evidence from which the jury could justifiably say that the defendant company had removed the snow in an unusual or negligent manner under the circumstances; that by the cleaning of its tracks it had created an unreasonably hazardous condition on the highway, which had become a standing danger to its public use, as in some of the cases cited by the appellee; or, in point of fact, that the snow placed by the defendant on the sides of the road caused or directly contributed to this unfortunate accident. Nothing negligent or unusual had occurred in the operation of the car to which the conduct of the horse or the unseating of the rider could be attributed, so as to fix a liability upon the defendant; and it cannot be said with any degree of certainty whether it was contact with the car or with the ground that brought about the fatal injury. After viewing all the testimony in the most favorable light for the plaintiff, we deem the case devoid of evidence showing negligence on the part of the defendant.

The assignments of error are sustained, the judgment is reversed, and is here entered for the defendant.

QUATFASEL v. NEW YORK & QUEENS COUNTY RAILWAY CO.

(New York — Appellate Division, Second Department.)

Child; Raised in the Air on Cable from Which He Fell by Sudden Tightening of Same; Identity of Defendant.

PLAINTIFF appeals from judgment for defendant. Reported 135 N. Y. Supp. 765.

Opinion by WOODWARD, J.:

The plaintiff, an infant of nearly five years of age at the time of the accident, was playing upon the sidewalk opposite his father's store in Pierce avenue, Long Island City, on the 29th day of September, 1909. A party of men, alleged to be in the employ of the defendant, were engaged in placing wire cables upon certain poles along that thoroughfare. In doing this the cables would be lifted up to the supporting arms upon the poles, the loops falling nearly to the sidewalk. These loops were taken up and the cables made taut by means of a team of horses hitched to the end of the cable some distance away. The plaintiff was standing with his back to one of these sagging cables, which was about eighteen inches above the sidewalk, when the team was suddenly started and the child was caught under the arms and carried suddenly up a distance of about two stories, and when the cable became straight it operated like a bowstring and threw him off, resulting in serious injuries. The case is so identical in its principles with *Devine v. Brooklyn Heights R. R. Co.* (1 App. Div. 237) that we feel called upon to reverse the judgment now before us on the authority of that case.

It is attempted to show here that there was no evidence to establish that the defendant was doing the work. It may be admitted that the evidence was not entirely satisfactory, but we are of the opinion that in the state of the pleadings with the defendant's admissions, evidence that a wagon bringing tools and supplies to this work was marked with the initials or with the name of the defendant, and the other facts and circumstances surrounding the occurrence, was some evidence in support of the cause of action; was evidence which demanded the submission of the question to the jury, even though the court might owe the duty of setting aside a verdict based upon such evidence. This is a nonsuit and the plaintiff is entitled to all the legitimate inferences from the evidence, and we are persuaded that a *prima facie* case was presented by the evidence and one which justified a submission to the jury unless, upon the presentation of defendant's case, there was some conclusive fact to overcome the testimony tending to connect the defendant with the accident.

The judgment appealed from should be reversed and a new trial granted, costs to abide the event.

JENKS, P. J., HIRSCHBERG, BURR and RICH, JJ., concurred.

Judgment reversed and new trial granted, costs to abide the event.

RIST v. PHILADELPHIA RAPID TRANSIT CO.

(Pennsylvania — Supreme Court.)

Passenger; Injury While Alighting by Stepping into Depression in Street; Res Ipsa Loquitur.

DEFENDANT appeals from judgment for plaintiff. Reported 84 Atl. 667

Opinion by STEWART, J.:

The plaintiff received her injuries while alighting at night time from the car in which she had been a passenger. The car, upon the plaintiff's signal, had come to a full rest at the accustomed place of stopping, the intersection of two streets. In descending from the step of the car she stepped into a depression on the street, which caused her to fall upon a pile of paving blocks immediately before her. The negligence complained of was plaintiff's discharge from the car at a point where the street was in an unsafe and dangerous condition. There was evidence that extensive alterations and improvements in connection with the change of grade of the street at that point had been in progress for some time previous, and that when this accident occurred, and at the place where it did occur, the street was in a bad and unsafe condition. The case was submitted to the jury, and resulted in a verdict for the plaintiff. That it called for a submission is, we think, clear. Error is complained of in the manner of its submission, and it is only necessary to advert to the one assignment which challenges its correctness.

On behalf of the defendant company, this point, among others, was submitted: "No presumption of negligence on the part of defendant company arises by reason of the fact that the plaintiff had been a passenger upon its car, and was in the act of alighting, under the circumstances of this case." The learned trial judge answered the point as follows: "The circumstances of this case require that I should decline to affirm that point, and I do so." The point should have been unequivocally affirmed. The mere happening of this accident, under the circumstances, did not raise any presumption of negligence on the part of the company. The cause of the accident as charged was failure on part of defendant company to provide a safe place at this accustomed stopping point for the discharge of passengers. The burden of showing negligence in this regard, and that such negligence was the proximate cause of plaintiff's injuries, was upon the plaintiff. In answer to another and later point, the learned trial judge did say "that the burden is upon plaintiff to establish that her alleged injuries were received in consequence of some act of negligence on the part of the defendant company;" but, so far as this instruction conflicted with the answer to the earlier point, it left the jury without any positive instructions as to the law of the case.

The first assignment of error must be sustained, and the judgment is accordingly reversed, and a *venire de novo* awarded.

HIBBLER v. DETROIT UNITED RY.

(Michigan — Supreme Court.)

Highways, Use of; Traveler May Drive on Tracks Where Company Has Rendered Highway Impassable by Throwing Snow Thereon; Traveler Struck by Car While Driving on Such Track; Duty of Operators of Cars to Have Regard for Conditions of Highway; Negligence; Contributory Negligence.

DEFENDANT brings error from judgment for plaintiff. Reported 137 N. W. 719.

Opinion by STEERE, J.:

This is an action brought by plaintiff to recover damages for personal injuries sustained on the evening of December 31, 1910, through being struck by one of defendant's interurban cars while he was driving a team of mules, drawing a wagon, along the highway between the cities of Detroit and Pontiac. The case was tried before a jury in the Circuit Court of Oakland county, resulting in a judgment on verdict for plaintiff in the sum of \$1,500, and defendant has removed the proceedings to this court for review on a writ of error, claiming that a verdict should have been directed in its favor.

Defendant owns and operates a double-track electric railway system, running along said highway, connecting the two cities, and passing through the two villages of Birmingham and Royal Oak. This highway, known in its early history as the "Saginaw Pike," is conceded to be approximately sixty feet in width between the fences. Most of the way outside of the two terminal cities, and including the place of the accident in question, defendant's tracks are laid along the easterly side of the highway, occupying thirty-two feet, and leaving twenty-eight feet of the original sixty feet for general public travel. Between Pontiac and Birmingham the ties are laid practically on a level with the roadway, the rails resting on the ties and projecting four and one-half inches above. On the morning of December 31, 1910, the plaintiff, a farm laborer, was sent by a Mr. Simpson, his employer, to Detroit, with instructions to bring back to Pontiac a team of mules, a wagon and two horses, recently purchased by Mr. Simpson. Plaintiff left Detroit on his return shortly after noon, driving the mules hitched to the wagon and leading the horses tied behind. The wagon was a heavy one, with tires one and three-quarter inches in width. It was winter weather, and there was considerable snow on the ground, which had drifted some in certain places. The testimony is not harmonious as to the exact depth of snow or extent of its drifting. Plaintiff appears to have progressed rather slowly, and is shown to have arrived at Birmingham, which is seven miles from Pontiac, after nightfall. He stopped there to get warm, it being a cold night, and while there drank a glass of beer. Resuming his journey, he had more or less trouble driving on the usually traveled portion of the highway. His mules were sharp shod, and with their small feet did not travel easily in the snow. In places he found it necessary, or at least easier, to drive along the railway track from which the snow had mostly been removed. It is the claim of plaintiff that at certain points on the route the snow had been thrown on the side by defendant's snowplow in such quantity and in such manner as to render the usually traveled way difficult and practically impassable. When within about a mile of Pontiac, at what plaintiff

claims was a bad portion of the road which compelled him to drive along the railway track, a south-bound car running at the rate of forty miles an hour came in sight over a hill in front of him. As soon as he saw it he at once started to turn off the track, but owing to a steep bank of deep snow at the side, in which one of his mules got fast, he could not do so in time, and the car caught him. Three of the animals were killed and plaintiff was seriously injured. His right leg was broken, his shoulder and neck sprained, and his face and head were cut with glass and bruised by his striking the vestibule of the car. He was under the care of a physician and confined in the hospital for about a month, experiencing much suffering. No issue is raised as to the nature, manner of receiving or extent of his injuries, or the size of the verdict, provided it were shown any legal liability on the part of defendant existed.

The declaration alleges, and plaintiff claims to have shown, two grounds of recovery: First, that defendant carelessly and negligently deposited from its tracks upon the traveled way large quantities of snow, piled up in such a manner as to render it unsafe and unfit for travel; second, that defendant's motorman ran his car in a careless and reckless manner, regardless of the rights and safety of plaintiff, although, had he been attentive and vigilant, he could have seen plaintiff and stopped his car in time to avoid the collision, or, at least, to have greatly reduced its force and effect. Defendant's request for a directed verdict and subsequent motion for a new trial were denied; the issues there raised being comprehended within these two assignments of error: "That the court erred in submitting the cause to the jury for the reason that, under the evidence in said cause, the plaintiff was himself guilty of contributory negligence," and "that the court erred in submitting the said cause to the jury, for the reason that under the proofs in said cause the said defendant was not guilty of any negligence which contributed to bringing about of the injuries of which plaintiff complains." It appears that during the winter, and prior to the accident, considerable snow had fallen, accompanied at times with some drifting. Defendant, as occasion required, used a snowplow to clear its tracks. The plow proper was a V-shaped projection in front of the car, in addition to which there were attached to the sides of the car wings, made of oak planks, about fifteen feet in length, to push the snow still farther back and away from the tracks. These wings were so attached to the car that they could be swung at different angles and set at various pitches, as desired. The snow plowed from the westerly track going to either side accumulated partly on the traveled way and partly on the space between the two tracks, called by the railroad men the "devil strip," for reasons not given, but which can be imagined in times of deep snow. Defendant's testimony shows that it plowed the snow from the entire system on December 26th, and went over the road with the snowplow practically each day thereafter until the accident; the plow being run between Pontiac and Birmingham on that day. There is much testimony tending to show that the twenty-eight feet of roadway beside the tracks was in bad condition, heavy with snow and difficult to travel at that time, and that the action of defendant in throwing the snow from its tracks upon it contributed largely to that condition.

If the portion of the highway to the west of the tracks was rendered impassable or unsafe for travel in places by reason of defendant thus throwing the snow from its tracks upon it, a person having occasion to travel along that

public highway would have a right to drive upon the tracks, where necessary to effect a passage, exercising, of course, reasonable caution, vigilance and care.

It was also the duty of defendant's employees in operating its cars along a traveled highway to have due regard for known conditions, and take reasonable precautions to avoid accidents which such conditions rendered more probable.

Numerous witnesses testified as to the deep snow and bad condition of the road, and the necessity of driving onto the tracks in places to effect a passage. There was testimony that the snow in places had drifted next to the fence and was very deep; that at such places it had been thrown up by the plow onto the road next to the track from three to four feet high; that in some places a sleigh would slew so it could not be kept up on the traveled way; that the snow was thrown up by the snowplow in chunks and bunches, and was not level; that where the accident happened there was so much snow and the road so bad that other rigs had also been obliged to drive along the railway tracks; that on the night of the accident an automobile, attempting to go from Detroit to Pontiac, encountered conditions near the place of accident which compelled the driver to abandon the trip and leave his car there for the time being. The evidence produced by plaintiff along these lines was abundant to present an issue for the jury as to defendant's negligence in causing, or contributing to, a condition of the highway which rendered it necessary for those traveling it to go upon defendant's tracks at different places in order to get through.

It was not unlawful in itself for defendant to shovel snow from its tracks and within reasonable limits, for a reasonable time, accumulate it on adjacent portions of the road, but such disposition of snow must be made with due reference to the rights of travel on the highway. The defendant would not have the right to go to the extent of rendering other portions of the highway impassable in order that its tracks might be made passable for cars. *Wallace v. Detroit City Ry.*, 58 Mich. 231, 24 N. W. 870. "It certainly cannot be laid down as an unvarying rule applicable to every community and to every street and road that the company may not cast the snow on the highway at the sides of the track. This would be unreasonable. Nor, on the other hand, can it be said that it may do so without regard, in the manner of disposing of it, to the effect which the accumulation will have on public travel. Any disposition that is made of the snow must be with due regard to the rights of travel on the highway, and so as not to interfere needlessly, in a practical sense, with the safety and convenience of persons lawfully using the street in an ordinary way." *Stanton v. Scranton Trac. Co.*, 11 Pa. Super. Ct. 180. The testimony in this case clearly presents an issue of fact as to defendant's negligence in that particular.

The rise in the road towards Pontiac from the place of the accident, called "Hadsell's Hill," prevented the motorman and plaintiff from sooner seeing each other, as both testified. It is undisputed that when the car had gotten over this hill and down to the bottom, so the headlight shone squarely along the track, the motorman had an unobstructed view of plaintiff, where he was in trouble on the track ahead, for 600 feet. He testified that he was running forty miles an hour when he reached the hill, and possibly forty-five miles when he reached the foot, as he kept the power on; that when he saw the rig on the track he threw off the power, pulled the reverse, and blew the whistle; that the reverse took, but he went to the point of accident as quick

as he could snap his finger. On cross-examination, being asked his judgment of the distance in which he could stop the car by using the air brake when running forty miles an hour, he testified: "Under normal conditions it might take it 500 feet with the air brake; now, if you wish to use the reverse, you might stop it in 100 feet less, you might stop it if you wish to use the reverse." The evidence shows that with 600 feet in which to stop after the motorman saw, or could have seen, the rig in trouble, on the track ahead of him, he struck it with such force as to kill three of the animals, two of which were behind the wagon, and that the car ran on beyond the place of the collision several rods, shoving the dead animals ahead of it.

The negligence of the motorman in the management of the car was put in issue by such evidence, and became a question of fact for the jury. "It was the duty of the motorman to have the car under such control as to admit of its being stopped after he became able to discover objects on the track, and before a collision with such objects should occur, and it was his duty to give timely warning. If the motorneer had performed his plain legal duty he would have been able, after discovering plaintiff's position, to have stopped his car and avoided the collision." *Ablard v. Detroit United Ry.*, 139 Mich. 248, 102 N. W. 741. See also *Quirk v. Rapid Ry.*, 130 Mich. 654, 90 N. W. 673, and cases there cited. In the latter case two boys were on the track, one drawing the other in a cart to which he had attached himself with some kind of a harness. In turning the cart from the track it became caught on the rail in some way. The boy in the cart jumped out and escaped, but plaintiff could not free himself from the harness in time. The car struck the cart and threw him in such a manner that his arm got on the rail and was cut off. It was held that both negligence of defendant and contributory negligence of the plaintiff were for the jury.

Defendant's chief contention is that plaintiff was guilty of contributory negligence in driving along the tracks and failure to keep proper watch for an approaching car. As to plaintiff keeping a proper watch for an approaching car, his testimony is positive that he did. A denial of the truth of his statement can go no further than to raise a question of fact. He testifies: "I was driving north on the track. I was looking ahead of me, expecting a car. * * * I didn't see any until just as it came up by Hadsell's. * * * The car when I first saw it was just breaking over the hill up in front of Hadsell's. When I saw the car coming I tried to get up into the road. * * * I tried to pull up into the road, and the snow was deep, and I got one of my mules fast, and I couldnt get up and the car struck me."

This was a public highway sixty feet wide. Though defendant's double tracks occupied and made less safe thirty-two feet of this width, it was nevertheless all a highway open to public travel. Defendant having, by franchise, authority to lay its tracks and operate its lines on the highway, its cars and ordinary conveyances had equal rights there. One traveling with an ordinary vehicle on a street or road traversed by electric cars has a right to drive over or along the tracks on which such cars run whenever the customary or necessary use of the way permits or requires him to do so, and plaintiff was not in this case *per se* guilty of negligence in driving on the track; nor was he necessarily and as a matter of law guilty of negligence in failing to leave the track in time to avoid collision when a car came along, provided he was keep-

ing watch, promptly proceeded to leave the track as soon as the car came in sight, tried his best to do so, and would have done so in time but for the fact that the condition of the snow thrown up by the defendant resulted in his mule getting fast, thus unexpectedly delaying him. *Manor v. Railway*, 118 Mich. 1, 76 N. W. 139; *Rouse v. Detroit Elec. Ry.*, 128 Mich. 149, 87 N. W. 68. This is not a case of a person suddenly appearing on the track at a crossing in an attempt to cross over ahead of a car, or unexpectedly turning upon the track while passing along the street. Plaintiff was upon the track, and trying to get off, from the time the car came in sight. According to his testimony, he was watching for the car, and promptly attempted to leave the track when it appeared. He had driven on and off the track twice before, only going along it when the condition of the road made it necessary. Others had done the same, and for the same reason. The accumulation of snow in the highway and general conditions existing there were presumably known to defendant's employees in charge of the operation of the road. It was the duty of the motorman also to exercise care and vigilance, and control his car according to known conditions and dangers. Plaintiff had a right to assume that he would do so. Their duties were mutual — one to exercise ordinary prudence to avoid receiving injury and the other to avoid inflicting it. "Street railway companies have no such proprietary interest in the portion of the street upon which their tracks are laid as limits the rights of the general public to use the same territory as a part of the public highway, so as to impose upon travelers the duty of keeping themselves and horses out of the way of cars on such tracks." *Nellis on Street Railways*, § 417. The cars being confined to the tracks, heavier to handle and unable to turn aside, it is the duty of the ordinary vehicle or foot passenger to vacate the track when cars approach and allow them to pass, but, as emergencies arise, each must seek to avoid collision and guard against resultant injury to himself or others.

The element of trespass, however, is absent, and persons crossing or passing along the tracks are only required to exercise that degree of care which a reasonably careful, prudent and cautious person would ordinarily exercise under like conditions. Plaintiff had a right to assume that the operator of the car would exercise like vigilance and care, would have his car under reasonable control, and when an obstruction in the shape of a vehicle appeared on the track ahead that he could and would, in an emergency, stop or check his car to avoid a collision. The track was straight between them. Plaintiff was upon it and in sight for a distance of at least 600 feet after the car reached the bottom of the hill. The motorman testified that, even going at the excessive rate of forty miles an hour, he could, under normal conditions, stop the car by using the reverse in 400 feet. "It was a question of fact for the jury to determine whether the plaintiff, under the circumstances, should have been out of the way when the car reached that point, or whether the accident occurred wholly by reason of the negligence of the driver of the car. He could have stopped his car and avoided the injury. If he saw plaintiff could not get out of the way in time to avoid a collision, it was his duty to stop the car." *Laethem v. Railway Co.*, 100 Mich. 297, 58 N. W. 996. We think the questions of negligence and contributory negligence were properly submitted to the jury under proper instructions.

The judgment is affirmed.

HARLAN v. JOLINE.

(New York — Appellate Term, First Department.)

Collision with Automobile; Rights of Chauffeur and Street Car at Crossing.

PLAINTIFF appeals from judgment for defendant. Reported 136 N. Y. Supp. 72.

Opinion by BIJUR, J.:

The plaintiff's automobile, being driven with his consent by a friend, was crossing Lenox avenue from west to east on One Hundred and Twenty-second street. When it had reached Lenox avenue and was twenty to thirty feet from the south-bound car track of defendants, the chauffeur, looking to the north, saw a car coming south and then about 110 feet north of the automobile. The latter was proceeding at from three to five miles per hour; the car about fifteen miles per hour. The chauffeur spoke to his companion, who was sitting to the left of him in the front seat, who thereupon held out his left hand toward the car, while the chauffeur proceeded to cross the track. The car hit the automobile about in the middle but slightly to the rear, and inflicted damages for which recovery is sought.

The learned trial judge seemed to regard the motorman of the car as negligent, but treated the chauffeur's course as contributory negligence as matter of law, because, as the judge said, he took upon himself "a dangerous attitude" and a "wild and reckless guess at what he might do." This ruling, however, is not justified by the authorities. The chauffeur had equal right at this crossing with the defendants' car. From the facts proved, the question, whether he was justified in assuming that the car was under control of the motorman and would be slowed down to enable him to cross without danger, should have been submitted to the determination of the jury. See *Handy v. Metropolitan St. R. Co.*, 70 App. Div. 26, 32; *Hugher v. Nassau El. R. R. Co.*, 142 id. 522; *Lawson v. Metropolitan St. R. Co.*, 40 id. 307, aff'd, 166 N. Y. 589; *Legare v. Union R. Co.*, 61 App. Div. 202, aff'd, 175 N. Y. 502.

Judgment reversed and new trial ordered, with costs to appellant to abide the event.

SEABURY and LEHMAN, JJ., concur.

Judgment reversed.

LARSON v. BOSTON ELEVATED RY. CO.

(Massachusetts — Supreme Judicial Court.)

Passenger; Placing Hand on Door When Car Lurched; Hand Caught Between Side of Door and Jamb as It Opened; Contributory Negligence; Negligence of Servant in Opening Door as Car Lurched; Evidence, Rule That Passengers Should Leave by Side Doors; Damages, Tuberculosis as Element of; Hypothetical Questions.

DEFENDANT excepts from verdict for plaintiff. Reported 98 N. E. 1048.

Two actions, one by Julia J. Larson and the other by Canute B. Larson, her husband, both against the Boston Elevated Railway Company, for damages

from injuries to plaintiff Julia by her hand being caught between the side door of defendant's car, in which plaintiffs were riding as passengers, and the jamb into which the door opened.

Defendant's rule 91 is as follows:

"Gates and Doors. Rule 91. Every precaution must be taken to avoid accidents. Gates and side doors must never be opened so that passengers can board or leave a moving train, nor must trains ever be started until gates and side doors have been properly closed and all necessary signals given. In all cases of doubt adopt the safe course. Great care must be used in operating gates and doors so that passengers will not be struck or their clothing caught by same. Passengers should be induced to leave car by the side doors and enter by the end doors, provided doors and gates stop abreast of the same place on station platform. Passengers wishing to leave train must be allowed to do so before others are permitted to board."

Its rule 99, of which there was introduced only the paragraph commencing "always face the door," is as follows:

"99. Car Doors. During cold or stormy weather guards and brakemen must be careful to keep the doors of the cars closed as much as possible. Open the door of the front car in your charge first and the door of the rear car afterwards, at all times, and close the door of the rear car first and the forward one afterwards, so as to cause as little draft as possible through the trains.

"Always face the door when closing it in order to avoid shutting it against a person's hand or clothing; never slam the door, but use care to open and shut it noiselessly."

Opinion by SHELDON, J.:

The jury had a right to find that the female plaintiff was in the exercise of due care and had not assumed the risk of the accident which happened. The fact that she had left her seat and walked to the door of the car as it approached the station was not decisive against her. *Barden v. Boston, Clinton & Fitchburg R. R.*, 121 Mass. 426; *Worthen v. Grand Trunk Ry.*, 125 Mass. 99. Her putting her hand upon the door was an involuntary act done to steady herself when the lurch of the car threw her against the door. This presented a question for the jury.

There was also evidence of negligence on the part of the defendant. It is not claimed that the lurch of the car, however violent and unexpected, constituted such negligence; but the jury might find that it should have operated as a warning to the defendant's servant in charge of the door that passengers who had come or were coming to it for the purpose of leaving the car might be thrown against it and involuntarily might seize any support within their reach. If the person so in charge was the brakeman at the rear of the car, as reasonably might have been inferred, the argument in favor of the plaintiff was strengthened. *McGlinchy v. Boston Elev.*, 206 Mass. 7, 91 N. E. 892. The reasoning in that case is closely applicable to the case at bar.

The admission in evidence of the defendant's rules 91 and 99 was excepted to. That part of rule 91 which states that "passengers should be induced to leave the car by the side doors" was plainly competent. It tended to show the necessity of care in opening the door in question, by which passengers were expected to go out. Nor was the rest of the rule clearly inapplicable to the

case presented, especially as the exceptions do not show at what stage of the trial the rules were offered and admitted. *Crowley v. Boston Elev.*, 204 Mass. 241, 246, 90 N. E. 532. Only the second paragraph of rule 99 was admitted. This was not incompetent for similar reasons. Both of these rules on their face applied to all the doors of the car.

The testimony as to verbal instructions or directions given by the defendant to the servants as to the operation of the doors was admitted without exception, and it is not necessary to consider the question which was left undecided in *Crowley v. Boston Elev.*, *ubi supra*. It was perhaps intimated in *Lindenbaum v. N. Y., N. H. & H. R. R.*, 197 Mass. 314, 324, 84 N. E. 129, that published rules might be modified by oral instructions; but the question whether the doctrine of *Stevens v. Boston Elev.*, 184 Mass. 476, 69 N. E. 338, firmly settled as it now is in our decisions, should be extended to cover all verbal instructions given by a superior officer or an instructor to an inferior servant, has not been passed upon by the court, and is not now presented.

We cannot say that Pasho's testimony on cross-examination and on his re-direct examination had as matter of law the effect of annulling his testimony as to the oral instructions about which he testified. It was for the jury to settle the fact. *Cameron v. New Eng. Tel. & Tel. Co.*, 182 Mass. 310, 65 N. E. 385; *Tupper v. Boston Elev.*, 204 Mass. 151, 90 N. E. 422. The jury could believe his earlier rather than his later statements. He was not allowed to say what doors or what cases the rules in evidence were intended to cover. This was right. The rules were not ambiguous, and spoke for themselves. Any oral modification or explanation of the rules given to the operators were not excluded.

It was not wrong to admit the hypothetical question put to Dr. Hawes. The question could properly include what material facts the counsel deemed to be proved or expected to be proved, and need not include others. It would be for the jury to say what facts were proved. *Hunt v. Lowell Gaslight Co.*, 8 Allen 169, 85 Am. Dec. 697; *McCarthy v. Boston Duck Co.*, 165 Mass. 165, 166, 42 N. E. 568; *Burnside v. Everett*, 186 Mass. 4, 6, 71 N. E. 82.

If the plaintiff's tuberculosis had been directly caused by this accident it would of course have been an element of damages. So, if it were induced without any other intervening cause by her weakened condition or her loss of blood, itself directly caused by the accident, the same would be true. And if at the time of her injuries there were germs of tuberculosis in her system, and if the direct consequence of her injuries was to lessen her general health and cause weakness and reduce her power of resistance to the toxic effect of these germs, and if solely by reason thereof the tuberculosis which had been merely latent in her system became developed into an existing disease, as on the evidence the jury were warranted in finding, they would then have a right to find that the tuberculosis was a direct and immediate result of her injuries and to assess damages therefor. *Coleman v. N. Y., N. H. & H. R. R.*, 106 Mass. 160, 178; *Derry v. Flitner*, 118 Mass. 131, 133; *McGarrahan v. N. Y., N. H. & H. R. R.*, 171 Mass. 211, 50 N. E. 610; *Rooney v. N. Y., N. H. & H. R. R.*, 173 Mass. 222, 53 N. E. 435; *Sullivan v. Boston Elev.*, 185 Mass. 602, 71 N. E. 90; *Weber v. Third Avenue R. R.*, 12 App. Div. 512, 42 N. Y. Supp. 789; *Dickson v. Hollister*, 123 Pa. 309; *Baltimore City Ry. v. Kemp*, 61 Md. 74; *Beauchamp v. Saginaw Mining Co.*, 50 Mich. 163, 15 N. W. 65, 45 Am. Rep. 30; *Louisville*

& Nashville R. R. v. Jones, 83 Ala. 376, 3 South. 902; Louisville, New Albany & Chicago Ry. v. Falvey, 104 Ind. 409, 426, 3 N. E. 389, 4 N. E. 908; Seckinger v. Philibert Mfg. Co., 129 Mo. 590, 31 S. W. 957; Neff v. Cameron, 213 Mo. 350, 365, 111 S. W. 1139, 18 L. R. A. (N. S.) 320, 127 Am. St. Rep. 606; Ross v. Great Northern Ry., 101 Minn. 122, 111 N. W. 951; People's Ry. v. Baldwin, 7 Pennewill (Del.) 383, 72 Atl. 979; Crane Elevator Co. v. Lippert, 63 Fed. 942, 11 C. C. A. 521. If, however, her tuberculosis came from germs introduced into her system after she had sustained these injuries, or by the operation of some other subsequent and independent cause, then, even though the disease would not have developed and manifested itself but for her physical condition having been weakened and her power of resistance diminished by those injuries, it well may be that she could recover no damages for that sickness and its consequences. Raymond v. Haverhill, 168 Mass. 382, 47 N. E. 101; Snow v. N. Y., N. H. & H. R. R., 185 Mass. 321, 70 N. E. 205; Scheffer v. Railroad, 105 U. S. 249, 26 L. Ed. 1070. But no such claim as that last suggested was made here. The defendant's contention was and is that the evidence as to tuberculosis was wrongly admitted and that no damages should be allowed by reason thereof, and that contention cannot be sustained. The judge clearly and plainly instructed the jury to allow no such damages unless they were satisfied that the tuberculosis was the direct and immediate result of the plaintiff's original injuries. As to this, the defendant's only exception was to the refusal of the instructions for which it asked. These requests, so far as not given, were properly refused.

The other exceptions either have been waived or require no discussion.

Exceptions overruled.

LENNON v. BROOKLYN HEIGHTS R. R. CO.

(New York — Appellate Division, Second Department.)

Collision with Truck at Crossing; Injury to Driver; Negligence; Contributory Negligence.

PLAINTIFF appeals from judgment for defendant. Reported 134 N. Y. Supp. 1009.

Opinion by HIRSCHBERG, J.:

The action is brought to recover damages for personal injuries sustained by the plaintiff as the result of a collision between a heavily loaded beer truck which he was driving and one of the defendant's trolley cars at the intersection of Lee avenue and Lynch street, in the borough of Brooklyn. These highways cross each other at right angles, the avenue extending north and south, and the plaintiff, driving west on the north side of Lynch street, had almost crossed the first of a double line of trolley tracks on Lee avenue when the defendant's trolley car, proceeding north on the avenue, struck the left hind wheel of the beer truck with such force as to push it over towards the westerly side of the avenue and to throw the plaintiff from his seat to the ground. The occurrence took place in broad daylight. The load on the brewery wagon weighed 5,200

pounds. The horses were walking and had proceeded so far in crossing the track that the car caught the hind wheel of the truck, as stated above. The plaintiff's evidence is generally to the effect that when he reached what he calls the "building line" of Lee avenue the car was about seventy or seventy-five feet distant; that it was fifty feet away when his horses stepped on the first track; that he "hollered at the motorman to stop;" that he whipped the horses up as soon as he saw that the motorman was not going to stop, but that he was unable to get clear of the car in time to avoid a collision. A corroborating witness for the plaintiff testified that he was standing near the scene of the accident and that when the plaintiff's wagon was on the north-bound track, the first track it came to, "*all of a sudden a car shot past the corner and hit the truck.*" It seems to be undisputed that the car was going very rapidly and that the truck was moving slowly under a very heavy load; and as it had nearly crossed the tracks sufficiently to avoid danger at the time of the actual collision, it would seem clear that under the authorities the questions of negligence and of contributory negligence should have been submitted to the jury for determination.

It may be that a jury would resolve the questions adversely to the plaintiff, and it may even be that such a result could not be set aside as against the weight of evidence. It cannot be said, however, that there is no room in the circumstances for a fair difference of opinion, and the solution of the questions presented must, therefore, be dependent upon the facts as distinguished from the law alone.

In *Wolfkiel v. Sixth Ave. R. R. Co.* (38 N. Y. 49) it was held as per the head note that the rule is well settled that it is a matter of right in the plaintiff to have the issue of negligence submitted to the jury when it depends upon conflicting evidence, or on inferences to be deduced from a variety of circumstances, in regard to which there is room for fair difference of opinion among intelligent men.

In *Payne v. Troy & Boston R. R. Co.* (83 N. Y. 572) the rule was reiterated, the court saying (p. 574): "If there is any evidence from which a jury might find in favor of the plaintiff, the case should not be withdrawn from their consideration. The testimony here as to the defendant's negligence is not very strong, and the case is a very close one on the question of such negligence; yet it was not so destitute of facts and circumstances for the consideration of the jury, and so clear against the plaintiff, as to leave no room for doubt, and to justify the court in holding that there was no evidence of negligence." To the same effect is *Weil v. D. D., E. B. & B. R. R. Co.*, 119 N. Y. 147.

In *Huther v. Nassau Electric R. R. Co.* (142 App. Div. 522), this court has recently held that the right of the street railroad and of vehicles at intersecting streets are equal; that the railroad company is chargeable with negligence where the motorman failed to have his car under control while crossing an intersecting street, with the result that while driving at a high rate of speed he collided with a vehicle crossing the track; and that it is for the jury to say whether a person driving across the tracks was guilty of contributory negligence, where by reaching the crossing first he had earned precedence in passing over, even though when he first saw the car it was going at a high rate of speed, for he had a right to expect that it would be kept under reasonable

control. The court said (p. 523): "The negligence of defendant was clearly established. At intersecting streets the superior right of way, which ordinarily belongs to a street surface railroad, yields to the necessities of the situation, and its rights and those of vehicles passing along the intersecting streets are equal. As a consequence it is the duty of the motorman operating the car to exercise reasonable care to have it under control as it approaches the point of intersection. The evidence warrants a conclusion that he made no effort to check the speed of the car. In determining the question of contributory negligence on the part of plaintiff all the circumstances surrounding the occurrence must be considered. It was for the jury to say whether plaintiff was not justified in expecting that the rule relating to reasonable control would be observed, and that, although the car was going rapidly when he first saw it, it would be checked if he, reaching the crossing first, had earned precedence in passing over it. It may be that a jury would have determined that he did not exercise such care, but the determination of that question belonged to the jury as one of fact, and not to the court as one of law. *Monck v. Brooklyn Heights R. R. Co.*, 97 App. Div. 447, aff'd 182 N. Y. 567; *Lane v. Brooklyn Heights R. R. Co.*, 85 App. Div. 85, aff'd, 178 N. Y. 623."

The judgment should be reversed.

JENKS, P. J., BURE, THOMAS and WOODWARD, JJ., concurred.

Judgment reversed and new trial granted, costs to abide the event.

INDIANA UNION TRACTION CO. v. LOVE.

(Indiana — Supreme Court.)

Collision with Automobile; Complaint in Action for Death of Guest Riding in Automobile; Contributory Negligence in Remaining in Automobile After Seeing Car; Concurring Negligence of Driver of Automobile Not Imputed to Guest; Not Negligence Per Se to Run Interurban Car at Thirty Miles per Hour Over Country Crossing; Care as to Speed of Cars; Rights of Public and Company at Crossings; Duty of Motorman at Crossings; Failure to Sound Gong.

DEFENDANT appeals from a judgment for plaintiff. Reported 99 N. E. 1005.

Opinion by MYERS, J.:

Action for damages for the death of one Maria Love. The sole error assigned is as to the overruling the demurrer to the complaint.

The complaint in the particulars in question in substance is that on the 11th day of June, 1907, Maria Love was riding as a guest in an automobile owned, controlled and operated by one Heimes, and he was in control of and operating and running such automobile to the west in and along Thirty-eighth street, a much traveled and principal thoroughfare within the corporate limits of the city of Indianapolis, Ind.; that Mrs. Love, as they approached the crossing of the tracks of appellant over said Thirty-eighth street, looked and listened for an approaching car, and that she did not see or hear any approaching car upon said track until just before Heimes went upon the track, and that she,

together with the other guests in the said automobile, called to Heimes to stop the machine, but that he continued to go upon said tracks; that at said time there was a car of this defendant going toward the north upon the east track, and that the view of persons in said automobile to the north was obstructed by a dwelling house, and by two large signboards which were situated near the tracks, and upon the east side of the tracks and north of Thirty-eighth street; that Mr. Heimes, after said car had passed to the north, with his view of the west track obstructed by said house and by said signboards, and by said car moving to the north, failed to see another car of this defendant coming to the south upon the west track and approaching said crossing from the north, and when said car had passed to the north Mr. Heimes turned on the power and started said automobile across said track, and Mrs. Love looked and listened for approaching cars upon both tracks, but saw and heard no cars on said west track until just as Mr. Heimes started said automobile, and when she did see a car coming from the north she, together with the other guests in the car, called to Mr. Heimes and endeavored to have him stop the automobile before going upon said track; that it was impossible for Mrs. Love to jump from said machine at said time without being threatened with instant death, and that she remained in said automobile when it went upon said tracks for the reason as herein set forth; that at said time defendant was carelessly and negligently running said car upon said west track within the corporate limits of the city of Indianapolis, and approached said Thirty-eighth street as aforesaid at a high and dangerous rate of speed, to wit, thirty miles per hour; that defendant was negligently failing to observe said crossing; that defendant carelessly and negligently ran said car on said crossing at said high and dangerous rate of speed; that said defendant negligently failed to sound any gong on approaching said crossing, and negligently failed to observe said crossing to see whether any one was about to cross the same, and, by reason of the negligence of said defendant company in operating said cars as aforesaid, defendant ran said car into said automobile with great force and violence, hurling said automobile and its passengers into the air, throwing Mrs. Love about fifty feet in the air, thereby inflicting on her body deep and lasting and mortal injuries from which she soon died; that said death of Maria Love was caused proximately by the negligence of the defendant as aforesaid.

Defendant demurred to the complaint for the reason that the same does not state facts sufficient to constitute a cause of action. The lower court overruled the demurrer, and appellant excepted. Appellant appeals to this court on the grounds that the lower court was in error in overruling its demurrer (1) because contributory negligence is affirmatively shown by the allegations of the complaint, and (2) that the complaint does not show that any negligence of defendant was the proximate cause of the injuries sued for.

Appellant's theory is that the allegation that "it was impossible for said Maria Love to jump from said automobile at said time without being threatened with instant death" is a mere conclusion, and not the pleading of facts which would be admitted by the demurrer, under the rule that only facts well pleaded are admitted by a demurrer for want of facts. *Pittsburg, etc., Co. v. Schepman*, 171 Ind. 71, 76, 84 N. E. 988; *Pittsburgh etc., Co. v. Peck*, 165 Ind. 537, 76 N. E. 163; *State v. Casteel*, 110 Ind. 174, 187, 11 N. E. 219; *Palmer v. Logansport, etc., Co.*, 108 Ind. 137, 142, 8 N. E. 905; *Indianapolis, etc., Co. v.*

Pressell, 39 Ind. App. 472, 77 N. E. 357. The allegation as made is a conclusion. There is no fact stated showing why she could not have alighted. The speed of the car in which she was riding is not shown, nor her situation, or the reason why she could not have alighted in safety.

However, the allegation was not a necessary one. The fact that she could or could not have alighted from the car could only go to the question of contributory negligence, a fact which plaintiff was under no obligation to show by his complaint, and as to which the burden of proof was upon appellant, and the allegation was immaterial. An unnecessary allegation in a complaint might disclose contributory negligence as a matter of law, but as applied to this case we cannot say as a matter of law that no other inference except contributory negligence could be drawn. Treating the allegation that she was unable to alight without peril as a conclusion, as appellant insists, there is no allegation that enforces an inference of contributory negligence.

It does not appear what the situation of the decedent was, or that she could have avoided the injury. She may have been so situated in the automobile that she could not alight, and the rule is that where the court can perceive that reasonable men might honestly differ in their conclusions, and the facts are of a character to be reasonably subject to more than one inference or conclusion as to whether negligence or contributory negligence exists, the question is one for the jury, and cannot be determined as one of law. *Greenawaldt v. Lake Shore, etc., Co.*, 165 Ind. 219, 223, 74 N. E. 1081; *Stoy v. Louisville*, 160 Ind. 144, 66 N. E. 615; *Pittsburgh, etc., Co. v. Browning*, 34 Ind. App. 90, 71 N. E. 227; *Cooley on Torts* (2d Ed.), 805; 1 *Shearman & Redfield on Negligence* (4th Ed.).

So, too, the concurring negligence of the driver of the car was not attributable to the decedent. *Louisville, etc., Co. v. Creek*, 130 Ind. 139, 143, 29 N. E. 481, 14 L. R. A. 733; *City of Michigan City v. Boeckling*, 122 Ind. 39, 42, 23 N. E. 518; *Town of Knightstown v. Musgrove*, 116 Ind. 121, 124, 18 N. E. 452, 9 Am. St. Rep. 827; *Pittsburgh, etc., Co. v. Spencer*, 96 Ind. 186; *Town of Albion v. Hetrick*, 90 Ind. 545, 46 Am. Rep. 230; *Frank Bird, etc., Co. v. Krug*, 30 Ind. App. 602, 610, 65 N. E. 309; 21 Am. & Eng. Encyc. of L. (2d Ed.) 495, 496.

If a jury might or may infer negligence from the facts stated, the complaint is not bad on demurrer. *Greenawaldt v. Lake Shore, etc., Co.*, *supra*.

The serious question is presented by the insistence that the complaint does not show that any negligence of appellant was the proximate cause of the injury. The claim is made that, under the allegations of the complaint, the automobile had stopped beside the track, and was started and run upon the tracks, and plaintiff's decedent saw the coming car and remained in the automobile just as it was started, when it went upon said tracks, upon the theory (a) that, in the absence of a statute or ordinance, it is not necessarily negligent to run a car thirty miles an hour; (b) that the speed of the car and failing to sound the gong did not cause the collision when the automobile had already stopped; (c) that the allegation of negligence in approaching the crossing at high speed without sounding the gong does not show liability, and (d) that the allegation that the injury was caused "proximately by the negligence of the defendant as aforesaid" cannot supply the omission of facts showing it to have been so caused, and reliance is placed on *Lake Shore, etc., Co. v. Barnes*, 166 Ind. 7, 76 N. E. 629, 3 L. R. A. (N. S.) 778; *Moran v. Lealie*, 33 Ind. App.

80, 70 N. E. 162, and *Lake Erie Co. v. Moore*, 42 Ind. App. 32, 81 N. E. 85, 84 N. E. 506, respectively, as to those respective propositions.

It is alleged "that said Mrs. Love, as they approached the crossing of said interurban railroad tracks and said Thirty-eighth street, looked and listened for an approaching car, and that she did not see or hear any approaching car upon said tracks until just before said Heimes went upon said track, and that she with the other guests in said automobile called him to stop the same, but that he continued to go upon said tracks." Then follow allegations as to obstructions in the form of a house and signboards, and by a car on appellant's track going north, and then follow the allegations that "when said car had passed to the north said Mr. Heimes turned on the power and started the automobile across said track, and plaintiff says that said Maria Love looked and listened for approaching cars upon both tracks, but saw and heard no cars on said west track until just as Mr. Heimes started said automobile, when she did see a car approaching from the north, and that she called to Mr. Heimes and endeavored to have him stop the automobile before going upon said track." It is urged that the complaint shows that the automobile had stopped, based on the phrase, "just as Mr. Heimes started said automobile." It is true that it is a loosely drawn complaint in respect to connecting causation, but all the allegations must be taken together, and, so taking them, it is a fair construction that the automobile was approaching the crossing under control, and while so approaching its speed was accelerated because the driver, Heimes, "turned on the power and started said automobile across said track," and the allegation, "just as Mr. Heimes started said automobile," as we understand it, refers to acceleration of speed in starting across the track. That allegation in any event goes to the question of contributory negligence, and not to the question of the cause of the accident.

There is another proposition involved in the question of contributory negligence which appellant has overlooked, viz., that one in a position of peril not created by his own negligence has a right to make a choice of means to be used to avoid peril, and he is not held to a strict accountability if he takes an unwise course. *Dyer v. Erie, etc., Co.*, 71 N. Y. 228, and cases cited; *Alabama, etc., Co. v. Davis*, 69 Miss. 444, 13 South. 693. So that whether the decedent was negligent in not remaining in the automobile was a question for the jury.

It must be conceded that it is not negligence *per se* to run a steam train or interurban car at thirty miles an hour over a country highway in the absence of a statute limiting speed. *Lake Shore, etc., Co. v. Barnes*, 166 Ind. 7, 10, 76 N. E. 629, 3 L. R. A. (N. S.) 778.

Also, that the allegation that death "was caused proximately by the negligence of this defendant as aforesaid" alone cannot supply the omission to state facts showing it to have been so caused, or the basis for such allegation, and, if standing alone, must be disregarded. *Lake Shore, etc., Co. v. Barnes, supra*; *Lake Erie, etc., Co. v. Moore, supra*; *Baltimore, etc., Co. v. Conoyer*, 149 Ind. 524, 48 N. E. 352, 49 N. E. 452; *Lake Erie, etc., Co. v. Mikesell*, 23 Ind. App. 395, 55 N. E. 488; *Toledo, etc., Co. v. Beery*, 31 Ind. App. 556, 68 N. E. 702. But it is obvious that there may be distinctions between the operation of trains or cars at a speed of thirty miles an hour across country highways and across thoroughfares in cities, depending upon location and conditions surround-

ing the crossing. Whether the rate of speed is dangerous depends largely upon the circumstances.

The general duty may be said to be the use of reasonable care to so regulate the speed as not to jeopardize those who are passengers, or those who have rights in the streets. *Snow v. Indianapolis, etc., Co.*, 47 Ind. App. 189, 93 N. E. 1089; *Stevens v. New Jersey Co.*, 74 N. J. Law, 237, 65 Atl. 874; *Vizsachero v. Rhode Island Co.*, 26 R. I. 392, 59 Atl. 105, 69 L. R. A. 188.

The rights of the public and of the car at crossings are equal in respect to the use of the crossing, subject to priority on its tracks, in the car. The driver must be vigilant in his watch for persons approaching the tracks, and to have his car under control. *Marchal v. Indianapolis, etc., Co.*, 28 Ind. App. 133, 62 N. E. 286; *Aurelius v. Lake Erie, etc., Co.*, 19 Ind. App. 584, 49 N. E. 867; *Lake Shore, etc., Co. v. Boyts*, 16 Ind. App. 640, 45 N. E. 812; *Wallen v. North Chicago Co.*, 82 Ill. App. 103; *Owensboro, etc., Co. v. Hill*, 56 S. W. 21, 21 Ky. Law Rep. 1638; *Little v. Boston, etc., Co. N. H.*, 72 N. H. 61, 55 Atl. 190; *Martin v. Third Ave., etc., Co.*, 27 App. Div. 52, 50 N. Y. Supp. 284; *Harvey v. Nassau Co.*, 35 App. Div. 307, 55 N. Y. Supp. 20; *Memphis, etc., Co. v. Wilson*, 108 Tenn. 618, 69 S. W. 265; *West Chicago, etc., Co. v. Petters*, 196 Ill. 298, 63 N. E. 662.

The failure to sound a gong in approaching a street crossing has been held evidence of negligence. *Marchal v. Indianapolis, etc., Co.*, *supra*; *Schwarzbach v. Third Ave. Co.*, 54 App. Div. 164, 66 N. Y. Supp. 367; *Chicago, etc., Co. v. Sandusky*, 198 Ill. 400, 64 N. E. 990; *Ryan v. Detroit, etc., Co.*, 123 Mich. 597, 82 N. W. 278; *Galbraith v. West End, etc., Co.*, 165 Mass. 572, 43 N. E. 501. And when, in addition, no warning is given, a stronger case is made. *Howard v. Indianapolis, etc., Co.*, 29 Ind. App. 514, 64 N. E. 890; *Driscoll v. West End Co.*, 159 Mass. 142, 34 N. E. 171; *Shea v. St. Paul, etc., Co.*, 50 Minn. 395, 52 N. W. 902; *Campbell v. St. Louis Co.*, 175 Mo. 161, 75 S. W. 86; *Dennis v. New Jersey Co.*, 64 N. J. Law, 439, 45 Atl. 807; *Greenfield v. East Harrisburgh, etc., Co.*, 178 Pa. 194, 35 Atl. 626; *Frame v. Electric, etc., Co.*, 180 Pa. 49, 36 Atl. 404; *Fenner v. Wilkesbarre, etc., Co.*, 202 Pa. 365, 51 Atl. 1034; *Andres v. Brooklyn Heights, etc., Co.*, 84 App. Div. 596, 82 N. Y. Supp. 729; *Strauss v. Brooklyn Heights Co.*, 85 App. Div. 613, 82 N. Y. Supp. 767.

The rule must therefore be that it is a question for the jury, considering the conditions and circumstances surrounding the injury, to determine whether a given rate of speed or the failure to observe a crossing, or to sound a gong, is negligence, or the proximate cause of the injury, where it is alleged that the injury was caused from such alleged negligence.

Reduced to its charging part in this last particular, the complaint alleges negligent operation of the car at a high and dangerous rate of speed of thirty miles an hour across a known highway for driving in a city, and in negligently failing to observe the crossing to see whether any one was about to cross its tracks, and in negligently failing to sound the gong, by reason of which the car was run into the automobile with great force and violence. Having regard to the duties of an interurban company as disclosed in the decided cases, as well as upon principle, where, as here, it is alleged that, by reason of the manner in which it was run, it was run upon the automobile with great force and violence, the cause of the injury is sufficiently shown.

About all that could be alleged in addition in such a complaint would be that owing to the speed and the lack of attention to the crossing the car was not under such control that the accident could have been avoided, which is necessarily embraced in the allegations as made, as showing the absence of control, disregard of the rights of travelers at the crossing, which, coupled with the surroundings shown, and the failure to give warning to enable the traveler to protect himself, we think make a *prima facie* case, at least as applied to this case, of the proximate cause of the injury being the neglect alleged, and coupled with these allegations is the allegation that the death was caused by reason of the acts of negligence charged, and sufficiently charges the cause of death.

It is not a showing of negligence only in the speed of the car in approaching the crossing, but also in approaching it without warning, and without having regard to the conditions at the crossing, without the car being under control where there was much travel, without regard to, or attention to the crossing itself, and these facts in combination resulted in the car being run upon the automobile with great force and violence, showing at one and the same time, that the car was not under control, and was being so rapidly driven that the automobile could not get out of the way, whereby it was struck.

The complaint is not reasonably open to any other construction, and the judgment is affirmed.

OSTEEN v. DALLAS CONSOL. ELECTRIC ST. RY. CO.

(Texas — Court of Civil Appeals.)

Injury to Passenger Thrown from Crowded Car; Negligence in Permitting Car to be Overcrowded.

PLAINTIFF appeals from a judgment for defendant. Reported 145 S. W. 643.

Opinion by RAINES, C. J.:

Appellant instituted this suit against the appellee to recover damages for personal injuries sustained by him, occasioned by being thrown from a moving car.

Appellee pleaded general denial and contributory negligence. A trial resulted in a verdict and judgment in favor of the railway company, and appellant appeals.

The appellant assigns error as follows: "The court erred in giving to the jury the fourth special charge, requested by defendant, as follows: 'If you find and believe from the evidence that plaintiff left his seat voluntarily, and that the conductor did not request the plaintiff to so leave his seat, you will return your verdict for the defendant, regardless of your finding on any other issue submitted to you herein.'" And submits this proposition: "There being sufficient evidence introduced to warrant a verdict for plaintiff, even though, without the request of the conductor, he got up from his seat voluntarily and gave it to a lady passenger with a baby in her arms, it was error to instruct the jury to find for the defendant, if the plaintiff voluntarily

surrendered his seat, without being requested to do so by the conductor, regardless of their finding on any other issue."

The court, by paragraph 2 of its main charge, submitted plaintiff's case affirmatively, as follows: "At the time of the alleged accident, plaintiff was a passenger on one of defendant's cars, and if you find and believe from the evidence that the defendant overcrowded the car on which plaintiff was a passenger, or the seat on which plaintiff was seated, and that plaintiff yielded his seat to a lady at the request of the conductor of defendant, and that in so doing plaintiff was not guilty of negligence as above defined, and you further find that as the direct result of said conduct of plaintiff in so yielding his seat, if he did, he was thrown from the car and injured, as alleged, and that the defendant was guilty of negligence as alleged, and as hereinbefore defined, then plaintiff would be entitled to recover."

In deference to the verdict of the jury, we find that Osteen entered defendant's car and took a seat. It was a summer or open car, the seats running across the car, which was open at the sides, affording a place for ingress and egress. After traveling a few blocks, a lady with a baby in her arms entered the car in the section where plaintiff was seated. The section where plaintiff was seated being crowded, he voluntarily arose from his seat and gave it to the lady with the baby. He was a cripple, and when he arose he caught hold of the seat in front of him, and immediately, while in that position, a passenger fell against him and knocked him from the car to the ground, whereby he was injured.

Appellant's action was based on two grounds of negligence, viz., the request of the conductor to Osteen that he vacate his seat, after he had secured one on the car, that it might be occupied by a lady with a child in her arms, and an overcrowded car. These acts, as pleaded, were connecting links in the cause of the injury, and so intimately related and dependent, one upon the other, that on failure to establish one the right to recover was of necessity bound to fail.

Osteen was in a partially paralyzed and crippled condition, unable to protect himself in a crowded car, of which he was well aware, and, being safely seated in the car at a place furnished him by the appellee, which safe place he voluntarily left, we are not prepared to say he would be entitled to recover on account of the crowded condition of the car, in the absence of an invitation from the conductor to leave his seat, however much we may admire his courteous demeanor in yielding his seat to a lady, under the circumstances.

Some cases have held, under certain circumstances, steam railroads liable for allowing their cars to be overcrowded; but it cannot be said, as a matter of law, that to overcrowd a car is negligence *per se*. *Railway Co. v. Tittle*, 115 S. W. 640. This principle should apply with more force to street railways; for it is a matter of common knowledge that they are frequently so crowded many passengers are not able to get seats, especially during the rush hours. The evidence as to the crowded condition of the car under consideration was, in effect, that some parties did not have seats. This evidence, we think, was not sufficient to show negligence on the part of the railway company. *Burton v. Ferry Co.*, 114 U. S. 474, 5 Sup. Ct. 960, 29 L. Ed. 215; *Jacobs v. Railway Co.*, 178 Mass. 116, 59 N. E. 639.

Plaintiff asked no special charge as to the matter of which he complains;

and if there were other issues omitted from the court's main charge, on which appellant was entitled to recover, there should have been a request therefor.

As we view the case, there is no reversible error shown by the record, and the judgment is affirmed.

KEYES v. METROPOLITAN ST. RY. CO.

(Missouri — Kansas City Court of Appeals.)

Contributory Negligence of Hack Driver Struck by Car Approaching from Rear; Complaint; Duty of Motorman Approaching Vehicle on Track.

DEFENDANT appeals from judgment for plaintiff. Reported 144 S. W. 166.

Opinion by BROADBUSH, P. J.:

The plaintiff's suit is to recover damages he alleges he sustained by reason of the negligence of defendant's employees. The charge of negligence is as follows: "Plaintiff states that on or about the 26th day of February, 1909, at about 8 o'clock p. m. of said date, he was engaged as a hack driver in driving a hack along said Eighteenth street in a westerly direction; that while he was so driving along said Eighteenth street, and while in the exercise of ordinary care on his part, one of defendant's cars in charge of defendant's agent, servants, and employees negligently and carelessly ran into and struck the hack upon which plaintiff was riding as aforesaid, throwing plaintiff to the ground with great force and violence, and injuring plaintiff as hereinafter set out. Plaintiff states that defendant, its agents, servants, and employees in charge of said car were guilty of negligence, in this: That they saw, or by the exercise of ordinary care could have seen, plaintiff driving along said street and on the track of defendant in time to have stopped said car before striking the hack upon which plaintiff was riding as aforesaid, and in time to have prevented the injury to plaintiff; that defendant, its agents, servants, and employees in charge of said car negligently failed to ring the bell and sound the alarm as a warning to plaintiff of the approach of said car; that defendant's servants and employees in charge of said car saw the dangerous position of plaintiff on its tracks in time to have stopped said car before striking plaintiff, or by the exercise of ordinary care could have seen the dangerous position of plaintiff in time to have done so." The answer was a general denial. The evidence shows that plaintiff while driving a hack west on Eighteenth street the hack was struck from behind by one of defendant's cars being operated on said street, and plaintiff was thrown out and severely injured. As to the extent of his injuries there is no dispute.

Plaintiff's evidence tended to show that he came upon Eighteenth street from Forest avenue, and, when he had proceeded about thirty or forty feet west, he drove onto the defendant's track; that at that time he looked back, but saw no car coming from the east. Plaintiff stated that Eighteenth street is a narrow street, and that, in order for drivers of teams meeting on the street to pass, one of them would have to pull upon the defendant's tracks;

that at the time he went upon defendant's tracks he did not do so at that time in order to let another team pass, but because he saw one coming, and that it was his intention to remain on the track until he passed it. It was while so driving that his vehicle was struck by defendant's car coming up from behind. It was night, but there was sufficient light for plaintiff to have seen a man a block away. His statement was that he was struck about 200 feet from the place where he came upon Eighteenth street.

A witness by the name of Hoover was standing on the corner of Forest avenue and Eighteenth street when plaintiff entered the latter street and turned west on the south side of defendant's tracks; that he did not see the collision because the car was between him and the hack, but that he heard the crash; that the car was going at the rate of twenty or twenty-five miles an hour, and that he heard no bell sounded. A witness by the name of Keller did not see the collision, but it occurred just in front of his place of business, and he went to the place at once. He stated that he heard no signals from the car.

Plaintiff does not claim that he looked back for a coming car except when he first came upon the street. The car went fifty or sixty feet after the collision before it stopped. The evidence of other witnesses tended to show that the bell was rung, and that the car was not going very fast. It was shown that the night was bright, and that the plaintiff could be seen for the distance of several blocks.

The defendant's motorman and conductor were absent in California, and their testimony was not introduced. The testimony of several persons on the car was introduced. Some of them testified that the car was coasting downhill, and that the motorman was using the brakes to get it under control; that it was slowing down before he made the effort to stop it; that the bell was ringing all the time from the time it left the crossing at Forest avenue. The blinds of the doors and windows were down, which prevented them, except one, from seeing the hack struck. The latter stated that the plaintiff came upon the track a few feet ahead of the car. The burden of the testimony of the defendant's witnesses is that the motorman made a strenuous effort to stop the car just before the collision occurred. The judgment was for plaintiff, from which defendant appealed.

Taking all the evidence, including that of plaintiff himself, we are of the opinion that he was guilty of negligence under the particular circumstances of the case in going upon defendant's tracks. He should at least have waited until he met some team before he got upon the defendant's tracks, and he failed to look at the proper time to see if any car was coming from the rear. It is true he had the right to use the streets if in doing so he did not obstruct the passage of defendant's cars. If it had been necessary for him to have gone onto the defendant's tracks in order to pass another team, he was rightfully there, and, if defendant's motorman saw or could have seen him in time to have checked his car by a proper effort after he discovered his peril before the collision, he would not have been chargeable with negligence. But such, as we have seen, was not the case. He should, it being in the night-time, have looked back to see if any car was coming from the rear. It is held that, under such circumstances, while a driver of a vehicle has a right to drive upon the tracks of a street car company if the conditions require it, if he

uses ordinary caution in listening for the signal of an approaching car from the rear, and, if he hears one, to withdraw from the tracks, and that the further duty is imposed upon him, if by looking he could see a car approaching from the rear, to get off the tracks and let it pass. *Zander v. Transit Co.*, 206 Mo. 445, 103 S. W. 1006.

It is contended by appellant that the respondent was not entitled to recover on his petition. The argument is that, as the petition alleges that plaintiff was in the exercise of ordinary care, he is precluded from recovering on the humanitarian theory; that "it is impossible to reconcile any theory of law upon which recovery can be predicated in which plaintiff is in the exercise of ordinary care and at the same time permit a recovery under the humanitarian or last chance doctrine." We are unable to see the impossibility of reconciling the two allegations of the petition. They are not inconsistent. The appellant's argument leaves out of consideration the fact that, if plaintiff was in the exercise of due care at the time he was on defendant's track and in peril, the defendant would be liable for striking and injuring him, if by the exercise of proper care it could have avoided doing so under the humanitarian theory. One of the allegations of the petition is that the plaintiff was in the exercise of due care, and the other is that the defendant was guilty of negligence in striking him, while it could have, by the exercise of ordinary care, avoided doing so. There is nothing inconsistent in the two allegations. The term "humanitarian theory" has given rise to many hairsplitting theories, when, as a matter of fact, it is a statement of nothing more nor less than that of approximate cause, which must exist in every case in order to render the defendant liable for negligence. And it is held that the humanitarian doctrine does not necessarily presuppose that the injured person was negligent. *Shipley v. Railway*, 144 Mo. App. 7, 129 S. W. 768; *Grout v. Railway*, 125 Mo. App. 552, 102 S. W. 1026.

The street being well lighted and the plaintiff being in plain sight, we are justified in assuming that the motorman saw the plaintiff on the track in time to have avoided striking him by the exercise of reasonable diligence. And making due allowance for the fact that the motorman was ringing his bell to give plaintiff notice of the approach of the car, and that he had the right to expect that plaintiff would heed it and get off the track, yet, if he saw or might have seen that he did not heed the warning, it became his duty to have checked his car in time to have prevented it from reaching plaintiff on the vehicle. The circumstances tended to show that defendant's motorman could have, by the exercise of the necessary vigilance, avoided the collision. The plaintiff's case was put to the jury on this theory of the case. The defendant's criticism of it is that it authorizes a recovery, although the jury may find that plaintiff negligently placed himself in dangerous proximity to the car. This objection has already been answered in discussing the merits or demerits of the petition.

The court gave all defendant's instructions asked covering its theory of the case. It is further contended that the court committed error in the admission of certain evidence offered by plaintiff, but, as we believe there is no real foundation for such contention, we do not think it necessary to discuss the question.

Affirmed. All concur.

MARKOFF v. DETROIT UNITED RY.

(Michigan — Supreme Court.)

Assault by Conductor upon Person Attempting to Board Car; Evidence; Damages.

PLAINTIFF brings error from judgment for defendant. Reported 134 N. E. 1101.

Opinion by STONE, J.:

The plaintiff brought suit to recover damages to his person and property by reason of an alleged unprovoked, vicious and unjustifiable assault committed upon him while boarding a standing car of defendant, by one of its conductors, at the trolley station of the defendant on Fort street west and Woodward avenue, in the city of Detroit, on January 12, 1910. In his declaration, after alleging the circumstances of the assault, he set forth his injuries in the following language: "And the plaintiff further avers that by reason of the negligent, careless, reckless, improper and vicious conduct of the said defendant, its conductors, agents, servants and employees in charge of the said car as aforesaid, said plaintiff then and there became and was greatly hurt, bruised, injured, wounded, cut and lacerated in and about his head, neck, shoulder, sides and arms, and then and there received severe and permanent injuries by reason of the premises to his head and base of his brain from which he has suffered through faintness, dizzy spells, nausea and hypochondria, which has caused him to lose sleep, and also by reason of the premises said plaintiff herein has suffered great and excruciating pains in and about his head and base of his brain for a long space of time, to wit, from thence hitherto, and is informed by his physician that he will continue to suffer from such headaches, faintness, dizzy spells and nausea for a long time to come, and further that by reason of the premises aforesaid said plaintiff suffered a severe and permanent injury to his face and neck, his said face and neck being then and there cut, bruised, lacerated and injured, causing him great pain for a long space of time, to wit, from thence hitherto, and said plaintiff was also by reason of the premises injured internally as well as externally, and further that by reason of the premises aforesaid the said plaintiff suffered a severe and permanent injury to his neck, shoulders, sides and arms, the ligaments, tendons, sinews, muscles and cords of his neck, shoulders, arms and sides being then and there twisted, torn, wrenched, sprained and greatly and permanently injured, causing said plaintiff most excruciating pain and agony of both mind and body for a long space of time, to wit, from thence hitherto, and plaintiff will continue in the future to suffer from said injuries as aforesaid for a long space of time; and plaintiff also by reason thereof had his watch torn from his coat and lost the same and has not recovered his said watch and chain up to this time, and the said plaintiff by reason of the premises and the many injuries so received as aforesaid then and there and thereupon became and was sick, sore, lame and disordered, and so remained and so continued for a long space of time, to wit, from thence hitherto, and from which injuries he will continue to suffer during the remainder of his natural life, as his said injuries are permanent and incurable; and because of the

said unwarranted and negligent and improper assault as aforesaid plaintiff herein has suffered great mental anguish and pain, humiliation and distress by reason thereof, and from which injuries he will be deprived of social enjoyment and companionship in the future, and will suffer great mental as well as great bodily pain, anguish, weakness and distress."

On the trial the plaintiff gave evidence tending to show that he was in the employ of the American Brewery Company, located at Delray; that for many years it was the custom of the plaintiff to board a car of the defendant on what is known as the Fort line at the trolley station located on Fort street west, and the city hall, ride around the loop on Cadillac square, and thence proceed west on Fort street to his destination at Delray; that on the morning in question he left his home, took a Third avenue car, and obtained a transfer to the Fort line; that when he arrived at Woodward avenue and Fort street west he saw a Fort car standing there, and he hurried over and got on the rear platform, as was his custom; that the conductor immediately ordered him off, and at the same time struck him several violent blows upon the chest and face, and spat in his face, and a scuffle ensued in which the plaintiff was injured. The plaintiff distinctly testified that he had had no previous notice or warning, either that morning or before, from the conductor, not to board the car at that place, and that no passengers were getting off at the rear end of the car at the time he boarded it, and the plaintiff was corroborated by other witnesses.

On the part of the defendant there was testimony tending to show that the conductor had on two or three previous mornings warned the plaintiff to keep off the car until the passengers had alighted; that it was the custom of twenty or thirty men to board this car at the place indicated every morning before the passengers alighted; that plaintiff seemed to be the first one to get on the car; that a number of passengers were getting off the rear end of the car at the time he detained the plaintiff. It was also testified to that the conductor made no assault upon the plaintiff, but simply took hold of him to detain him until the passengers alighted.

Upon the trial the plaintiff testified as follows: "I attended the doctor a couple of times — Dr. Berger. I suffered pain. It hurt me where I was struck, right in the heart; that was where I was struck. * * * My heart never bothered me before the accident, and I did not have headaches before that."

The defendant's attorney moved that the testimony in regard to the plaintiff's heart trouble be stricken out, as not covered by the declaration. This motion was granted, whereupon plaintiff's attorney excepted.

The case was submitted to the jury under the charge of the court. In his charge the trial judge, among other things, said: "The conditions which obtained when the trouble which is the subject of this lawsuit occurred are not in dispute. Briefly stated, they are these: A street car that the plaintiff sought to board was bound east on Fort street, and was going, shortly after, west, and was going around what is known as the Cadillac square loop in the city. * * * On that car there were certain passengers, and those passengers had to alight at Woodward avenue, and after the passengers alighted the car was then turned around, after going a couple of blocks it would turn around and go west, and it appears from the evidence that is undisputed that certain

passengers that were in the habit of taking that car, and others, early in the morning, were in the habit of getting on the car before it started westward, and it appears by the undisputed testimony in this case by doing that, inconvenience was suffered by those who were on the car when it was bound east, and because of that the conductor sought to keep those who desired to go west on the car off from the car until other passengers had alighted, and until the car had started toward the west. It appears from the undisputed testimony in this case that a statement of the desire and wish of the conductor had been imparted on previous occasions to this plaintiff, and it appears further that this conductor was in charge of the car."

The jury returned a verdict in favor of the defendant of no cause of action. There was a motion for a new trial, and among the errors complained of by the plaintiff was because the court erred in excluding plaintiff's testimony respecting heart trouble. The motion for a new trial was denied, the reasons for such denial were excepted to, and the plaintiff has brought the case here upon writ of error. Among other things, he alleges error in the ruling striking out the testimony of the plaintiff relating to his heart trouble. Also to that part of the charge above quoted which states that the conditions which obtained when the trouble arose were undisputed, and that it appeared from the undisputed testimony that a statement of the desire and wish of the conductor had been imparted on previous occasions to the plaintiff, relative to waiting until the passengers on the car had alighted before boarding the car, and that passengers were alighting at the time.

1. Did the trial court err in its ruling striking out the testimony of the plaintiff relating to heart trouble for the reason that it was not covered by the declaration?

In view of the repeated decisions of this court, we are of opinion that the ruling was erroneous. See the following cases: *Montgomery v. Railway Co.*, 103 Mich. 46, 61 N. W. 543, 29 L. R. A. 287; *Lealie v. Jackson, etc., Traction Co.*, 134 Mich. 518, 96 N. W. 580; *Comstock v. Tp. of Georgetown*, 137 Mich. 541, 100 N. W. 788; *Renders v. Grand Trunk R. Co.*, 144 Mich. 387-391, 108 N. W. 368; *Groat v. Detroit United Railway*, 153 Mich. 165-167, 116 N. W. 1061.

2. Was there error in that part of the charge above indicated?

We are of opinion that there was a sharp conflict in the evidence upon the questions above stated, and that the court erred in instructing the jury that the evidence was undisputed. We think that this part of the charge was prejudicial to the plaintiff. *Hengesbach v. Detroit United Railway*, 147 Mich. 681, 111 N. W. 345; *Plefka v. Detroit United Railway*, 155 Mich. 53, 118 N. W. 731.

The other errors complained of relate to the refusal to grant a new trial on the ground of newly discovered evidence, and the questions are not likely to arise upon another trial.

For the errors pointed out, the judgment of the Circuit Court is reversed, and a new trial granted.

BIRD, J., not sitting.

BIRMINGHAM RY., LIGHT & POWER CO. v. GREEN.

(Alabama — Court of Appeals.)

Collision with Vehicle; Street Car Not a "Locomotive" Within the Meaning of Code 1907, § 5473, Relating to Signals at Crossings.

DEFENDANT appeals from judgment for plaintiff. Reported 58 So. 801.

Opinion by PELHAM, J.:

The appellee's suit against the appellant in the court below was for damages to a horse and wagon and personal injuries suffered by the plaintiff in consequence of a collision between a team being driven by him and one of the defendant's street cars in the town or village of Elyton, which collision, appellee alleged, was due to the negligent operation and management of the street car of appellant by its servant or employee in charge thereof.

The court, in charging the jury orally, stated that the provisions of section 5473 of the Code, relating to the ringing of the bell or blowing the whistle by the engineer or other person having control of the running of a locomotive, were applicable to this case, in which it was shown that the injury was occasioned by a street car operated by electric power. The defendant reserved separate exceptions to those portions of the oral charge wherein the court stated that the provisions of section 5473 applied to the case, and all of the assignments of error have reference to this proposition as charged by the court.

The point in question has been determined by this court in the case of Birmingham R., L. & P. Co. v. Ozburn, 56 South. 599, but the trial court did not have that case as a guide at the time of delivering the oral charge; for that opinion had not been rendered when this case was tried at *nisi prius* on the 14th day of February, 1911, it not having been handed down until the following November (November 14, 1911), and the charge of the trial court is in direct conflict with Ozburn's case.

We have again, on the present appeal, carefully considered the applicability of this statute (§ 5473) to a modern street or interurban railway operating cars propelled by electric power through the streets of a city or town into adjacent territory, and have given close attention to the cases cited by the appellee, and to the argument of counsel contained in brief, and were aided also by oral argument; but we find nothing to convince us that the reasoning and distinctions drawn in Ozburn's case, showing the inapplicability of this statute to cases of this kind, are incorrect.

While it is true that those sections embraced in that article of the Code containing "regulations affecting public safety" will be generally extended to new things, which the language of the act is sufficient, reasonably and fairly construed, to comprehend, for the purpose of promoting the real intention of the enactments, as was the case, for example, in reference to section 5474 (Birmingham Min. R. R. Co. v. Jacobs, 92 Ala. 187, 9 South. 320, 12 L. R. A. 830; L. & N. R. R. Co. v. Anchors, 114 Ala. 492, 22 South. 279, 62 Am. St. Rep. 116), yet our courts cannot, with a due regard to the unquestioned and well-recognized rules of statutory construction, stretch those statutes so as to make them apply to changed conditions, even though we give full significance

to the knowledge that the enactment is a regulation affecting public safety, when the plain language of the statute itself is such as to make it totally inapplicable to those new things resulting from changed conditions and different modes of travel. The intent of the particular statute is first to be sought in the language of the statute itself. 2 Lewis' Sutherland, Statutory Construction (2d Ed.), c. 13, § 366; *United States v. Goldenberg*, 168 U. S. 95, 18 Sup. Ct. 3, 42 L. Ed. 394. To hold that section 5473 is applicable to this case would be for us to say that a street car, in its popular sense, the plain sense in which people generally understand it, is a locomotive (*Harrison v. State*, 102 Ala. 170, 15 South. 563); and that the person in control of its operation through the streets of a city, town or village must be guilty of negligence for a failure to blow the whistle or ring the bell one-quarter of a mile before reaching any public road crossing or regular stopping place, notwithstanding the person in control would thereby be required to be giving signals for one crossing before it reached and stopped at several other intervening crossings within the one-quarter of a mile. This would not be giving to the statute a sensible application, but one leading to an unjust and absurd conclusion, which, if possible, is to be avoided in construing legislative intention in the interpretation of statutes. *In re Chapman*, Petitioner, 166 U. S. 661, 17 Sup. Ct. 677, 41 L. Ed. 1154.

If new conditions have arisen since the passage of the statute that have not been provided for, this would not justify a judicial addition to the language of the statute itself, so as to make it apply to the new conditions or contingencies, nor justify a tortious construction of the language used, to make the statute apply to things or conditions plainly not comprehended within the terms of the statute, which would lead to an absurdity and injustice in the construction or application given. What we have said in the case of *Ozburn*, *supra*, fully covers the subject, and we are unwilling to make any change in the rule there announced.

The court below committed an error by giving in charge to the jury those portions of the oral charge to which an exception was reserved, and the case must be reversed.

Reversed and remanded.

LOUISVILLE & S. L. TRACTION CO. v. WALKER.

(Indiana — Supreme Court.)

Injury to Passenger, Required to Leave Car and Board Another Car, from Excavations in Street Causing Her to Fall; Contributory Negligence; Negligence; Care Required Toward Passengers.

DEFENDANT appeals from a judgment for the plaintiff. Reported 97 N. E. 151.

Opinion by Cox, J.:

The appellee recovered a judgment against appellant in the court below for damages for personal injuries, alleged to have been sustained by her while a passenger on one of appellant's lines of street cars.

A reversal of that judgment is asked by appellant, on the grounds that the trial court erred in overruling a motion made by it for judgment in its favor on answers to special interrogatories, which the jury returned with a general verdict for appellee, and that error was also committed in overruling appellant's motion for a new trial.

To the extent needed to be set out to intelligently exhibit and consider the questions involved in the appeal, the averments of the complaint are, in substance, that appellee entered one of appellant's street cars, to be carried as a passenger on it over the route and line regularly traversed by it to her intended destination at the terminus of the line, and paid the usual fare therefor; that, for the purpose of relaying its track and improving it, appellant had, at a certain point on the line, excavated and torn away that part of the street occupied by its track, and more than a foot on either side of it; that, through appellant's carelessness and neglect, the space on each side of its track was excavated six inches below the grade of the street, was rough and uneven, and filled with loose earth and loose stones, and thereby rendered unsafe and wholly unfit as a place for passengers to alight; that, in consequence of the work being done, the distance from the lowest step of the car to the ground alongside of it at the point where appellee was required by appellant to alight, as hereinafter stated, was not less than two feet, and too great for safety, as appellant well knew. While appellee was so being carried as such passenger, when the car in which she was traveling arrived at the point above described on appellant's line of road, which was near an intersecting street, the track was obstructed by cars of appellant, loaded with stone and other materials to be used on the street and track, which appellant had placed there, so that the car on which appellee was traveling could not proceed farther toward her destination; that by reason of this obstruction the car was stopped near the loaded cars, and appellee, with other passengers thereon, was wrongfully and negligently directed and required by the agent and collector of appellant in charge of the car to leave and get off of it at the said dangerous and unsuitable place, and to walk northward along the street and track, and past and beyond the loaded cars which obstructed the track, to another car of appellant, which was then standing and being held in waiting to carry the passengers to the end of their broken journey; that appellant, notwithstanding the conditions set forth, negligently failed to furnish any stool, step or other means to enable appellee to safely get off and alight from the car, and its agents and employees in charge of the car wrongfully and negligently failed to offer and give to the appellee any assistance in getting off of said car and alighting therefrom. That, in obedience to the wrongful and negligent command of appellant, made by and through its agents in charge of the car, the appellee, desiring to complete her journey and to be carried to her destination by appellant, attempted to get off and alight from said car onto the street, exercising due care in so doing, but that, in descending from said car and alighting on said part of said street adjacent to said track, without fault on her part, the appellee stepped upon a loose stone, or stones, negligently left by appellant along the side of said track, and thereby turned her foot and violently wrenched and severely sprained her ankle. A second paragraph of complaint was different from the first only in that it alleged that the street was being improved by the city, and that the excavations were made by it.

The contention of counsel for appellant, in behalf of appellant's right to judgment on the answers to interrogatories, has a double basis. The first is the claim that the facts specially found by the answers show contributory negligence on appellee's part in alighting from the car. This claim we cannot sustain. The answers upon which reliance is placed by counsel may be summarized as follows: At the time of the accident the eyesight of the appellee was good. The injury to her occurred about 4:30 o'clock of the afternoon of a clear day, and while the sun was shining. The street where she was injured was being improved, and there was earth and a lot of broken stone lying loosely on the ground in the street below the step, and covering the ground where she was compelled to step in alighting from the car. The distance from the step down to the broken stone on the ground was about two feet. There was nothing to prevent appellee from seeing the condition of the street, and she did see it before she stepped down, and also the distance from the step to the ground. She stepped down with a suit case in her hand. We find none of these to be out of real harmony with the general verdict. The complaint alleged that the appellee was required to leave the car at a point where the excavated street was rough and uneven and filled with loose dirt and stones. Not one of the above summarized facts is inconsistent with the conclusion which the jury might have and doubtless did reach by their general verdict for appellee, that, impelled to leave the car by the direction of appellant's employees, which unexpectedly broke her journey, she saw a place where she would have to alight which appeared to her to be safe, and which revealed to her nothing of its dangerous condition. The dirt may have, apparently to her, so embraced and been combined with the stones as to give her no suggestion or warning that it might be loose, and cause her foot to turn. She was required to leave the car on its west side, with the sun shining directly in her eyes. The circumstances of her alighting and the conditions present did not give time or opportunity for close inspection of the place where she must alight, and the rule of ordinary care, as applied to her conduct, did not require a close and critical study of the ground before she trusted herself upon it. She had not completed the passage of the trip on which appellant was carrying her, and she was still its passenger, to whom it owed a duty involving a high degree of care for her safety. And while she was not absolved from using ordinary care in getting off the car, such care is affected by the circumstances and conditions, and the fact that she was entitled to rely to some extent on the belief that she would not be required to alight at an unfit and dangerous place.

The second basis of appellant's contention, that it should have had judgment on the answers, is that the facts established by certain answers are fatally at variance with those alleged as constituting the cause of action. The complaint avers that appellee suffered her injuries in the act of getting off the car, as she stepped therefrom upon the ground. It is earnestly contended by counsel for appellant that the answers show that appellee was injured by stepping on broken rock while walking, after she had alighted from the car. The interrogatories and the answers thereto, which are relied on to sustain this contention, are as follows:

"(22) Did the plaintiff then and there step off the car of the defendant traction company, on said Vincennes street, to the street below? Answer: Yes.

"(23) After so doing, did the plaintiff then and there step on the broken rock in the street? Answer: Yes.

"(24) In, as aforesaid, stepping on said broken rock, did one of plaintiff's feet turn and cause the injury she complained of? Answer: Yes.

"(25) Was the aforesaid injury the only injury plaintiff received on that occasion? Answer: Yes."

It may be said that no interrogatory was submitted to the jury, making inquiry as to how appellee was injured, which involved any other act than alighting, or any other place than the ground, to be reached at once by stepping from the car. This time and place and manner are indicated by all of them which relate to the question, unless the words "after so doing" in interrogatory No. 23 is such a departure as to show that she was injured while walking, after she had alighted. Taking all of the interrogatories and their answers together, it is not clear that they show, either that appellee was injured while walking, after the act of getting off of the car was completed, or that, if she was so injured, the variance was material. If she had stepped from the car to the ground, and then, in taking another step to make the transfer to the waiting car, had been injured by the unsafe conditions alleged to exist in the place where she was required to leave the car, it must be kept in mind that she was still appellant's passenger, doing what was required of her, as such, to complete her journey, and appellant owed her that degree of care incumbent upon a common carrier of passengers to guard her against injury. But we are not obliged to, nor do we, resolve either of these questions. Another interrogatory and its answer make it unnecessary. It may be conceded that the construction of the interrogatories and the answers to them, above set out, must be in accord with the contention of counsel, and still the general verdict must remain unaffected; for interrogatory No. 10 and its answer establish, in express and unequivocal words, that in attempting to alight from the car appellee stepped on a loose stone, or stones, and sprained her ankle. These conflicting interrogatories and answers neutralize and destroy each other, and the rule that, if answers of the jury to questions of fact are inconsistent with or contradictory of each other, the special findings will not overthrow the general verdict is too well established to require the citation of authorities. The court did not err in overruling the motion for judgment on the answers.

Involved in the action of the court in overruling appellant's motion for a new trial is the contention that the evidence fails to establish negligence on the part of appellant, and that it does show that appellee was guilty of contributory negligence. There is an earnest controversy between counsel for the opposing parties as to the degree of care by which appellant's duty to appellee should be measured. The rule which requires a carrier of passengers to exercise the highest degree of care for the safety of its passengers consistent with the practical operation of its road, and which is generally applied to the actual progress of the passenger on the journey undertaken, applies to street railroads. *Citizens' Street Railroad v. Twiname*, 111 Ind. 587, 13 N. E. 55; *Prothero v. Citizens' St. Ry. Co.*, 134 Ind. 431, 33 N. E. 765; *Conner v. Citizens' St. Ry. Co.*, 146 Ind. 430, 441, 45 N. E. 662; *Citizens' St. Ry. Co. v. Jolly*, 161 Ind. 80, 90, 67 N. E. 935; *Anderson v. Citizens' St. Ry. Co.*, 12 Ind. App. 194,

197, 38 N. E. 1109; *Hammond, etc., Ry. Co. v. Spyzchalski*, 17 Ind. App. 7, 46 N. E. 47; *Citizens' St. Ry. Co. v. Hoffbauer*, 23 Ind. App. 614, 620, 56 N. E. 54; *Ft. Wayne Tr. Co. v. Morvilius*, 31 Ind. App. 464, 66 N. E. 304; *Crump v. Davis*, 33 Ind. App. 88, 70 N. E. 886; *Terre Haute Tr. Co. v. Payne*, 45 Ind. App. 132, 89 N. E. 413; *Thornton on Negligence*, § 2072.

But it is contended by counsel for appellant that this rule is not the proper one to gauge the duty of appellant, under the facts in this case, but, on the contrary, that the rule which requires only ordinary care of railroad carriers, in providing and maintaining safe and convenient places for the ingress and egress of passengers to and from their trains at regular stopping places, should apply. *Pennsylvania Co. v. Marion*, 104 Ind. 239, 3 N. E. 874; *Pittsburg R. Co. v. Harris*, 38 Ind. App. 77, 77 N. E. 1061; *Elliott on Railroads*, § 1590.

There are obvious reasons why the care to be exacted from appellant, under the circumstances of this case, should not be narrowly limited by this latter rule. The circumstances and conditions which produced appellee's injury in this case are more complex than those which usually admit an application of it. The obstruction of the street by the work cars, which stopped the car on which appellee was a passenger at an unusual place in the middle of a square, the condition of the disembarking place, the compulsion under which appellee's journey was interrupted, and she was required to leave the car at an unusual and unfit place, were all brought about by appellant. But ordinary care ebbs and flows with the danger to be fairly anticipated by a man of reasonable prudence from the circumstances and conditions involved in each case. Where the danger indicated is small, ordinary precaution and care required to avert it are not great. Where the danger to be anticipated is great, ordinary care may call for the highest vigilance, activity and unremitting attention to guard against it.

And, even yielding to the insistence of counsel that appellant's duty was satisfied with ordinary care, it cannot be ruled, as a matter of law, that the evidence does not show a violation of duty. There was evidence that appellee got on one of appellant's cars at one end of the line over which it ran to go to the other terminus, and paid her fare. She carried with her a light suit case. The car went part of the route to a point on one of the streets in which the track was laid, about midway between cross streets, where it was stopped close to two cars, which were in use by appellant in doing reconstruction work on its track in the street. This work was being done by appellant preliminary to a permanent improvement of the street by the city. It had excavated in the street, and had thrown out dirt and stones. The car on which appellee was a passenger had a door, platform and steps at both ends. There were other passengers besides appellee, who was nearer the rear end of the car than the front. When the car stopped the conductor or motorman opened the door at the front end of the car and called out generally to the passengers to change cars and transfer, but he did not direct them to go out at the rear end. No direction was given appellee as to which door she should take in leaving the car. The other passengers went out at the front door, and she followed them, carrying her suit case in her right hand. The step was about two feet from the ground below, which was rough and covered with loose dirt and stones. There was no board, platform or step, and no person there to aid her in getting

off of the car. In accordance with instructions to change cars, she stepped down as carefully as she could. She tried to avoid any accident, but stepped on a loose stone that she did not see; it turned her ankle, and she fell on her knees. The conductor and motorman, who had both left the car before she did, and were talking together at the street curb, came and helped her up. Appellee had frequently ridden on this line of road, but had been away on a short visit, and had never made a transfer on the line before.

The evidence also shows that when the car stopped appellant's employees placed a wide board on the step at the rear entrance to the car, which extended thence across the rough portion of the street towards the curb. Upon this fact, the assumptions that appellant had fully discharged its duty to appellee, and that appellee was guilty of contributory negligence, rest. This, however, is not so. The front door being available for exit from the car, the duty of appellant did not end with the placing of the board at the rear. Appellee should have been directed to it. Both assumptions would be valid if appellee had been directed to leave the car by the rear step, where the board was placed, and possibly if she had known it was there to aid the safe egress of the passengers, and took the other way of her own undirected volition. But she did not know of the board, and the evidence, as above set forth, shows an allurement, if not, indeed, a positive direction, for appellee to leave the car at the front entrance. We think the jury was clearly warranted in finding that appellant was guilty of negligence, and that appellee was not.

Brief criticism is made of four instructions tendered by the appellee and given by the court. What has been said in considering the other questions applies to the objections to two of the instructions, and it is clear that the jury was not misled, to the harm of appellant, by the giving of the other two, even if they be justly subject to the complaint made of them.

The judgment of the lower court is affirmed.

BIRMINGHAM RY., LIGHT & POWER CO. v. SAXON.

(Alabama—Supreme Court.)

Contributory Negligence of Pedestrian in Stopping on Track with Knowledge That He Could Not Cross Without Being Struck; Pleading; Answer Alleging Contributory Negligence; Evidence; Opinion; Illustration by Motorman as to Stopping of Car; Duty of Motorman Toward Person Approaching Track.

DEFENDANT appeals from judgment for plaintiff. Reported 59 So. 584.

Count 3 is in subsequent negligence for a negligent failure of the servants of the defendant to use all means at their command to prevent the car from running against plaintiff's intestate after becoming aware of his peril, when, by the use of such means, the accident might have been avoided. The plaintiff's intestate was crossing the track at a public crossing, as alleged in count 3, when he was struck and killed.

Plea 5 is as follows: "Defendant says that plaintiff's intestate voluntarily left a place of safety by the side of defendant's track at said crossing, and from which position by the said side of the track, at the said crossing, his view of the approaching car was unobstructed, and, well knowing that defendant's car was rapidly approaching, he measured the distance and took the chances of crossing the track before the car reached him, and attempted to cross said track immediately in front of the moving car, and in such close proximity thereto that no preventive effort on the part of defendant's employees in charge of said car could have prevented injury to him, and by his own gross and reckless negligence and wanton conduct in this regard he proximately contributed to the injury and death."

(6) "Defendant says that plaintiff's intestate was himself guilty of negligence which proximately contributed to his injury and death, which negligence consisted in this: The plaintiff's intestate attempted to cross the said track in front of defendant's moving car without looking and listening for the approach of a car, and well knowing that said car was approaching, and in such close proximity that no preventive effort on the part of the employees or servants in charge of said car could have prevented the injury after the peril of plaintiff's intestate became known to them, or after he stepped on the track on which said car was moving."

(N) "The defendant says that plaintiff's intestate was himself guilty of negligence which proximately contributed to his injury and death in this: That said intestate went upon or dangerously near, or attempted to cross, the railway track of defendant in front of and in dangerous proximity to an electric car, which was then and there approaching on said track, without looking for said car."

(11) "The defendant says that plaintiff's intestate was himself guilty of negligence which proximately contributed to his alleged death in this: Said intestate, after having looked for defendant's said car, and having seen the same then and there approaching on said track, nevertheless negligently went upon or dangerously near said track in front of and in dangerous proximity to said car, which was then and there approaching on said track."

(12) "Defendant says that plaintiff's intestate was himself guilty of negligence which proximately contributed to his alleged death in this: Said intestate went upon or dangerously near, or attempted to cross, the railway track of defendant in front of, and in dangerous proximity to an electric car, which was then and there approaching on said track, and negligently failed to listen for said car before doing same."

(13) Same as 12.

(14) "Defendant says that plaintiff's intestate was himself guilty of negligence which proximately contributed to his alleged death in this: Said intestate approached said track, for the purpose of crossing it, at the point at which he was struck by said car, and before going upon said track for such purpose did not stop and look for said car, and at the time that intestate voluntarily went upon said track said car was approaching said point, and said intestate could have seen said car in time to have avoided being struck by it, had he stopped and looked for it before going upon said track."

(15) "Contributory negligence in this: Plaintiff's intestate negligently attempted to cross the track of the defendant, aforesaid, without looking or

listening for the approach of the said car of the defendant, then and there approaching on said track in dangerous proximity to him; and defendant avers that the plaintiff's intestate thus negligently attempted to cross the track of the defendant, as aforesaid, with knowledge of the danger of so doing, and well knowing that to so cross the said tracks, as aforesaid, would imperil and endanger his life by collision with an approaching car."

(16) "Contributory negligence, in that defendant says that, with knowledge that said car was approaching the point on said track at which it struck said intestate, and would probably pass said point before said intestate could get entirely across said track, the said intestate voluntarily undertook to cross said track at said point, and was injured and killed by being struck by said car at said point before he had entirely crossed said track; said intestate having attempted to cross said track without having informed said servants or agents of his purpose to do so, and without having been assured by them that it would be safe for him to do so."

(A) "Contributory negligence in this: Said intestate having seen the defendant's car which struck him approaching the point at which he was struck by it at a high rate of speed, and knowing that it was probable that said car would continue to run at said speed while passing over the point at which said intestate was struck, nevertheless negligently ran in front of said car at said point, which the same was approaching said point, at said high rate of speed, and was in dangerous proximity to said point, knowing that it was probable that he would not have time to go across defendant's track at said point before being struck by said car, unless the speed thereof was reduced before said car reached said point, and without any assurance that its speed would be reduced before it reached said point."

(B) "Contributory negligence in this: After the said servant of the defendant became aware of said intestate's peril of being run against by said car, said intestate, well knowing that said car was approaching the point at which he was struck by it at a rapid rate of speed, and without any assurance that its speed would be reduced before passing said point, negligently attempted to cross said track on which said car was being run at said point, when said car was in dangerous proximity to said point, and was being run at such high rate of speed, and was killed while making said attempt."

(C) "Contributory negligence in this: After the said agents or servants became aware of said intestate's peril of being run against by said car, the said intestate saw the said car approaching at a high rate of speed the point on track of defendant at which he was struck by it, and in dangerous proximity thereto, and thereafter, knowing that it was probable that it would be impossible for him to cross said track before said car reached said point, unless the speed thereof was reduced, and without any assurance that the speed of said car would be reduced before reaching said point, and fully appreciating his peril, said intestate negligently attempted to cross said track at said point, and was struck by said car while making such attempt."

(D) "Contributory negligence in this: After said agents or servants became aware of said intestate's peril of being run against by said car, the said intestate became aware that said car was approaching at a high rate of speed the point on said track at which he was struck by it, and would probably pass said point before he could cross said track at said point, he being a

said track near one side thereof, and said intestate negligently failed to get off of said track at said side, as he might have done by the exercise of reasonable care and prudence, and thereby avoided being struck by said car, but negligently attempted to cross to the other side of said track, and was struck by said car while making such attempt."

(E) "Contributory negligence in this: After said agents and servants in charge of said car became aware of said intestate's peril of being run against by said car, said intestate went upon and attempted to cross said track on which said car was being run, without stopping and looking for cars which might be approaching the point on said track at which he went upon and attempted to cross the same, as aforesaid."

(G) "Contributory negligence in this: After the said agents and servants of the defendant became aware of said intestate's peril of being run against by said car, said intestate saw said car approaching at a high rate of speed the point on the track of defendant at which he was struck by it, and in dangerous proximity to it, and thereafter, knowing that it was highly probable that it would be impossible for him to cross said track before the said car passed the point at which he was struck by it, and that it was highly probable that the speed of said car could not be sufficiently reduced to prevent its passing said point before he could cross said track at said point, and without any assurance that its speed would be reduced sufficiently to enable him to cross said track at said point in safety, said intestate negligently attempted to cross said track at said point, appreciating the danger of doing so as fully and well as said servants and agents appreciated the same, and said intestate was struck by said car while so attempting to cross said track."

The exceptions to evidence sufficiently appear from the opinion. The following charges were refused to the defendant:

(5) "I charge you that, if the motorman in charge of said car did not have time to reverse the same after becoming aware of the peril of plaintiff's intestate before the car struck such intestate, then said motorman was guilty of no negligence in failing to reverse the car."

(6) "If, after considering all the testimony in this case, your minds are left in a state of confusion as to whether or not plaintiff should recover in this case, you cannot find for the plaintiff."

(7) Covered by charge given.

(10) "I charge you, gentlemen of the jury, that, if you believe the evidence in this case, you cannot find that plaintiff's intestate was in a perilous position before some part of his body got on or was near the track on which the car that struck him was being run, and that said car would strike such part of his body in running over the track at the place where said intestate was on the same, or near there, as stated above."

(11) "I charge you that all that the motorman in charge of said car was required to do after becoming aware of the peril to plaintiff's intestate was to use such means as were at hand, in a skilful manner, to stop said car; and, if you are reasonably satisfied from the evidence in this case that he did so, you must find for the defendant under the third count of the complaint, as amended."

(12) "I charge you that, even if you believe from the evidence in this case that the motorman in charge of defendant's car that struck plaintiff's

intestate saw said intestate running toward the track on which said car was being run, he had the right to assume that said intestate would stop and listen for said car before actually going on the said track; and it did not become incumbent upon said motorman to make any effort to stop this car until the circumstances indicated to him that it was probable that said intestate would not stop and look before going upon said track."

(13) "If the jury believe from the evidence that plaintiff's intestate approached the railroad crossing wishing to cross, and that he saw and heard the car approaching, and that he for himself measured the distance and the time that it would take him to cross, and, acting upon his own judgment, undertook to cross in front of said approaching car, then I charge you that he assumed the risk of injury in crossing in front of said car; and his administrator cannot hold defendant responsible in this action, if you believe from the evidence that the deceased was injured in crossing the track in front of said car, unless the intention of plaintiff's intestate was apparent to the motorman operating said car, and, after his perilous intention and conduct became apparent, by the exercise of due care and diligence, the injury could have been avoided."

(14) "If you are reasonably satisfied from the evidence that the motorman saw the deceased at or near the track, but it also became apparent to the motorman that the deceased saw the approaching car, and was in such a position as to have gotten out of the way of danger, the motorman would have the right to presume that the deceased would get out of the way of danger, until by his conduct he showed that it was not his purpose so to do; and it would be the duty of the motorman to begin to stop the car only from the moment that the deceased's conduct made it reasonably manifest that he did not intend to get out of the way, or when, from deceased's position, it became reasonably manifest that he could not reasonably extricate himself from his peril; but the motorman, acting with reasonable prudence and in good faith, might delay using such preventive efforts until too late to avoid the collision. In which event the defendant would not be liable."

Count 2 is as follows: "Plaintiff sues as administrator of the estate of H. F. Saxon, and claims of the defendant, a body corporate, owning and operating an electric street railway in the county of Jefferson, State of Alabama, \$100,000, for that, to wit, February 22d, plaintiff's intestate, while in the act of crossing the street railway aforesaid at a public crossing, was run against and killed by a car on the track of the railway aforesaid, in the county and State aforesaid. Plaintiff avers that the death of his intestate was proximately caused by the wanton, wilful, or intentional conduct of the servants or agents of the defendant while acting within the line and scope of their employment, which wanton, wilful, or intentional conduct consisted in this: The servants or agents aforesaid wantonly, wilfully, or intentionally ran a car against plaintiff's intestate, with knowledge that plaintiff's intestate would probably be injured thereby, and with reckless disregard of the consequence."

(3) Same as 2 down to and including the words "the county and State aforesaid," where they last occur therein, and adds: "plaintiff avers that the death of his intestate was proximately caused by the negligence of the defendant's servants or agents while acting within the line and scope of their

employment, which negligence consisted in this: Said servants or agents negligently failed to use all the means at their command to prevent said car from running against plaintiff's intestate after becoming aware of said intestate's peril of being run against by said car, when, by the use of said means, said car would have been prevented from running against said intestate, and his death would have been avoided."

Opinion by SIMPSON, J.:

This action is by the appellee against the appellant for damages on account of the death of the plaintiff's intestate from being struck by a car of defendant's

The first assignment of error insisted on is that the court erred in sustaining the demurrer to plea 5 as an answer to count 3 of the complaint. The court erred in sustaining the demurrer to said plea. The plea showed a knowledge of the danger by alleging that the intestate, "*well knowing that defendant's car was rapidly approaching,*" "measured the distance and took the chances of crossing the track before the car reached him, and attempted to cross said track *immediately in front of* said moving car;" and it shows that such negligence was subsequent to the negligence of the defendant (if there was such) in failing to use preventive efforts, after discovery of the peril of the intestate, by alleging that said intestate left a place of safety, and thus stepped immediately in front of said rapidly approaching car "*in such close proximity thereto* that no preventive efforts on the part of the employees of defendant in charge of said car could have prevented injury to him." If it was in such close proximity that no preventive efforts could have prevented the injury, it necessarily follows that, if there was any subsequent negligence on the part of the defendant, it must have been before said act of contributory negligence by the intestate.

In the case of Johnson v. Birmingham Railway, Light & Power Co., 149 Ala. 529, 531, 534, 43 South. 33, the plea, in addition to being alleged in the alternative, does not show as definitely as does the one in this case the knowledge of the peril and the time when the negligence occurred; and the court held that it simply set up a condition.

In the case of Anniston Electric & Gas Co. v. Rosen, 159 Ala. 195, 200, 43 South. 798, 133 Am. St. Rep. 32, the only contributory negligence alleged was initial, and not subsequent.

In the case of Louisville & Nashville Railroad Co. v. Calvert, 170 Ala. 565, 572, 54 South. 184, the plea does not allege any facts showing the distance at which the cars were when plaintiff attempted to cross, whether the danger was obvious to plaintiff, or whether it was before or after the initial negligence of defendant. In fact, as said by the court, it alleged the negligence itself only as a conclusion.

What has been said as to plea 5 applies, also, to the demurrers to plea 6.

There was no error in sustaining the demurrer to plea 10 as an answer to count 3 of the complaint. No facts are alleged, showing that the negligence of the intestate was subsequent to that of the defendant, if there was such. For the same reason there was no error in sustaining the demurrer to plea 11.

There was no error in sustaining the demurrer to plea 12. It does not

show that the intestate was aware of the peril. For the reasons above assigned, there was no error in sustaining the demurrers to pleas 13 and 14.

For reasons already stated, and because plea 15 states simply conclusions, and not facts, there was no error in sustaining the demurrer to said plea.

There was no error in sustaining the demurrer to plea 16. Besides being otherwise defective, said plea does not state that the negligence complained of was the proximate cause of the injury.

There was no error in sustaining the demurrer to plea A. It does not show that the negligence complained of as contributory was subsequent to the alleged negligence of the defendant after the discovery of intestate's peril.

There was no error in sustaining the demurrer to plea B. While said plea does allege that intestate knew that the car was approaching, and in a subsequent part alleges that he attempted to cross when the car was in dangerous proximity, yet it does not allege that intestate knew it was in dangerous proximity.

There was error in sustaining the demurrer to plea C. Said plea sets up all the elements of contributory negligence subsequent to the negligence of defendant. It is hypercritical to say that it does not appear where the intestate was when an appreciation of his peril dawned on him. It states distinctly that, "fully appreciating his said peril," he attempted to cross. In other words, at the time he attempted to cross, he fully appreciated the peril. As to this point MAYFIELD, SAYRE, and SOMERVILLE, JJ., concur, and DOWDELL, C. J., and ANDERSON and MCCLELLAN, JJ., dissent. For the same reasons the court erred in sustaining the demurrer to plea D.

The demurrer to plea E was properly sustained, as it did not allege that the intestate was aware of the danger of crossing the track.

The court erred in sustaining the demurrer to plea G, as it correctly states the law.

There was no error in permitting the evidence as to whether the *locus in quo* was "a thickly populated neighborhood," where there were "numbers of people on both sides of the track," etc. Such evidence is permissible, in connection with other evidence, in order to determine whether the conditions at such place were such as to impute simple negligence or wilful or wanton wrong to the engineer in running at a high rate of speed at the locality. *Highland Ave. & Belt R. R. v. Sampson*, 112 Ala. 425, 434, 20 South. 566; *L. & N. R. R. Co. v. Orr*, 121 Ala. 489, 502, 26 South. 35; *Weatherly v. N., C. & St. L. Ry.*, 166 Ala. 587-590, 51 South. 959.

There was no error in overruling the objections to the questions as to whether Wilks Station was a regular station or stopping place, etc. Evidence as to the locality where the injury was received, its condition and surroundings, cannot work any injury to either party. This was a collective fact to which any witness might testify.

For the same reason, there was no error in permitting the evidence as to at what hour of the day the crossing was most used. At any rate, the answers were favorable to the defendant, and it was not injured thereby. *Redus v. Milner, etc., R. Co.*, 41 South. 634; *A. G. S. R. R. Co. v. Guest*, 144 Ala. 383, 39 South. 654; *A. G. S. R. R. Co. v. Guest*, 136 Ala. 354, 34 South. 968; *B. R., L. & P. Co. v. Ryan*, 148 Ala. 76, 77, 41 South. 616; *Southern Railway*

Co. v. Forrister, 158 Ala. 483, 48 South. 69; Birmingham Southern Railway v. Fox, 167 Ala. 284, 285, 52 South. 889.

There was no reversible error in permitting questions and answers as to whether there was anything to prevent the motorman from seeing one coming out of the store and crossing.

There was no error in permitting the witness, John Young, to testify as to the best and quickest way to stop a car—to lessen its speed, etc. He testified that he had been a motorman for between seven and eight years, had had experience in stopping cars, etc.; and the court, in the proper exercise of its discretion, allowed the testimony. If there was any difference between the cars that the witness had managed and the one in question, that could have been brought out in cross-examination.

There was no reversible error in excluding the expression by the witness Colbie, after he had stated what he did to stop the car, "That is all I could do." In the first place, the admission of expert testimony is largely within the discretion of the trial court. Ala. Consol. C. & I. Co. v. Heald, 168 Ala. 627, 53 South. 162; Stewart v. Sloss-Sheffield Steel & I. Co., 170 Ala. 550, 54 South. 48. The witness had merely testified that he had been running a car for about two months, and there was no evidence as to his expertness. In addition, the material question was not, what the particular motorman could do, but what a skilful one, similarly situated, could have done. Brown v. St. Louis & San Francisco R. R. Co., 171 Ala. 310, 55 South. 109; L. & N. R. R. Co. v. Young, 168 Ala. 564, 53 South. 213; B. R., L. & P. Co. v. Morris, 163 Ala. 208, 209, 50 South. 198.

There was no error in permitting the motorman to illustrate, with his hands, the time it would take him to go through the various motions necessary to reverse the lever, etc., in order to stop or check up the car. Being an expert, and familiar with the amount of resistance usually met with in performing these services, it seems that he would automatically make the motions in about the time usually employed. But, however that may apply, the illustration would present to the jury a better idea of what was to be done than could be explained by mere words; and if counsel was of opinion that it would take more time, by reason of the resistance of the levers, that could be brought out on cross-examination, and the jury could judge of it and give such weight to the illustration as they thought proper. This bears no analogy to the case of Birmingham Railway, Light & Power Co. v. Hayes, 153 Ala. 186, 44 South. 1032, in which the answer was the mere solving of a mathematical proposition, which the court said the jury could work out as well as the witness; nor to the case of Teesney v. State, 77 Ala. 38, in which "a separate and distinct experiment" was made by firing at a coat; nor to the Burgess Case, 114 Ala. 596, 22 South. 169, where, also, a separate and distinct experiment was made by placing children in the supposed position of the injured, in order to determine whether they could be seen at a certain distance; nor to the Collier Case, 112 Ala. 682, 14 South. 327, where an experiment was also sought to be made by *pouring* a liquid fire extinguisher on cloth, so as to determine what injury could be done to clothing by the *explosion* of a bottle containing the extinguisher.

To the question to the motorman, on cross-examination, "You wanted to make town as soon as you could?" the defendant objected, but stated no

ground of objection. The court was not bound to cast about for grounds to sustain the objection, and consequently cannot be placed in error for overruling the same. *Dryer v. Lewis*, 57 Ala. 554, 555; *B. R., L. & P. Co. v. Landrum*, 153 Ala. 200, 45 South. 198, 127 Am. St. Rep. 25; *L. & N. R. R. Co. v. Seale*, 55 South. 238.

The witness Ensey, having testified that he was instructed in the duties of motorman by Mr. Walker, who had previously testified to the same fact, was asked: "What did Mr. Walker tell you was the most effective way to stop a car in emergency?" "The defendant objected to said question, on the ground that it called for illegal, irrelevant, and immaterial testimony." The objection was overruled, and the witness answered: "Well, reversing was the quickest way." No motion was made to exclude the answer. It is now insisted that the ruling was erroneous, because the question "does not hypothesize facts in issue, does not limit the car referred to to the character of car alleged to have struck plaintiff's intestate," and because Walker had not been questioned about the matter.

The broad grounds of illegality and immateriality do not cover the objections insisted on; and, where a party states particular grounds of objection, he waives all others. *Southern Railway Co. v. Gullatt*, 158 Ala. 507, 48 South. 472; *Garrett v. Trabue, Davis & Co.*, 82 Ala. 232, 3 South. 149; *St. L. & S. F. R. R. Co. v. Savage*, 163 Ala. 58, 50 South. 113; *Broyles v. Central of Georgia Ry. Co.*, 166 Ala. 627, 52 South. 81, 139 Am. St. Rep. 50.

The answer not being responsive to the question, and there being no motion to exclude the answer, the court could not be put in error for its ruling. *Sloss-Sheffield Steel & I. Co. v. Sharp*, 156 Ala. 284, 289, 47 South. 279; *Broyles v. Central, etc., Co.*, *supra*. For these reasons there was no error in overruling said objection.

The so-called question: "Suppose, Mr. Ensey, there was a man on the track, and you wanted to stop the car or slacken its speed as quick as possible, in order to save his life?"—does not really contain any question at all. Whether the question was interrupted before it was finished, or what question was intended to be asked, we cannot tell. However, no motion was made to exclude the answer, and the court cannot be put in error. Authorities, *supra*.

The witnesses for plaintiff, in rebuttal, had stated what Walker's instructions were to them, and particularly that said Walker had instructed them that reversing the lever was the best and quickest way to stop or check a car. After the plaintiff had closed his testimony in rebuttal, the defendant proposed to examine said Walker as to what instructions he had given witnesses on this subject, and the court refused to admit the testimony.

It is true that after the testimony has been closed it is a matter within the sound discretion of the trial judge whether or not to reopen the testimony (*Chandler Bros. v. Higgins*, 156 Ala. 516, 47 South. 284); and it is also true that after the plaintiff has closed his testimony in rebuttal it is within the discretion of the court whether or not to allow surrebuttal testimony as to matters which might have been inquired into before (*So. Industrial Institute v. Hellier*, 142 Ala. 688, 39 South. 163); but where, as in this case, testimony is brought out on rebuttal, as to facts which could not have been

testified to before, by defendant's witness, we think justice requires that the defendant should be allowed, in surrebuttal, to contradict the same.

Walker could not legally have testified before as to what instructions he had given the witnesses; but he having testified as to the best and quickest way to stop or check a car or cars, conditioned as these were, and the evidence in rebuttal having a tendency to impeach his testimony by showing that his instructions were contrary to his testimony, he should have been allowed to either contradict or explain said statements. This was not, as counsel for appellee thinks, seeking merely "a contradiction of Ensey's contradiction of Walker's previous testimony," because Walker had not testified on that subject; but it was the introduction of new matter, tending to throw a cloud over Walker's testimony. The court erred in not admitting said testimony.

There was no error in that part of the court's oral charge excepted to. *L. & N. R. R. Co. v. Holland*, 55 South. 1001; *Brown v. St. L. & S. F. R. R. Co.*, 171 Ala. 310, 55 South. 108; *L. & N. R. R. Co. v. Young*, 168 Ala. 564, 53 South. 213.

The court erred in refusing to give the general charge in regard to the second count of the complaint, as there was no evidence to justify a finding that the injury was caused by the wilful, wanton, or intentional act of the servants of the defendant. As to this point, all of the justices concur, except Dowdell, C. J., and Sayre, J., who think it was a matter for the jury to consider.

There was no error in refusing to give the general charge as to the third count of the complaint, as it was a question for the jury whether or not there was simple subsequent negligence. *N., C. & St. L. Ry. v. Harris*, 142 Ala. 252, 253, 37 South. 794, 110 Am. St. Rep. 29. As to this point, Dowdell, C. J., and Anderson and Sayre, JJ., concur; but McClellan, Mayfield and S  merville, JJ., dissent, holding that the general charge should be given as to said third count.

Charge 5, requested by the defendant, was properly refused, as it assumes that reversing was the best way to stop the car quickly, on which point the evidence is in conflict.

Charge 6 expresses the law, and the court erred in refusing to give it. If the jury must be reasonably satisfied, it necessarily follows that, if their "minds are left in a state of confusion as to whether or not plaintiff should recover," they cannot find for the plaintiff. *L. & N. R. R. Co. v. Sullivan Timber Co.*, 126 Ala. 95, 99, 103, 104, 27 South. 760; *Calhoun v. Hannan & Michael*, 87 Ala. 277, 285, 6 South. 291.

In the *Calhoun Case*, 87 Ala. 285, 6 South. 292, *supra*, a charge that, "if the evidence leaves them confused or uncertain as to the truth or falsity of such charge, they must find for the defendant," was sustained; the court saying: "Manifestly, if their minds are left in a state of confusion and uncertainty on this point, the plaintiff has failed to make out this very essential part of his case, and cannot recover."

In the *Sullivan Timber Co. Case*, *supra*, the trouble with the charge was that it exacted too high a degree of proof in requiring the jury to be "satisfied," in place of "reasonably satisfied," and the question was whether the addition of the words "uncertainty, confusion, and doubt" cured that infirmity; and it was held that they did not, evidently because no words could

extract the defect in the previous part of the charge; and the court states, referring to the Hill case and the Brown-Master case, that, if the words "confused or uncertain" had been connected by an "and," "they would not have vitiated the charge."

In the case of Alabama Great Southern Railroad Co. v. Hill, 93 Ala. 514, 526, 527, 9 South. 722, 30 Am. St. Rep. 65, the trouble was that the charge required jury's minds to be absolutely "certain" and free from all "doubt," whether reasonable or otherwise; and the statement quoted from the Calhoun case is approved.

In the case of Brown v. Master, 104 Ala. 464, 16 South. 443, there was the same vice, to wit, the requiring of absolute certainty.

Charge 7, requested by the defendant, was covered by charge 19, given on request of defendant, and no error can be predicated on its refusal.

There was no error in refusing to give charge 10, requested by the defendant. The intestate's actions and appearance may have been such as to manifest his intention of crossing the track, before he came in actual range of the car. B. R., L. & P. Co. v. Hayes, 153 Ala. 178, 181, 183, 44 South. 1032; Burson v. L. & N. R. R. Co., 116 Ala. 198, 22 South. 457.

Charge 11, requested by the defendant, was substantially covered by charge 6, given at the request of the defendant, and, in addition, it fails to hypothesize the use of the means "promptly." There was no error in its refusal.

There was no error in the refusing to give charge 12. The word "even" carries an intimation against the supposition. Manistee Mill Co. v. Hobdy, 165 Ala. 411-418, 51 South. 871, 138 Am. St. Rep. 73. Besides, it is not stated at what distance the intestate was, when seen running.

The court erred in refusing to give charge 13, at the request of defendant. The same is true as to refusing the fourteenth charge.

The court committed no error in overruling the demurrers to counts 2 and 3 of the complaint as amended.

The judgment of the court is reversed, and the cause remanded.

Reversed and remanded. All the justices concur in the opinion, except as to the points noted in the opinion, in which dissent is expressed.

ERVIN v. PHILADELPHIA RAPID TRANSIT CO.

(Pennsylvania — Supreme Court.)

Injury to Blind Man Struck by Car While Crossing Street; Proof of Negligence Insufficient; Exclusion of Ordinance as Evidence.

PLAINTIFF appeals from judgment for defendant. Reported 84 Atl. 966.

Opinion by POTTER, J.:

The plaintiff in this case is blind, but has been trained to go about the streets of the city alone. He brought this suit to recover damages for injuries resulting from a collision with a street car, while he was crossing Columbia avenue, on the morning of November 17, 1906. He charged the motorman with negligence in failing to stop his car in time to avoid the collision. The trial

judge submitted to the jury the question of defendant's negligence and the plaintiff's contributory negligence. Upon both of these issues the verdict was in favor of the defendant. The plaintiff could not of course see the car, and he testified that he did not hear it, when he started to cross the street. It was in fact approaching, and was quite near him. The motorman testified that, as he approached at slow speed, he saw plaintiff standing in the roadway near the curb, apparently looking towards the car. He did not know plaintiff was blind. When the car was about its own length away from him, plaintiff started swiftly across the street in front of it. The motorman put on his brake hard, but the fender struck the plaintiff's leg just as he was clearing the track. The jury evidently credited this statement. There is no evidence that the car was not under proper control, or that the motorman neglected his duty in any way. Not satisfied with the verdict, plaintiff has appealed from the judgment entered thereon. With much earnestness and great pains, his counsel has sought to show that the trial judge erred in the rejection of some testimony, and in charging the jury.

In the first assignment of error, complaint is made of the rejection of a portion of a city ordinance. The record shows the expression of a wish to offer an ordinance, but its subject-matter did not appear, nor was its relevancy to the issue being tried, made apparent. The negligence alleged was in bringing the car up to the crossing without notice or warning of its approach. This charge was met by evidence which satisfied the jury that the motorman had done everything in his power to avoid the accident after its possibility became apparent to him. The provisions of the ordinance could have had no bearing upon this question.

In the second assignment the court is charged with error in saying to the jury that he saw nothing in the testimony to indicate that the car in question ran at an unusual rate of speed. The record fully sustains this statement, as the car only ran about three feet after it came in contact with plaintiff.

In the third assignment it is alleged that the court erred in explaining the difference between affirmative and negative testimony, and in further intimating that the testimony of plaintiff was negative. Here again the record fully bears out the statements of the judge, and his instructions to the jury were timely and well adapted to aid in securing a proper understanding of the real question at issue. The effort which he made in this respect was most commendable. The jury were rightfully instructed that, if the plaintiff had been a person with normal eyesight, his action would, under the law, have been properly considered contributory negligence. Nor do we see any fair ground for criticising the instruction that it was the duty of plaintiff, even though not able to see, to exercise as much care as possible for his own protection under the circumstances. It was left squarely to the jury to determine whether, in view of his blindness, the plaintiff exercised due care in walking the streets.

The sixth point was as follows: "If the jury believe that the blind man was physically and mentally fit to go about alone, and that on the occasion of his injury he was exercising all the care that a reasonable and prudent blind man should exercise under the circumstances, they cannot find him guilty of contributory negligence." This point was affirmed.

In none of the assignments do we find anything set forth which in any way approaches reversible error. The charge as a whole carefully and impartially

sets forth the respective rights and duties of both plaintiff and defendant, and it is evident, from the record of the questions asked by the jury, and the further instructions which they of their own accord requested from the court, that the jury gave unusual and discriminating attention to the just and proper determination of the questions of fact submitted to them.

The assignments of error are overruled, and the judgment is affirmed.

GRADYSZEWSKI v. DETROIT UNITED RY.

(Michigan — Supreme Court.)

Injury to Pedestrian Struck by Car in Attempting to Recover His Cap; Negligence; Duty of Motorman Toward Pedestrians.

PLAINTIFF brings error from judgment for defendant. Reported 138 N. W. 225.

Opinion by BROOKE, J.:

Plaintiff, a boy seven years and five months of age at the time of his injury, was proceeding southerly along the east side of St. Aubin avenue in the city of Detroit. He desired to cross Forest avenue upon which defendant operates a double-track electric line. The paved portion of Forest avenue at this point is forty feet wide. The distance from the north curb on Forest avenue to north rail of defendant's tracks is 12.65 feet. As plaintiff left the curb and started to cross the street, he saw one of defendant's cars approaching from the east. The car was then a little east of the alley, which is 100 feet east of the east line of St. Aubin avenue, where the plaintiff was. When plaintiff reached the middle of the track upon which the car was approaching, his cap fell off. He attempted to recover it, and while so doing was caught and run over by the car, sustaining injuries for which recovery is sought.

Plaintiff testified that he had been going to school about a year, that he was familiar with this crossing, and knew that cars ran east and west on Forest avenue. On cross-examination he further testified: "Q. You saw the car coming down, then, on the north track? A. Yes, sir. It was going kind of fast. I knew it was going kind of fast because I seen it coming. I didn't see any cars coming in the other direction. That was the only car I saw. Q. You saw that coming. It was about opposite the alley? A. Yes, sir. Q. You were then on the curb on the corner of Forest and St. Aubin? A. Yes, sir. Q. How far was the curb from the track that the car was on? A. Oh, about six or seven feet. Q. And this car was coming — was it coming very fast? A. Yes; it was going pretty fast. I didn't, it didn't go very fast, but it was going kind of fast. Q. You walked along in front over the track? A. No; I didn't walk over the track. Q. What did you do? A. I walked up and I happened to stoop down and pick up my hat. The Court: I understood him to say that he walked onto the track, not over it. Q. You walked onto the track? A. Yes; onto the track. Q. You didn't go right onto the track, did you? A. Yes, sir; I went onto the track that the car was coming on. Q. Did you go right to the middle of the track? A. Yes; in the middle. I don't know how my hat happened to fall off. I

don't remember if it was windy or not. My cap fell off. Q. Why didn't you go and leave your hat there in the street? You knew the car was coming fast, didn't you? A. Yes, sir; I did. I thought I would get past. Q. How far was the car from you when your hat fell off? A. It was about a little—half ways of that house. Q. You know how much ten or fifteen feet is, don't you? A. Yes, sir. Q. Speaking of feet, about how far was the car from you when your cap fell off? A. Oh, it was about twelve feet. Q. It hadn't slowed up any, had it? A. No; it didn't slow up. Q. When the car was about twelve feet from you, you went to get your hat, which was in the middle of the track? A. Yes, sir. Q. You had been in the middle of the track before, hadn't you, or your hat wouldn't have been there, would it? A. No; it wouldn't have been there. Q. Your hat dropped off, and then you walked back. A. No; I didn't go back at the same time. I picked it up. It fell off frontways. Q. And the car was about twelve feet away from you when you picked the cap up? A. Yes; maybe about fourteen, I don't know. Q. Twelve or fourteen? A. Yes, sir. Q. Didn't you know that the car that near—you knew if you got in front of a car it would hurt you, didn't you? A. Yes; but I knew I would get past it. Q. You didn't get past it, did you? A. No; it must have started faster. Q. Did you notice it start up faster? A. No; I didn't notice it. Q. When you stooped over, was your back to the car or were you facing the car? A. I was in the middle of the track. Q. Your back to the car? A. Yes; I was this way. Q. You were not looking at the car when you picked your cap up? A. Yes; I was looking at it, picking up my hat. Q. Were you looking at your hat or at the car? A. At the car. Then I looked at my hat and picked it up. Q. Which did you look at first—the car or your hat? A. The car. Q. Suppose the car was coming about here, where the jury is—you turned around this way? A. Yes, sir. Q. You were back to the car? A. No; towards the car, I looked. Q. Were you facing the car when you picked it up? A. Yes; I faced it—not all. I faced, as though the car was coming from that way, and I faced. I tried to pick my hat up. Q. You stooped over that way in front of the car? A. No; I had my face towards the car, and I was then, I was standing this way, looking at the car that way, and trying to pick up my hat. Q. Had you your hat in your hand when the car struck you? A. No; I don't remember that, if I had it in my hand. Q. How did you know where your hat was; were you groping around to find your hat? A. Yes, sir; I was looking. Q. You couldn't look at your hat and the car the same time, could you, John? A. No. Q. How did you arrange that? A. I seen my hat fall off. Q. You knew your hat was falling off, you felt that? A. Yes, sir. Q. You say you didn't look at the hat while you picked it up, you looked at the car? Is that right? A. Why, yes; I looked at the car. Q. But you didn't look at the hat? A. Yes; I looked at the hat, too. Q. The hat was on the pavement, and the car was along about twelve feet from you? A. I looked at the car first, then at the hat. Q. You looked at the car first, then at the hat? A. Yes; then at the hat. Q. You were not looking at the car when you were struck? A. Then, no; because I couldn't. Q. You say, when you first saw the car, it was right opposite the alley? A. Yes, sir. Q. You walked along, and the car kept right along, coming towards you? A. Yes, sir. Q. You were going across the track? A. Yes sir. Q. You intended to get across the track, didn't you? A. Yes, sir.

Q. Isn't that right? When you got in the middle of the track your hat fell off? A. Yes, sir. Q. And you didn't go on; but then the car was twelve feet from you? A. Yes, sir. Q. Coming along pretty fast? A. Yes, sir. Q. You saw the car? A. Yes, sir. Q. Looked at the car coming along pretty fast, twelve feet from you, and you stooped over to pick up your hat? A. Yes, sir. Q. That is all you remember? A. Yes, sir; that is all. I don't remember how far the car went after it hit me, because I never seen anything."

On redirect: "Q. When you say 12 or 14 feet, John, how far do you think it is? Can you tell me here in this room on the floor? A. It is further than that there side. Q. Here? A. Yes; it is further than that. Q. How far do you think 12 feet is—about here? A. Yes; about that far. Q. That is the distance you saw the car when your hat fell off. A. Yes, sir."

On recross: "Q. How much is a foot? Put your hands up for a foot. A. About that much. Q. You think 12 of those would take you down there where he is? A. I don't know the difference. I never measured. Q. What? A. I never bothered myself measuring. Q. You said 10 or 12 feet. A. I don't know how much it is. Mr. Doetsch: He said 12 or 14. Q. If the car was 12 or 14 feet, and was down where Mr. Cyrowaki stood, you were pretty slow in picking up your hat, weren't you? A. No; I wasn't slow. I took it as fast as I could. Q. And yet the car came down on you in that distance? A. Yes, sir; struck me. Q. You were looking at the car all the time? A. No; not looking. I looked at the car. Then I went and took a chance at my hat. Q. That is how you got hurt? A. Yes, sir."

Upon this testimony the court directed a verdict for defendant, holding that plaintiff had failed to show any negligence on the part of the defendant company. A motion for a new trial was thereafter denied, and error was assigned upon such denial.

The only error argued in the brief for appellant is that the court erred in directing a verdict.

We are of opinion that the direction was warranted by the testimony. There is nothing in the record to indicate that defendant's car was operated at an excessive rate of speed or in any manner negligently.

It is obviously impossible to demand that motormen when running at proper speed should check their cars whenever they see a pedestrian in front approach the track. If the distance is sufficient for a crossing to be made safely, the motorman has the right to assume that the pedestrian will so cross, if the distance is insufficient he has a right to assume that the pedestrian will maintain a position of safety at the side of the track. The motorman is not bound to anticipate that the pedestrian will place himself in a place of danger; indeed, he has the right to assume the contrary. When, however, he becomes advised, or in the exercise of due care should become advised of the peril of the pedestrian, it is his duty to use all means within his control to avert injury. When plaintiff's hat fell off and he attempted to recover it, the car was so close to plaintiff that to stop it before collision was clearly impossible. This conclusion is based upon the assumption of the truth of plaintiff's testimony as to the rate of speed. Had plaintiff's hat not fallen off and had he not stopped to recover it, he could have crossed the track in safety. The motorman could not anticipate that this would occur, nor was he bound to

operate his car so as to be prepared for a contingency so remote. The facts in this case bring it within the principle of several of our own decisions. *Fritz v. Railway Co.*, 105 Mich. 50, 62 N. W. 1007; *Merritt v. Foote*, 128 Mich. 367, 87 N. W. 262; *Coessens v. Rapid Railway*, 136 Mich. 481, 99 N. W. 751; *Rollo v. City Electric Railway Co.*, 152 Mich. 77, 115 N. W. 727; *Stenzhorn v. City Electric Ry. Co.*, 159 Mich. 82, 123 N. W. 621. No negligence on the part of defendant having been shown, the question of plaintiff's contributory negligence becomes unimportant.

The judgment is affirmed.

CITY OF DETROIT v. DETROIT UNITED RY.

(Michigan — Supreme Court.)

Maintenance of Streets; Paving; Mandamus to Compel Street Railway Company to Put in Brick Between Its Tracks; Franchise Subject to Police Power of City.

CERTIORARI by relator upon dismissal of petition for mandamus. Reported 138 N. W. 215.

Opinion by MCALVAY, J.:

This case is before the court upon a writ of certiorari to mandamus proceedings to the Wayne Circuit Court. Relator asked for a writ of mandamus to compel the paving with brick the space between its tracks by respondent, as required by resolution of the village of Delray. In such proceedings, by reason of the fact that the territory in question had been annexed to the city of Detroit, by an order of the court made in this case the city was substituted for the village. Before such annexation and after issue joined in the mandamus proceedings, an agreement was entered into between the village authorities and the respondent, without prejudice to the continuance of the mandamus suit or to the rights of either party, under which a macadam pavement was laid. Later the common council of the city of Detroit, by resolution, directed its officers to bring these proceedings to a hearing as soon as possible. Upon a hearing of the case before Judge Donovan, an order was granted that respondent repair this macadam pavement within thirty days, and upon proof of such repair the petition be dismissed.

The franchises to respondent's predecessor in title were granted by resolutions adopted by the township of Springwells, dated, respectively, July 26, 1886, December 14, 1891, and December 26, 1891. The requirements as to pavement between the tracks were as follows: In the first grant to be paved in the same manner and maintained as certain other portions of its track described; and in the second and third grants "to be paved with cobblestones in the same manner as the balance of the track is now paved." The portions of the track mentioned in the first grant were also paved with cobblestones.

The petition for mandamus sets up the facts above stated, and, further,

the adoption by the village of Delray of a certain pavement — brick with a concrete foundation — and the contract entered into for the purpose of constructing the same, and shows that for that purpose it will be necessary to bring the tracks of the railway to the grade established, to cut off the ties projecting beyond the other rail, in order to prevent injury to the new pavement by vibration; that under the grant to respondent it was its duty to pave between the outer rails of the tracks operated by them, and was and is its duty to observe and obey the reasonable orders of the council in respect to such paving; that it was originally paved in cobblestone, which, for the purposes of the new pavement, are no longer practicable or proper by reason of the soft foundation and vibration; that originally the road was operated by horse cars of light weight and but little used; that the railway at present is operated by electricity, by suburban passenger and freight cars of very great weight; that River street, where this railway is located, is the main street through Delray, which had a population in 1905, when these proceedings were begun, of 6,000 inhabitants. Due notice was given of this action taken by the village of Delray, and of the requirements under it to be performed by respondent.

In its answer to this petition, respondent admitted the material facts above stated as to the origin of its franchises and its duty under its franchises to pave between the outer rails of its tracks operated by it, and also admitted the later action relative to requiring brick pavement upon a concrete foundation to be put in by respondent, and admitted notice of such requirement and its refusal to comply with the resolution. It denied that the ties were laid, as alleged, upon a poor foundation, and are appreciably of different lengths, and denies that, in order to properly grade and pave the street, it is necessary that any portion of the ties be cut off, and that the passage of cars will, by vibration or otherwise, injure the concrete pavement alongside of the rails, or destroy the same, or make the highway dangerous for passage. It denies that cobblestone construction is obsolete, or that the foundation is poor, and that the contractor is unable to lay the concrete and brick pavement by reason of the refusal of the respondent to conform with the requirements of the council; and it claims that, while admitting it is its duty to raise its tracks to the proper grade and repave between the outer rails with the material mentioned in the grants, it is not its duty to cut off the projecting ends of the ties, which, it claims, is unnecessary, as it has learned from long experience to allow them to so project, and that if cut, as required, it will be impossible to spike, brace, or adjust its rails to the ties supporting the traffic, and work irreparable injury; that its rails are from 77 to 100 pounds weight to the yard, and the track would collapse in case the ties were cut off as required. And, further answering, says that it has been willing, and is now willing, to place its tracks upon a foundation of crushed stone, extending the full width of its ties, of about twenty-one inches deep, thoroughly tamped and rolled, between the ties, and to fill the space between the outer rails and the ties with macadam pavement of first-class construction, which, it alleges, is demonstrated to be the best pavement now in use for such purposes. And, further, that the expense of such pavement, as contemplated by the city, will be \$40,000 in excess of the cost to it of the construction as con-

templated by respondent, and is not as serviceable or durable; and further claims that the requirement of the village to make this pavement different from that required by the terms of such grants is in violation of its rights under the Constitution of the United States, by impairing the obligation of existing contracts.

It appears from the record that under a temporary agreement respondent brought its tracks to grade on this street and constructed a macadam pavement the entire distance between the outer rails of its two-track system, and also a foot of brick pavement on each side, beyond such rails, the same as the brick pavement, with concrete foundation, upon the remaining portion of the street.

The claim is made and strongly urged by counsel for respondent that, by reason of the fact that under the agreement entered into between the parties, without prejudice, respondent proceeded to and did put in the macadam pavement, that conditions are so changed from those existing at the time of joining issue in this case that any determination by this court of the rights of the respective parties to this proceeding can or ought to be made, but that the petition should be dismissed without prejudice to relator. This contention does not appeal to us, under the circumstances upon which the macadam pavement was put in by respondent. In making such claim it appears to the court that counsel for respondent have overlooked the terms and conditions of the agreement entered into between the parties. By its express terms the mandamus proceedings were suspended until a date certain, "and until such time as the village council may direct; it being understood between the parties hereto that neither party shall gain nor lose any of its substantial rights by this agreement, and that it is without prejudice to the rights of said village and said railway, as asserted in the petition and answer above referred to." This agreement was entered into May 13, 1905. The proceedings under it were suspended until September 19, 1911, when the city of Detroit, successor to the village of Delray, directed its proper officer to proceed to a hearing of the case. Under these facts the court must hold that both parties contemplated a determination of their rights upon the petition and answer, in the same manner as if the macadam pavement had not been constructed. It is claimed by the relator that it was put in as a test pavement, and we do not find such claim to be contradicted by respondent; and the court, upon the case presented by the record before us, will proceed as if no such agreement had been entered into.

It is the contention of respondent that under its franchises, the requirement as to the kind of pavement authorized having been complied with, such requirement cannot be changed, and that to do so would be in violation of the Constitution of the United States, in that it would impair the obligation of an existing contract. In other words, that by these franchises respondent acquired a vested right to always maintain a cobblestone pavement.

It is not contended directly that a municipality cannot retain that control over the public streets and highways which is necessary for the protection and proper use of the public; but by indirection the contention of respondent goes to that extent. A municipality, in granting franchises and privileges to public utility corporations to construct and maintain their roads

in and upon the streets and highways, does not and cannot surrender or circumscribe its right to the exercise of general police powers. If the contention of respondent in this respect should be accepted, such would be the result, regardless of the change of conditions and circumstances, or the requirements necessary to maintain the streets and highways of a municipality in a reasonably safe condition for the use of the public. It would be impossible, during the life of the franchise, to make the necessary changes required for the public use and safety.

In our opinion, the great weight of authority is against such contention. The law upon this proposition is well stated by an eminent text-writer, as follows: "It is a general rule that the right to exercise the police power cannot be alienated, surrendered, or abridged, either by the Legislature or by the municipality acting under legislative authority, by any grant, contract, or delegation, because it constitutes the exercise of a governmental function without which the State would become powerless to protect the public welfare. Hence, when a franchise or privilege is granted to use the city streets for a public service, the grantee accepts the right upon the implied condition that it shall be held subject to the reasonable and necessary exercise of the police powers of the State, operating either through legislative enactment or municipal action." Dillon, *Municipal Corporations* (5th Ed.), § 1269. To the same effect are the decisions of this court.

A case in point is where a street railway had used a T-rail, claimed to be unsuitable for streets paved with brick, and the municipality, by ordinance, required the railway to substitute a grooved rail. We quote from the opinion: "Under respondent's contention, it could practically prevent any improvement in paving, or the adoption of new and better material, unless it could be used in connection with the T-rail, which the respondent had the right to lay when the road was constructed, and which it now claims the right to relay and maintain. It could not be compelled to substitute the grooved rail for the T-rail, even if the city should offer to pay the expense; for it claims the right to lay the T-rail was a part of the contract, which cannot be taken away. The amended ordinance does not impair the franchise conferred upon the respondent. The city recognizes respondent's right to the use of the street, to run its cars, and to charge the fares fixed by the ordinance. It only claims that conditions have changed, requiring essential changes in the character and manner of paving, and that the respondent must so construct and equip its road as to meet these changed conditions. In other words, the relator only claims that the respondent is deprived of none of its property, unless the increase in consequence of the improvement amounts to such deprivation. It is essential that municipalities retain that control over the public streets and highways which is necessary for the protection and proper use of the public. Courts will jealously guard the right of such control. It must be a very plain provision, indeed, in a contract, which will justify the courts in holding that this power has been conveyed away. Where doubt exists, such contracts will be construed against the surrender of such power." *City of Kalamazoo v. Traction Co.*, 126 Mich. 525, at page 531, 85 N. W. 1067, at page 1070; *Taylor v. Street Railway*, 80 Mich. 77, 45 N. W. 335; *People v. Detroit Citizens' Ry.*, 116 Mich. 132, 74 N. W. 520; *Detroit, etc., Ry. v. Commissioners*, 127 Mich. 219,

86 N. W. 842, 62 L. R. A. 149; *City of Detroit v. Ft. Wayne & Elmwood Ry.*, 90 Mich. 646, 51 N. W. 688.

It is suggested that these cases depended upon a construction of ordinances which, unlike the grants in the instant case, reserved certain rights, and are therefore not in point. The grants in those cases were with reservations of rights in the municipalities; but it is evident from the opinions that this court decided the cases upon the ground that the grants were accepted "subject to the reasonable and necessary exercise of the police powers of the State." We are convinced that the trend of the authorities and the attitude of this court is favorable to the protection of the rights of the public in the reasonable and necessary exercise of such powers, and hold in the instant case that these grants to use the public streets were accepted upon the implied condition that they should be held subject to such power, the necessity for the exercise of which is to be determined by the municipal authorities. In the exercise of its powers reserved to it to maintain its streets in a safe condition for the public use, the municipality is the judge of the necessity for repairing the pavement and repaving its streets, and its rights to do so cannot be surrendered; and it may impose such reasonable requirements upon the grantees of franchises given to street railways as to conform with changes which may be determined to be necessary and essential for the protection of the public.

The remaining question to be considered is the question of the unreasonableness of the requirement of the municipality in the changes imposed upon the respondent. Considering the situation as of the time when the respondent was notified and requested to conform with these requirements, this court cannot hold that they were unreasonable. Clearly not as to the requirement to put a pavement between the rails similar to that on the balance of the paved street, for the reason that it is apparent that to have a uniform pavement the whole width of the street would be the most satisfactory and safe. It is conceded that to bring the track to a uniform grade with the new pavement was not unreasonable. The other requirement, relative to cutting the ties projecting beyond the stringers under them, was before this court in the case of *Detroit v. Ft. Wayne & Elmwood Street Railway*, 90 Mich. 646, 51 N. W. 688, which is now a portion of respondent's system, where the same contention of unreasonableness was made; and it was held by the court that such requirement was not unreasonable. It is true that that decision might have been based partly upon a concession made in the case; but the same conditions upon which the court then acted are present in the instant case. In our opinion, the requirement was not unreasonable.

The order of the court dismissing the petition is reversed, and a writ of mandamus will issue according to the prayer of the petition.

CENTRAL KENTUCKY TRACTION CO. v. SMEDLEY.

(Kentucky — Court of Appeals.)

Injury to Employee Riding to Work by Falling from Car While Walking Along Running Board Caused by Jerking of Car; Assumption of Risk; Contributory Negligence; Proof of Negligence of Motorman.

DEFENDANT appeals from judgment for plaintiff. Reported 150 S. W. 658.

Opinion by CLAY, J.:

Plaintiff, George W. Smedley, suing by his next friend, W. M. Smedley, brought this action against the Central Kentucky Traction Company to recover damages for personal injuries alleged to have resulted from defendant's negligence. From a verdict and judgment in favor of plaintiff for \$5,000, the defendant appeals.

At the time of the accident defendant was engaged in ballasting its tracks with crushed stone. The stone was being quarried and crushed on the farm of H. H. Jesse, a few miles east of Versailles, in Woodford county, and was being hauled from there over the defendant's line to the place of distribution. It was the duty of the employees engaged in this work to load the stone on the cars, and then ride on the cars to the point of distribution, and there unload the stone. Plaintiff, who at the time was seventeen years of age, five feet, eleven inches high, and weighed 150 pounds, was employed a few days before the accident to assist in this work. In carrying the ballast, the defendant used two cars. One was a small freight car, without motive power. The stone was loaded on this car, and it was not used for any other purpose. Attached to the freight car was a summer passenger car, with trolley and other electrical appliances necessary for motive power. The motor car was an open car, such as is used in cities during the spring, summer, and fall. Its seats ran at right angles to the sides of the car. On each side of the car there was a running board eighteen inches to two feet wide, reaching from the front to the rear. This running board was used for the purpose of getting on and off the car, and for passing from one end of the car to the other. At each end of the seats there was an upright post. Fastened to each of these upright posts was a handhold. The freight car and the motor car were coupled together by a link and pin. The link was a solid bar of iron, with a round hole in the end.

The accident happened on the night of November 8, 1907. Plaintiff and those working with him had loaded the box car, and the box car was being pulled by the motor car to the point where the stone was to be distributed. As the two cars approached the point on the Versailles pike where the Louisville & Atlantic railroad crosses, some one suggested to plaintiff that it was his time to turn the derail. Plaintiff claims that he had never had any experience in doing this, and walked to the front of the passenger car to see how it was done. After the derail was turned, the cars crossed the railroad track, and proceeded towards Versailles. Just east of Versailles there is a hill. When the car reached this hill, and was moving at a speed of three or four miles an hour, plaintiff, who was cold, concluded to return to the rear end of the car, where he would be better protected. The car itself was not

inclosed, and there were windows in front and in the rear. Some of the windows in front had been broken, but the windows in the rear were all right. The employees were accustomed to ride on the rear seat. The only way to reach the rear end of the motor car was to step over the seats or to pass along the running board. As plaintiff was passing along the running board he says there was a snatch of the car which threw him to the ground, and under the car. His foot was caught under the wheels, and so badly crushed that amputation was necessary. Plaintiff says that while he knew the car would jerk, and did sometimes jerk, he had never seen a jerk as hard as the one that threw him from the car. Henry White, a witness for the plaintiff, says that there was first a jerk and then a jar. When he felt the jerk, he thought the car had jerked loose behind. The jerk occurred before the jar. He had never felt it snatch that way before going up that hill. According to the evidence for defendant, there was no jerk of the cars at all. There was simply a jar caused by the car running over plaintiff's leg. The motorman in charge of the car does not remember whether plaintiff was on the front of the car or not. He says that, immediately after the accident, plaintiff stated that he was aiming to get off the car and walk up the hill for the purpose of getting warm. Dr. Blackburn, who attended the plaintiff, testifies that the plaintiff said that he was sitting on the front end of the car, and the rest of the workmen were on the back seat. His feet got cold, and he started back to where they were. As he went along the running board, he was stamping his feet on the running board to get them warm, when one of his feet slipped off. One witness for the defendant says that he saw plaintiff starting from the front of the car to the rear on the running board. Plaintiff attempted to get off with his back in the direction the car was going. In doing this he was thrown to the ground and injured.

In his petition plaintiff alleged that he was thrown from the car and injured "by the carelessness and negligence of the defendant and its agents and employees superior in authority to the plaintiff." Defendant denied the allegations of the petition, and pleaded contributory negligence. Later on plaintiff filed an amended petition, pleading his infancy and inexperience, and the failure on the part of defendant to warn him of the dangers incident to his employment; also, that the place where he was required to work and the cars, machinery, and appliances furnished by the defendant were unsafe and dangerous, all of which the defendant knew, or by the exercise of ordinary care could have known. The amended petition, however, failed to allege that plaintiff's injuries were caused by any failure of duty on the part of defendant in either of these respects.

The court gave to the jury five instructions. The first instruction told the jury that if they believed from the evidence that the motor car furnished by defendant, upon which the plaintiff was traveling at the time he was injured, was insufficient or ineffective for the purpose of drawing loaded rock cars, of weight equal to the one in use upon that occasion, or for the purpose of carrying defendant's employees, and for either reason was dangerous or unsafe for the purpose of transporting plaintiff from place to place in the discharge of his duty, and same was unknown to plaintiff, but defendant knew that fact, if it was a fact, or, by the exercise of ordinary care and prudence, could have known same, and failed to notify or warn the plaintiff

of such danger, if any, and plaintiff was thereby injured, while using ordinary care for his own safety, then the jury should find for the plaintiff, but, unless they so believed, they should find for the defendant. By instruction No. 2 the court defined ordinary care and negligence as applicable to a boy seventeen years of age. Instruction No. 3 defines the measure of damages. Instruction No. 4 covered the question of assumption of risk. Instruction No. 5 presented the question of contributory negligence.

The defendant insists that the court erred in submitting the case to the jury on the question of the dangerous condition of the car, and the failure to warn. Plaintiff and his witnesses did not testify to any facts tending to show that the car was dangerous or insufficient for the purpose for which it was intended. The effect of their evidence is that it was an old summer passenger car. It was open on both sides. It was not heated in any way, and one or two glasses were out of the window in front. The seats ran cross-ways of the car. The only way to get from the front of the car to the rear was along the running board. The car was light. Nor did the cross-examination of defendant's witnesses elicit any facts tending to show that the car was insufficient for the purpose for which it was used, or that any part of the appliance was defective. The running board was all right. The handholds were in proper condition. Plaintiff was not thrown from the car because the night was cold and the car was not heated. No doubt on account of these conditions he attempted to go from the front of the car to the rear, but these conditions did not cause his injury. Nor can we see any reason why plaintiff should have been warned as to the dangers attending his work. He had no work to perform in connection with the operation of the car. He was not required to come in contact with any machinery of any kind. If he wanted to move from one end of the car to the other, all he had to do was to walk along the running board and hold to the handholds. He testifies that he knew the car would jerk, and had felt it jerk before. The evidence shows that, while only seventeen years of age, he was a boy of fair intelligence. Knowing the car would jerk, he also knew that while walking along the running board the jerk of the car would have a tendency to throw him off. The evidence leaves no doubt that he was fully capable of appreciating this danger. That being true, he assumed the risk of such jars and jerks as were ordinarily and usually incident to the prudent operation of the car, and it was not necessary to warn him of a danger which he knew and fully appreciated. *C., N. O. & T. P. Ry. Co. v. Finnell's Adm'r*, 108 Ky. 135, 55 S. W. 902, 22 Ky. Law Rep. 86, 57 L. R. A. 266; *Knight v. Paducah B. & B. Co.*, 102 S. W. 1185, 31 Ky. Law Rep. 629; *Kelly, etc., v. Barber Asphalt Co.*, 93 Ky. 363, 20 S. W. 271, 14 Ky. Law Rep. 356. We therefore conclude that the court erred in submitting the case on the propositions set out in instruction No. 1.

There was evidence, however, tending to show that plaintiff was injured by an unusual and unnecessary jerk of the car. Doubtless this phase of the case was not presented to the jury, because plaintiff, after alleging negligence in general terms, specified the negligence on which he relied, and the trial court was of the opinion that he was confined to a recovery for the negligence specified. On a return of the case, plaintiff will be permitted to amend his petition.

We are not inclined to hold that, because plaintiff at the time he was injured was not actually engaged in performing some active service for defendant, he is to be treated as a mere volunteer, and therefore not entitled to recover. It was a part of his duty to ride on the car from the quarry to the place where the stone was to be distributed. Being on the front of the car, we think he had the right to walk along the running board provided for that purpose in order to get to the rear end of the car, especially in view of the fact that the night was cold, and he could be better protected from the inclement weather at the rear end of the car. In doing this, however, it was his duty to exercise ordinary care for his own safety, and the fact that he was so engaged did not relieve the defendant from liability for a failure to use ordinary care in the operation of the car. While, of course, he assumed the risks and hazards arising from the jars and jerks that are usually and ordinarily incident to the prudent operation of cars similar to the one on which he was riding, yet if the motorman negligently gave the car a jerk which was unusual, unnecessary, and so violent as to show a want of ordinary care on his part for the safety of those riding in the car, and by reason of this plaintiff, while exercising ordinary care for his own safety, was thrown from the car and injured, he is entitled to recover. On the other hand, if plaintiff attempted to alight from the car while the car was in motion, and was thereby injured, or was engaged in jumping up and down on the running board and his foot slipped, and he was thereby thrown to the ground and injured, he is not entitled to recover.

It is not necessary to allege or show gross negligence on the part of the motorman in order to authorize a recovery by plaintiff. The accident did not happen at the crusher or at the point of distribution, where plaintiff worked under the motorman's direction or control. In riding on the car to the place of destination, plaintiff had no duties to perform in connection with the operation of the car. While so riding, he was not engaged in the same department of the same work with the motorman. Their duties did not require immediate cooperation, and did not bring them together or into such relation that they could exercise influence upon each other promotive of proper caution. *Louisville Ry. Co. v. Hibbitt*, 139 Ky. 43, 129 S. W. 319, 139 Am. St. Rep. 464; *Milton's Adm'x v. Frankfort & Versailles Traction Co.*, 139 Ky. 53, 129 S. W. 322. In the case of *L. & N. R. R. Co. v. Brown*, 127 Ky. 732, 106 S. W. 795, 32 Ky. Law Rep. 552, 13 L. R. A. (N. S.) 1135, the court said: "But when the servant is injured by employees of the same master, who are not directly associated with him, and with whom he is not immediately employed, and whose qualifications for the place they occupy he has no means of knowing, and in whose selection he has no voice, and over whose conduct and actions he has no control, and against whose negligence and carelessness he cannot protect himself, he may recover damages from the master for injuries received through their negligence, whether it be ordinary or gross, and without any reference to the position or place the servant causing the injury holds." Applying the above rule, we conclude that plaintiff was not a fellow servant of the motorman, and that he may recover for the motorman's negligence, whether it be ordinary or gross.

Judgment reversed and cause remanded for new trial consistent with this opinion.

**BALTIMORE & O. S. W. R. CO. v. CINCINNATI, L. & A. ELECTRIC
ST. R. CO.**

(Indiana — Appellate Court.)

*Right of Street Railway to Cross Railroad Tracks; Street Railway Not
an Additional Burden; Right of Steam Road to Right of Way; Con-
tract by Street Railway for Crossing Over Steam Road; Con-
sideration.*

PLAINTIFF appeals from an order sustaining a demurrer to the complaint.
Reported 99 N. E. 1018.

Opinion by MEARS, P. J.:

Appellant brought this action against appellee to collect a sum of money alleged to be due it by the terms of a certain written contract. The complaint was in one paragraph, to which a demurrer, for want of facts, was sustained, and this ruling is assigned as error.

From the complaint it appears that both appellant and appellee were Indiana corporations, the former owning and operating a line of railroad through the city of Lawrenceburg for the carriage of freight and passengers for hire, and the latter owning and operating a street railroad through said city for the carriage of passengers for hire. On March 21, 1900, these companies entered into a written contract made a part of the complaint by exhibit, which, omitting the formal parts, reads as follows: "Witnesseth: Whereas, the said party of the second part desires to cross at grade the right of way and track or tracks of the party of the first part for the purpose of constructing and operating an electric railroad at Walnut street in the city of Lawrenceburg and at George street in the city of Aurora, both in the State of Indiana; and whereas, the parties have mutually agreed that said party of the second part may construct, maintain, and operate its electric railroad over and across the right of way, railroad, and track of the party of the first part at the points named, to wit: Walnut street in the city of Lawrenceburg and George street in the city of Aurora, and State of Indiana, upon the terms and conditions hereinafter set forth: Now, therefore, it is agreed between the parties: (1) The party of the first part grants to the party of the second part the right to cross at grade, construct, maintain, and operate an electric street railroad over and across the right of way, railroad, and track of the party of the first part at Walnut street in the city of Lawrenceburg, also at George street in the city of Aurora, State of Indiana, upon the conditions and terms hereinafter set forth. (2) The party of the second part, the condition of the grant of the right to cross at grade the right of way, railroad, and track of the party of the first part above mentioned, covenants and agrees that it will, for its own sole cost and expense, construct and forever afterwards maintain the crossing, frogs, fixtures and appliances necessary for the safe and proper crossing of the said right of way, railroad, and track of the party of the first part at Walnut street in the city of Lawrenceburg, and for the safe and proper crossing of the said right of way, railroad, and track of the party of the first part at George street in the city of Aurora, State of Indiana, all of said work,

crossings, frogs, fixtures, and appliances, and the manner of construction and maintenance of the same, shall be done to the satisfaction of the party of the first part. (3) The said party of the second part further covenants and agrees that it will bring its cars to a full stop on each side upon approaching either of said crossings over the right of way, railroad, and track of the party of the first part at Walnut street in the city of Lawrenceburg, and at George street in the city of Aurora, and will in each case upon approaching said railroad track with its cars send a conductor ahead of such car, whose duty it shall be to observe the approach of trains at said crossings, or either of them, and direct the movement of said electric cars so that the same shall not collide or be struck by the engines or cars of the party of the first part being operated over said line of railroad, it being the distinct agreement and understanding of the parties that the said party of the first part shall have precedence in the operation of its trains over said crossings, and that the party of the second part, in the operation of its electric cars, shall only attempt to cross the line of said railroad at a time when the same may be done with safety. (4) The said party of the second part further covenants and agrees that whenever it shall be necessary for the safety of said crossing, or either of them, or whenever the said party of the first part shall be required by any law or ordinance of either of the said cities of Lawrenceburg or Aurora, or the State of Indiana, to keep or maintain any crossing watchman or watchmen at said crossing of Walnut street, Lawrenceburg, or George street, Aurora, or either of them, then the party of the second part hereby covenants and agrees to pay for, keep, and maintain such watchman or watchmen. (5) The provisions of this contract shall extend to and be binding upon the parties and both of them, their successors, assigns and legal representatives, and the provisions of this contract shall govern and control the operation of said crossings so long as the same shall be used for the purposes provided by this contract."

An ordinance of said city passed and approved December 13, 1906, and continually thereafter in force requiring appellant to keep a watchman at the crossing of its track on Walnut street, was made a part of the complaint, as was also an itemized statement of the money paid by appellant for the services of a watchman at said crossing from December, 1906, up to and including February, 1910. Other facts are alleged, but the question here for decision is apparent from the facts stated. The objection to the complaint is that it fails to disclose a consideration for appellee's agreement to pay for the services of a watchman.

The fourth specification of the contract is the only one concerning the subject of pay for a watchman's services, and appellee's promise in this respect, as we read the instrument in question, must be supported by a valuable consideration.

In Beach on Modern Law of Contracts, § 5, it is said: "The general rule is that, in order to support an action, the promisee must have been made upon a legal consideration moving from the promisee to the promisor." The same author (section 147) says: "A 'valuable consideration' consists either in some right, interest, profit, or benefit accruing to the one party, or some extension of time of payment, detriment, loss, or responsibility given, suf-

ferred, or undertaken by the other." In Page on Contracts, § 247, it is said: "A valuable consideration is some legal right acquired by the promisor in consideration of his promise, or foreborne by the promisee in consideration of such promise." And again (section 301): "While the parties to a contract may make such terms and select such consideration as they choose, the consideration selected must be the forbearance or acquisition of some legal right. If they select something which is not a legal right, the acquisition or forbearance of it constitutes no consideration, though the parties may believe otherwise." The contract before us recites, in effect, that appellee in the construction, maintenance, and operation of its road desired to cross appellant's track in Walnut street, in the city of Lawrenceburg, and that appellant consented thereto upon certain terms and conditions, among which was the promise of appellee to pay for, keep, and maintain a watchman at Walnut street crossing; or, in other words, the consideration for appellee's promise was the consent of appellant to cross at grade its track on Walnut street. If appellee acquired some legal right or any legal possibility of benefit by its promise, a sufficient consideration would be shown, but the mere consent or withdrawal of an objection by appellant to the doing of that which appellee had a legal right to do is not a consideration sufficient to support a promise. This is so upon the theory that the promisor gets nothing in return for his promise but that to which he is legally entitled. *Beaver v. Fulp*, 136 Ind. 595, 36 N. E. 418; *Reynolds v. Nugent*, 25 Ind. 328; *Shortle v. Terre Haute, etc., R. Co.*, 131 Ind. 338, 30 N. E. 1084; 1 *Beach*, *Modern Law of Contracts*, § 157; 9 *Cyc.* 347; *Horton v. Erie R. Co.*, 65 App. Div. 587, 72 N. Y. Supp. 1018; *Brooklyn Cent. & J. R. Co. v. Brooklyn City R. Co.*, 33 Barb. (N. Y.) 420; *New York & H. R. Co. v. Forty-second Street & G. Street Ferry R. Co.*, 50 Barb. (N. Y.) 309; *Market Street R. Co. v. Central R. Co.*, 51 Cal. 583; *Highland Ave. & Belt R. Co. v. Birmingham Union R. Co.*, 93 Ala. 505, 9 South. 568. What, then, was the legal right or benefit gained by appellee through its promise to pay for the services of a watchman, or right foreborne by appellant in consideration of such promise? The city of Lawrenceburg, by legislative enactment, had the power to require appellant to maintain a watchman at its railroad crossing over Walnut street. Section 8655, Burns 1908, cl. 49. This power was not enhanced, limited, or affected by the fact that appellant gave its consent for appellee to construct, maintain and operate its road in the street across appellant's track.

At the time of making the contract in question, and ever since that time, it was, and still is, the settled law of this State that the use of city streets by a street railway company with the consent of the common council does not constitute an additional burden. After affirming this doctrine in the case of *Chicago, etc., Ry. Co. v. Whiting, etc., Ry. Co.* (1849), 139 Ind. 297, 38 N. E. 604, 26 L. R. A. 337, 47 Am. St. Rep. 264, the court said: "So long, therefore, as it is the settled law of this State that a street railway is not an additional burden to that of the easement which the general public has in the street, and that the street railway company's right to use the street is founded on that easement, that long it must be held that the right of such street railway to cross over the tracks of a steam railway laid on such street is subject to no conditions other than those to which the general public is subject in traveling over such streets." While such company's cars may be pro-

pelled by electricity, its right to use the street and to cross the track of a railway company without the consent and against its will is no longer an open question. *Pittsburgh, etc., R. Co. v. Muncie, etc., Trac. Co.*, 174 Ind. 167, 91 N. E. 600, and cases cited; *Michigan Cent. R. Co. v. Hammond, etc., Elec. R. Co.*, 42 Ind. App. 66, 83 N. E. 650; *Pittsburgh, etc., R. Co. v. Brown- ing*, 34 Ind. App. 90, 71 N. E. 227; *Evansville, etc., Trac. Co. v. Evansville Belt R. Co.*, 44 Ind. App. 155, 87 N. E. 21.

When appellant constructed its road across Walnut street, it must be assumed that it did so with the understanding "that a street or interurban railroad might thereafter be lawfully located upon said highway and across the track at that point." *South East, etc., R. Co. v. Evansville, etc., R. Co.*, 169 Ind. 339, 82 N. E. 765, 13 L. R. A. (N. S.) 916, 14 Ann. Cas. 214. Hence priority in the location of tracks has nothing to do with the right to cross, for the reason that both companies in the use of the street are on equal terms, except that the steam road had the right of way upon giving due notice of its purpose so to do. *Evansville & T. H. R. Co. v. Berndt*, 172 Ind. 697, 88 N. E. 612. But the kind and character of the crossing, materials, appliances, and equipment to be used in its construction or maintenance are the proper subjects of contract. *Evansville, etc., Traction Co. v. Evansville Belt R. Co.*, *supra*. This is so for the reason that the companies owning such intersecting lines are charged with certain duties relative to the safety of the street from defects occasioned by such crossing, and the rights and duties of each with reference thereto as between themselves may be specifically defined by contract.

In the case last cited, the court in speaking of a contract in some respects similar to the one before us held that it was not void for want of consideration. But it must be kept in mind that the court then was considering the right of the companies owning such intersecting lines, and charged with the highest duty to guard and protect their passengers and servants operating their cars and trains, as well as their property, from the increased hazard of such crossing, and not the public generally intending to cross the tracks, which it is the purpose of the ordinance to protect by requiring a watchman. These considerations lead us to conclude that the complaint in this case does not state facts sufficient to constitute a cause of action.

The judgment is therefore affirmed.

CITY OF WATERBURY v. CONNECTICUT RY. & LIGHTING CO.

(Connecticut — Supreme Court.)

Franchise Conditional on Payment of Earning Tax Upon Capital Invested in Stocks or Bonds; Complaint in Suit to Recover Tax.

PLAINTIFF appeals from order sustaining demurrer to complaint. Reported 84 Atl. 723.

The substituted complaint sets out, in substance, the following among other facts:

The Waterbury Horse Railroad Company was organized in 1888 to operate a horse railway in certain streets in Waterbury under a charter granted in

1884 and amended in 1886. In 1893 its name was, by the General Assembly, changed to the Waterbury Traction Company, and permission given to it to operate in additional streets and to use electricity or other motive power except steam. It thereupon, acting under authority of section 2 of chapter 169 of the Public Acts of 1893, caused a plan for the proposed electrification of its lines to be made and presented to the mayor and court of common council of the plaintiff city for approval. The city authorities voted that authority to change the motive power from horse to electricity be given, but incorporated in its vote certain other requirements. Among these was one that the company should pay the city not less than two per cent. of its gross receipts after January 1, 1900. The directors of the company thereupon objected, and asked for a modification of the conditions imposed. A conference between committees of the court of common council and the company was thereupon had, and terms agreed upon. These terms were reduced to writing in the form of a report to the court of common council by its committee, signed by its members, and indorsed "accepted" under the name of the company acting by its secretary. The court of common council upon the receipt of this report changed its previous action to conform thereto.

The vote as thus amended contained, among others, the following provisions: "(6) That said company shall indemnify and save harmless the said city from all loss, cost, damage, or expense of every kind, nature, or description by reason of the operation of its cars in the streets of said city or arising or growing out of the use of electricity as a motive power. * * * (8) That said Waterbury Traction Company shall pay to the city of Waterbury, for the use of said city, in the month of January in each year, a sum not exceeding two per cent. of its gross receipts, to be determined as follows: The gross receipts for the purpose aforesaid consist of all fares not exceeding five cents (and five cents of each and every fare exceeding five cents) and the city of Waterbury at some time during the month of January in each year shall examine the books of said company and thus ascertain and determine such gross receipts. When and after such time as the net earnings of said company shall exceed the sum of six per cent. on the capital actually invested in said company, in stocks or bonds, or both, said company shall pay to said city such excess to the amount of two per cent. in the same manner aforesaid. If at any time hereafter the statute laws of this State shall make said company liable to local taxation, the provisions of this section shall be null and void during such time as said company shall be liable to local taxation and no part of said receipts shall be paid to said city during such time by reason of anything herein contained."

All the parties concerned understood, and it was agreed between them, that the words "net earnings," as used in the report and vote, meant gross earnings, less operating expenses and cost of maintenance and repairs. Immediately upon the passage of this vote, the Traction Company proceeded to change the motive power upon its lines from horses to electricity, and electricity has ever since been in use.

December 22, 1900, the Traction Company sold and transferred all its property and franchises to the Connecticut Lighting & Power Company, and thereupon ceased to operate street railway lines in the plaintiff city. As a part

of the consideration of the sale and transfer, the vendee assumed and agreed to pay all that was or might become due from the vendor to the plaintiff and others, and undertook to perform all the contracts of the latter. The name of the vendee was thereupon and within a few days changed by an order of court to the Connecticut Railway & Lighting Company, and the charter of the company amended by the General Assembly. By one provision of this amendment the company was required to do that which it had contracted to do as above stated. At about the same time the corporation last named purchased all the property and franchises of several other street railway and lighting companies located and doing business outside of Waterbury, thereby creating a large system, and has ever since continued to be the owner thereof. Until December 20, 1906, it operated the street railway lines which had belonged to the Traction Company, and carried on the business of the other corporations acquired as aforesaid. It was thus engaged when the action was begun. December 20, 1906, the Connecticut Railway & Lighting Company leased all the property and franchises which it had purchased as stated to the Consolidated Railway Company, and this latter company, under authority of its charter, operated all of said street railway and lighting properties as lessee thereof until June 1, 1907. On that date the last-named corporation became merged in the New York, New Haven & Hartford Railroad Company. Since this merger the latter company has operated these properties under the terms of the lease to the Consolidated Railway Company. The companies operating under the lease from the Connecticut Railway & Lighting Company have taken all the earnings and accounted to the lessor pursuant to the terms of the lease. During the time when the Waterbury lines were operated by the Traction Company, "the net earnings of said company exceeded six per cent. on the capital actually invested by said company for construction and equipment of its railway lines," and such excess annually amounted to more than two per cent. of the gross receipts from fares not exceeding five cents and five cents of each fare exceeding five cents. During the subsequent period covered by the operation of these lines by the Connecticut Lighting & Power Company under its original or changed name, which ended December 20, 1906, the net earnings from said Traction Company's properties were "more than sufficient to pay the plaintiff two per cent. annually of the gross earnings from passenger traffic after paying a dividend of six per cent. on the capital actually invested for construction and equipment." Ever since the Traction Company's lines were electrified "the net earnings of said company and its successors have exceeded six per cent. on the capital actually invested by said company and its successors for construction and equipment by more than sufficient to pay the plaintiff out of such excess two per cent. on the gross receipts of said Traction Company and by its successors from passenger earnings on the properties which belonged to said Traction Company."

The plaintiff asks for the ascertainment and determination of (1) the amount actually invested in the construction and equipment of the Traction Company's properties, and (2) the annual gross earnings of said properties during the period covered by the complaint from five-cent fares and five cents of every fare exceeding five cents, for an accounting as provided in section

951 of the General Statutes for "all the earnings of said Traction Company's property, the cost of construction and equipment thereof, and the expense of operating and equipment of its lines," and for a judgment to recover two per cent. of the annual gross earnings as ascertained.

The complaint contains extended allegations touching the capitalization, bond issues, and financial operations of the several corporations, and the manner in which the several properties referred to have been managed, the receipts therefrom handled and expended, and the accounts in relation thereto kept. These charge that the Traction Company during the period between the passage of the vote and its sale of its lines was guilty of stock watering, issuing bonds not representing capital actually invested, the appropriation of income to the payment of the cost of construction and equipment within and without the city, bookkeeping manipulation, and misrepresentation to the public as to its investment, earnings, and expenses, all calculated and designed to hinder and prevent a recovery by the plaintiff under the terms of the vote. They also charge that the corporations which have been the successive owners and operators of the Traction Company's lines since December 22, 1900, have, for the fraudulent purpose of depriving the plaintiff of its rights under the vote, used the earnings of the lines which had belonged to the Traction Company to pay for the cost of construction and equipment of other portions of their system, and in their financial management and bookkeeping so commingled and confused these earnings with those from other sources as to make it difficult to discover the true situation. As these matters do not enter into the discussion of the opinion, they need not be recited in detail.

The action was begun February 23, 1906, against the Connecticut Railway & Lighting Company as the sole defendant. Some three years later a substituted complaint was filed and the Waterbury Traction Company, the New York, New Haven & Hartford Railroad Company, and two other corporations incidentally involved were cited in as defendants. This substituted complaint continues to date the story of matters deemed to be relevant to the subject-matter of the action.

Opinion by PRENTICE, J.:

The plaintiff's appeal presents three general subjects of complaint. Two relate to incidental matters arising during the progress of the cause. The third touches more substantial questions resulting from the court's action in sustaining a demurrer to the complaint. This demurrer assigned a considerable number of reasons. The major portion of them attacked the sufficiency of those averments which undertook to establish the existence of an obligation binding upon the defendants. The court sustained this contention and the demurrer for these reasons. The subject of this ruling has occupied a large share of the attention of counsel in argument. We have no occasion to enter upon a consideration of the important questions which this phase of the case involves, since there appears at the very threshold of it another reason, pointed out in the demurrer, which is fatal to the plaintiff's recovery upon the complaint as framed.

The plaintiff rests its right of action upon a provision contained in a vote

of its court of common council approving a plan for the electrification of the street railway lines of the Waterbury Traction Company, which vote was passed upon an application presented by the company pursuant to section 2 of chapter 169 of the Public Acts of 1893, and also upon a certain agreement of the same tenor claimed to have been made by the company in connection with the passage of such vote, together with the conduct of the company in availing itself of the permit which the vote embodied. It is not asserted that the company came under any other duty to make payments to the city based upon income other than such as its language expresses.

The action is brought to recover amounts which it is claimed became due annually for several years prior to the commencement of the action in accordance with the terms of this vote. It will be noted that these terms, in addition to an attempt to state a rule for the determination of the amounts of the several payments, provide (1) a condition precedent to payments becoming due, and (2) a limitation of the amount to be paid under certain conditions of the net revenue account. The condition precedent is that the annual payments shall not be required, except "when and after such time as the net earnings of said company shall exceed the sum of six per cent. on the capital actually invested in said company in stock or bonds, or both." The pleader, having in his complaint made known the existence of this condition, was bound to show that it had been satisfied. The plaintiff is in no position to claim redress, unless the net earnings did, during some portion of the period covered by the complaint, pass the mark set by the vote, and in no position to invoke judicial intervention unless it claims that such was the fact. It matters not what dark and devious ways the defendants may have trodden in an unlawful effort to defeat the plaintiff of its rights, if there has been no such defeat. The latter can establish no claim to judicial intervention or relief by merely charging fraudulent conduct. It must show that by such conduct it has been deprived of something to which it was in fact and in truth entitled. In this case it is entitled to nothing unless the net earnings have passed a certain figure. Until it is charged that such has, upon an honest and true accounting, been the case, the plaintiff has acquired no standing in court to ask it to enter upon the inquiry and make the accounting asked for.

The pleader understood his duty in this regard, and we find three allegations, two covering separate periods, and one the entire period, since electrification, which were inserted to meet the requirements of the situation. They vary slightly in form, but all unmistakably indicate the pleader's intention to limit the fund upon which the six per cent. computation was to be made to the actual investment for the time being by the several owning or operating companies for construction and equipment. The first of these allegations, which deals with the period of the Traction Company's ownership, is that "the net earnings of said company exceeded six per cent. on the capital actually invested by said company for construction and equipment of its railway lines." The second allegation, which relates to a later period, differs in substance only in that the words "by the company" do not appear between "capital actually invested" and "for construction and equipment." The qualification of the investment as that by the company is here not expressed;

but it is necessarily implied from the context. In the third averment the pleader returns to his former use of language and the investment is expressed to be one by the companies and "for construction and equipment."

It is apparent from an examination of these repeated averments and of the prayers for relief that they were not inadvertently, but intentionally, made in the form in which they appear. The pleader has given to the terms of the vote expressive of the obligation claimed to have been imposed upon the Traction Company a construction which placed upon it the duty to make the prescribed annual payments whenever its net earnings should exceed the sum of six per cent. on the capital actually invested "by" it "in the construction and equipment of its lines." Unless this construction is justified, the complaint fails to state a cause of action, since it is not shown that a situation has ever arisen when a payment was required. We are in form dealing with a question of pleading; but it requires only a little study of the plaintiff's allegations to discover that we are in fact here brought to a consideration of one of the fundamental propositions of the case the plaintiff has chosen to present, to wit: One as to the scope and character of the obligation claimed to rest upon the defendants in its favor. By the terms of the vote the six per cent. computation is to be made upon "the actual investment in the company in stocks or bonds, or both." This unmistakably refers to the contribution to the company which the stock holders or stock and bond holders have made. The construction which the pleader has placed upon it transforms this investment into one by the company—that is, expenditure—a radically different thing. And it is not made the equivalent of the contribution to the company by the stock and bond holders by its limitation to expenditure for construction and equipment. It is clear from the context that the pleader had no thought that it was, and it is not. It is a matter of common knowledge that the capital invested in a street railway enterprise not only may, but ordinarily is, used in other legitimate ways and for other legitimate purposes than these. There are organization and preliminary expenses to be borne, rights of way to be acquired, property perhaps to be purchased, working capital to be supplied, and no inconsiderable incidental charges to be taken care of. All these things, as well as construction and equipment, enter into the burden for the bearing of which capital must be provided and used. The language of the vote in important particulars leaves much to be desired in the matter of certainty and precision, and this unfortunate feature is not lacking at the point we are discussing. But, however uncertain it may be, it must be said of it that it is by no possibility susceptible of a construction which calls for the six per cent. computation to be made upon the basis of the cost to the company of the construction and equipment of its lines.

There is no error.

HALL, C. J., and THAYER, J., concurred.

SOUTH COVINGTON & C. ST. RY. CO. v. BARR.

(Kentucky — Court of Appeals.)

Passenger; Injury from Derailment of Car; Motorman Not Negligent for Excessive Speed Resulting from Defective Appliances; Exemplary Damages.

DEFENDANT appeals from a judgment for plaintiff. Reported 144 S. W. 755.

Opinion by MILLER, J.:

The appellee, Mrs. Abbie E. Barr, was a passenger upon appellant's street car between 8 and 9 o'clock P. M. on February 27, 1910, as it was proceeding westwardly on Fourth street in the city of Covington. The car was under the control of the motorman at Russell street, which is the second street east of and 966 feet distant from Main street. The proper course of the car was westwardly upon Fourth street until it reached Main street, and thence northwardly on Main street. Shortly after the car had passed Russell street, the bell rang for a passenger to alight at Johnson street. The car, however, failed to stop at Johnson street, but proceeded with great speed to Main street, and, instead of turning north on Main street, it ran a short distance in the opposite direction, jumped the track, and went onto the sidewalk. The appellee was badly injured, and brought this action for damages. She recovered a judgment for \$4,380 damages, and from that judgment the defendant appeals.

From an examination made of the car after the accident, it appeared that one of the screws holding in place a part of the mechanism of the controller had dropped out of place, and caused the controller to lock, thus preventing the motorman from regulating the speed of the car. Appellant introduced evidence tending to show that the car had been carefully inspected the night before the day of the accident; that it was then in good order; and that the accident occurred by the screw in the controller having worked out of place during the day. Appellee introduced testimony tending to show that, although the controller was locked as above indicated, the car, nevertheless, could have been stopped in two other ways: First, by the motorman throwing off the hood switch over his head; and, secondly, by the conductor pulling the trolley from the overhead wire. When it became apparent that the car had gotten beyond the control of the motorman, the conductor was in the car gathering fares; and, although he attempted to get to the rear end of the car for the purpose of pulling the trolley from the overhead wire, he failed in his attempt by reason of the excitement and confusion of the passengers, who got in his way and impeded his passage. It does not appear that the motorman attempted to throw the hood switch; and it is claimed that this was negligence.

No serious objection is made that the damages are excessive. The grounds relied upon for a new trial are (1) that the court erred in refusing to give instruction X asked by the appellant; and (2) in giving instructions 2 and 3.

The cause of action stated in the petition was based solely upon the gross carelessness and negligence of the appellant's agents in running the car at

a great and excessive rate of speed. The answer contains a traverse, and a plea of contributory negligence. Instruction X, offered by appellant and refused by the court, was framed for the purpose of submitting to the jury the question whether appellant had performed its duty of inspection, which fact appellant claims must necessarily be considered in determining its liability under the evidence in this case.

The two controlling instructions given by the court are instructions Nos. 1 and 2, which read as follows:

(1) "It was the duty of the defendant to exercise the utmost care which careful and prudent persons are accustomed to exercise when engaged in the same or a similar business, and under like or similar circumstances as those in this case, in the operation and management of the car referred to in the proof; and if you believe from the evidence that defendant's servants or employees, engaged in the operation of said car, operated same at a rate of speed which was dangerous to passengers riding therein, and that by reason of such speed said car was caused to leave the railway track in the manner described in the proof, and plaintiff was thereby injured, you will find a verdict for plaintiff. If, however, you believe from the evidence that at the time and place, and under the circumstances described in the proof, said car was not operated at such a rate of speed as to render the operation of same dangerous to persons riding therein, or if you believe from the evidence that said car was not caused to leave the track by reason of the speed with which it was being operated, then, in either of said events, you will find a verdict for the defendant."

(2) "If you find a verdict for the plaintiff, you will award her such a sum of money as you believe from the evidence will fairly and reasonably compensate her for her expense for medical treatment, if any, not exceeding on this account the sum of \$380, for the physical pain and mental suffering, if any, which she has endured, or which it is reasonably certain she will in the future endure, if any, and for the permanent impairment of her power to earn money, if any, all directly and proximately resulting to plaintiff from the injury described in the proof; and if you believe from the evidence that the negligence of the defendant, if any, was gross negligence as hereinafter defined, you may in your discretion, governed by the proof, award plaintiff such further sum of money by way of punitive damages as you may think right and proper under the evidence, but not exceeding in all the sum of \$20,380, the amount prayed for in the petition."

Appellant insists that the first instruction is erroneous, in that it fails to submit to the jury the question whether it had performed its duty of inspection, while appellee insists that the instruction is correct, because it is based upon the only one issue presented by the pleadings; that is, the excessive rate of speed, which caused the accident.

It will be noticed, however, that the petition bases appellee's cause of action upon the gross and careless negligence of appellant in running the car; while the first instruction is based solely upon the idea that appellee was entitled to recover if the car was operated at such a rate of speed that made it dangerous to passengers, thus eliminating entirely from the consideration of the jury the question of negligence upon the part of the appellant in the running of the car. In this respect, the first instruction was

clearly erroneous, since the car may have been operated at an excessive rate of speed, and the appellant might still not have been liable.

Appellee's right of action arises, if at all, out of the negligence of the appellant's employees; but, if the excessive speed which caused the injuries resulted from the defective condition of the controller, the defective machinery prevented the motorman from controlling the car; and if its defective condition was not known to the appellant, its conductor, or motorman, and could not have been so known by the exercise of the highest degree of care, then appellant was not liable, unless by exercising like care it could yet have prevented the accident by stopping the car by one of the other means above referred to.

Instruction X as offered was somewhat involved, and should not have been given in the form asked. The appellant, however, had the right to have the jury try the question whether it had performed its duty of inspection, because, if it had so performed that duty, under the state of facts above pointed out, it was not, in law, liable for appellee's injury, unless its employees were subsequently negligent in not stopping the car.

Appellee relies upon *Louisville Street Railway Co. v. Brownfield*, 96 S. W. 912, 29 Ky. Law Rep. 1099, as sustaining the first instruction. It is clear, however, that the company's liability in that case was placed upon the voluntary operation of the car by the motorman at an excessively high rate of speed, which of itself constituted gross negligence. In the case at bar, however, the excessive speed was not the intentional act of the motorman, but one he claimed he could not possibly control; and, if he could not control it, he was not negligent, within the meaning of the *Brownfield* opinion. The same criticism applies to the opinion in *South Covington & Cincinnati Street Railway Co. v. Cleveland*, 100 S. W. 283, 30 Ky. Law Rep. 1074, 11 L. R. A. (N. S.) 853. Neither the *Brownfield* case nor the *Cleveland* case is similar in its controlling facts to the case at bar; on the contrary, the facts are radically different.

The second instruction, authorizing the recovery of punitive damages, should not have been given. It is well settled that exemplary damages can be awarded in case of personal injuries only where the negligence or injury complained of is malicious or wanton, or the negligence is gross. The act must partake of a criminal or wilful nature; and, in the absence of any evidence to that effect, the damages must be confined to compensation only. See *L. & N. R. Co. v. Wilkins' Guardian*, 143 Ky. 572, 136 S. W. 1023, and the cases there cited. These elements, which must necessarily appear in order to justify a recovery of punitive damages, were not shown in this case.

Judgment reversed for a new trial.

LOUISVILLE & N. R. CO. v. CENTRAL KENTUCKY TRACTION CO.

(Kentucky — Court of Appeals.)

Deed on Foreclosure Sale of Property of Street Railroad Company; Merger; Contract for Crossing Over Railroad Tracks; Repair of Crossing.

PLAINTIFF appeals from a judgment for defendant. Reported 144 S. W. 739.

Opinion by WINN, J.:

On July 25, 1893, the appellant railroad company and the Capital Railway Company entered into the following contracts:

"Whereas, the Capital Railway Company of Frankfort wishes to cross with its street car railway the main track of the Louisville & Nashville Railroad at Ann street, in the city of Frankfort, Ky.; and

"Whereas, the Louisville & Nashville Railroad Company has consented that said Capital Railway Company may make said crossing upon the terms and conditions set forth herein, to wit:

"Now, therefore, this contract, made and entered into this 25th day of July, 1893, by and between the Capital Railway Company of Frankfort, Ky., and the Louisville & Nashville Railroad Company, witnesseth: That the said Louisville & Nashville Railroad Company consents that said Capital Railway Company may make said proposed crossing and any additional crossing that may become necessary in consequence of any additional track or tracks that may be put down by said Louisville & Nashville Railroad Company, parallel with its present track, but said crossings are to be constructed by the Capital Railway Company at its own expense, and without expense, damage or injury to the said the Louisville & Nashville Railroad Company, or its property whatever, and are to be constructed in such a manner and are to be of such character, as to make the rails of said the Louisville & Nashville Railroad Company continuous over the crossings; and this permission is given upon the express condition that said Capital Railway Company is to construct and maintain said crossings free of expense to said the Louisville & Nashville Railroad Company; and in the event the said Capital Railway Company shall at any time fail or refuse to maintain said crossings at its own expense, as herein provided for, then, and in that event, said the Louisville & Nashville Railroad Company may take up and remove all such crossings as the said Capital Railway Company, its successors or assigns, may have put down or constructed, or the Louisville & Nashville Railroad Company may, if it choose to do so, furnish the necessary labor and material and repair and put in order said crossings at the expense of said Capital Railway Company, its successors or assigns, and the Capital Railway Company hereby agrees that it, its successors or assigns, shall pay the actual cost thereof.

"And this permission is given upon the further condition that the trains of said the Louisville & Nashville Railroad Company shall have precedence over the crossings. Said Capital Railway Company hereby agrees that all of its cars shall be stopped before passing over the crossings, and its motorman, drivers, conductors, or other employees, shall see that the track is clear before crossing.

"And said Capital Railway Company shall be liable for all damages to people or of property by reason of the failure of its employees to stop its cars, and see that the track is clear before passing over the crossings.

"It is further agreed that, if any overhead wires are erected by or for the said Capital Railway Company, such wires shall be at least twenty-two (22) feet above the top of the rail or tracks of said the Louisville & Nashville Railroad Company.

"All such crossings shall be made according to plans submitted to, and approved by, the chief engineer of the Louisville & Nashville Railroad Company.

"The Louisville & Nashville Railroad Company hereby expressly reserves the right at any time to lay such additional track or tracks parallel with its present tracks, or approximately parallel thereto, where the same is hereby authorized to be crossed by the said Capital Railway Company, as it may from time to time deem necessary.

"Witness the signature of the parties the date and year first herein written. Capital Railway Company, by Pat McDonald, President. The Louisville & Nashville Railroad Co., by J. C. Metcalfe, General Manager."

It appears that there was at the time only one track of the appellant company at the point of intersection named in the contract. It further appears that the railroad company, having built a new passenger station in Frankfort, found it necessary to lay an additional parallel track, and to grade and reconstruct the track named above. It thereupon presented the contract of 1893 to the appellees, and requested them to cause the crossings over the two tracks to be built at the expense of the appellees. Upon the failure by the appellees to construct them, the railroad company built them, and brought its action to recover the cost. By consent of the parties the action was transferred to equity. Upon a submission the petition was dismissed, and the Louisville & Nashville Company appeals.

Several questions are presented by the record. The first one is whether the appellee companies are bound by the original contract made with the Capital Railway Company. Its answer demands an examination of the connection or derivative relation of the companies. It appears that the Capital Railway Company, under the contract, *supra*, bore the cost of the crossing put down about the time the contract was made. Mr. John T. Buckley was the general manager of the Capital Railway Company. He testified that his company was to put in and keep up the crossing. In 1894 the Capital Traction Company went into a receiver's hands, and was operated by him for a time. It was sold under foreclosure proceedings in the United States Circuit Court, and conveyed by its commissioner, by deed of date June 23, 1898, to a corporation known as the Frankfort & Suburban Railway Company.

Of this concern Mr. Buckley was also general manager, as well as its secretary and treasurer. Among the properties conveyed by the deed were the old company's rights of way, equipment, privileges, rights, appendages, and appurtenances. No mention was made of the contract, *supra*; but Mr. Buckley was the general manager of both companies; and as to the rights of third parties his knowledge was the knowledge of the purchasing company. The contract right owned by the Capital Railway Company to operate its line across the Louisville & Nashville track passed by the deed named, although

there was no specific mention of it in the deed. *Hammonds v. Eads*, 146 Ky. 162, 142 S. W. 379; *Conley v. Fairchild*, 142 Ky. 271, 134 S. W. 142. And, since it had knowledge of the terms under which the right arose, it was bound to exercise the right, if exercised at all, under the obligations imposed by that contract. Having knowledge of the obligation imposed by that contract, it should in good conscience use no right gained under it, save by performing its obligation. So far, then, the Frankfort & Suburban Railway Company stood in the shoes of the Capital Railway Company. The Frankfort & Suburban Company operated until December, 1902, when it failed. It shut down operations, and its tracks were covered over by the city of Frankfort with macadam. The crossing was taken up by the railroad company. In 1903 the Frankfort & Versailles Traction Company was organized. Mr. Buckley was a stockholder, secretary, and, a little later, general manager of the new company. On December 28, 1903, the Frankfort & Suburban Company conveyed its properties to the new company. The deed conveyed "the entire holdings of real and personal property, corporate and incorporate, tangible and intangible, franchises, rights of way and all species and estates of every kind and description," which, of course, included the right to cross the railroad track. And, again, since through its manager the new company had knowledge of the obligation imposed as a condition to the right, it, using the right, had to perform the obligation. But there is a stronger factor against it. On December 13, 1903, the Frankfort & Versailles Company, through Mr. Buckley, wrote the appellant, desiring that a new crossing be put in at the traction company's expense. On December 21st the railroad superintendent replied, and among other things said: "I also send you a copy of the contract between this company and the Capital Railway Company, dated July 25, 1893." In one of his letters about the matter Mr. Buckley wrote that at the time of the removal he asked that the crossing be left alone, "as our company was about to change hands." Following this correspondence, and the receipt of the copy of the contract, the new crossing was put in in March, 1904. Certainly the contract was sent to it as a part of the understanding about the putting in of the new crossing; and when Mr. Buckley, for both companies, had had the matter in charge and in mind, the new company in using the rights must be held to own the obligation. That it so recognized it is evident from the fact that it paid the expense of installing this crossing.

The Central Kentucky Traction Company, the appellee, later, by merger, took over the property of the Frankfort & Versailles Traction Company at least in an amended petition filed upon September 20, 1909. It was charged that the Central Kentucky Company had acquired a right, title, and interest in and to the property of the Frankfort & Versailles Company, and that both of said companies were the successors and assigns of the Capital Railway Company and the Frankfort & Suburban Railway Company. The relationship of the two corporations was not denied in the reply. The principal defense was made by the Central Kentucky Traction Company; the Frankfort & Versailles Company having filed its answer in which it set up that it had no real interest in the controversy, was operating no railroad, and was no longer a going concern. There is in the record, marked "Tendered," a copy of the agreement, properly authenticated, whereby the Frankfort & Versailles Company was merged into the Central Kentucky Company, but the order tender-

ing it shows that the court took time to consider it; and the case proceeded to judgment without any further order in respect to it. We are of opinion, however, that the pleadings sufficiently admit the merger. The Central Kentucky Traction Company became liable thereby for all the liabilities and contract obligations of the Frankfort & Versailles Company. "Where one corporation goes entirely out of existence by being annexed to or merged into another corporation, if no arrangements are made respecting the property and liabilities of the corporation that ceases to exist, the surviving corporation will be entitled to all the properties and answerable for all the liabilities of the other. The liabilities of the old corporation are enforceable against the new one in the same way as if no change had been made." *Thompson on Corporations*, § 372. The text is adopted in *Louisville & Nashville Railroad Co. v. Biddell*, 112 Ky. 494, 66 S. W. 34, 23 Ky. Law Rep. 1702.

From the foregoing it will be seen that, in so far as the rights and obligations under the original contract are concerned, the Central Kentucky Traction Company is as much entitled to enjoy the rights as was the original Capital Railway Company; and it just as much owes the duty to discharge the other side of that contract as did the Capital Railway Company.

This position is not in the least affected by the fact that a new franchise was granted by the city of Frankfort in 1903 to the Frankfort & Versailles Traction Company; for, while a franchise was necessary to permit any one of the sundry companies to operate a street railway system in Frankfort, that franchise has naught to do with the contract rights and contract obligations imposed under the contract before us. The Capital Railway Company in the beginning saw fit to make it a matter of contract with the Louisville & Nashville Road, rather than to exercise any legal effort to force the right. Having made it a matter of contract, it and its successors and assigns are bound by it.

It remains to be seen whether the contract itself applies to the two crossings which were put down after the building of the new station. The contract is not as clear as it might be. Its preamble recites that the Capital Company desired to cross the main track of the Louisville & Nashville Road at the intersection named; that the Louisville & Nashville Road had consented that said crossing might be made. The body of the contract then recites that the consent is given to make said crossing, and any additional crossings that might become necessary in consequence of additional railroad tracks on condition that said crossings were to be constructed by the Capital Company at its own expense, and upon the further condition that the Capital Company was to construct and maintain such crossings free of expense to the Louisville & Nashville Company. It is argued by appellees that the additional crossings then contemplated were to be such crossings as might be over any additional tracks laid by the Louisville & Nashville Company before any original crossing work was done. The railroad company, on the other hand, argues that the intention of the contract was to embrace their construction at the expense of the Capital Company or its successors, over such additional track or tracks as might be laid down by the railroad company in future years. No light is thrown upon this matter of construction by any testimony in the record. We do find, however, a strong argument in the surrounding circumstances and facts existing at the time. It was recognized by the parties that the contract contemplated an immediate construction of a cross-

ing as the line of the Louisville & Nashville Road then existed. As a matter of fact, the contract was made in the latter part of July, 1893, and the crossing named was made some time later in that year. Had it been in contemplation of the parties that additional tracks were to be built by the railroad company during that year, some recital of such purpose doubtless would have appeared in the contract. The railroad company reserved to itself the right at any time to lay additional tracks whenever it from time to time might deem them necessary. It seems clear from these provisions in the contract and from the surrounding circumstances that the additional crossings named in the contract contemplated crossings over such additional tracks as the railroad company might construct through the future years.

It is further argued for appellees that the contract gave no right to the railroad company to do the original construction of such crossings, with the consequent right to look to the street railway company for the cost; and that the provision in the contract, whereby the railroad company might do the work itself, extend only to the maintenance, repairing, and putting in order of the crossings. The petition, however, alleges that the railroad company after it had put in the new track and changed the grade of the old one presented the contract of 1893 to the appellees, and requested them to cause the crossings to be made at their own expense, but that they failed and refused so to do; and that thereupon the plaintiff provided the material and labor, and constructed the crossings. The fact that the request was made and the contract presented is not denied. As a general proposition, one who voluntarily pays for another a debt or obligation owed by the other, without the request of that other, or who expends money on account of another, without the consent of that other, cannot recover the money laid out; and this upon the principle that no man can of his own volition make another his debtor. We do not think this case comes within that rule. The railroad company was bound to continue to operate its trains as a common carrier across this intersection. It realized that the traction company as well, as a common carrier, was operating its cars across the intersection. The railroad company knew that within reason it could not so alter the physical condition of the properties at the point of intersection as to stop the safe and prudent operation of both lines at this point. It therefore had to act promptly. The traction company, owing to the correlative duty, declined to act. Nor do we think that the narrow construction put upon the contract by the appellees in this aspect is correct. The right of the railroad company to furnish the necessary labor and material and to put in order the crossings at the expense of the street railway company, its successors or assigns, as provided in the contract, is given to it when the street railway company should fail or refuse to maintain the crossings at its own expense; and its failure to put in the new crossings when the conditions arose demanding them was a failure upon the part of the street railway company to maintain the existing condition of a crossing there.

For the reasons given the judgment of the trial court is reversed, with directions to enter judgment in favor of the appellant against the Central Kentucky Traction Company for the sum of \$548.65, with interest from the time of the filing of the petition.

LEWIS' ADMINISTRATOR v. BOWLING GREEN RY. CO.

(Kentucky — Court of Appeals.)

Pleading; Complaint Alleging That Motorman and Conductor Assaulted Boy and in Attempting to Prevent Him from Leaving Car Caused Him to Fall Under the Wheels.

PLAINTIFF appeals from judgment for defendant. Reported 144 S. W. 377.

Opinion by NUNN, J.:

This action was instituted by appellant against the Bowling Green Railway Company, Hubert Meyers, and W. C. Brownfield. Appellee filed a demurrer to the petition, and the court sustained it, and appellant offered to file an amended petition; but appellee objected, and the court sustained its objection and refused to allow it to be filed.

The amended petition was not made a part of the record by either an order of court or by a bill of exceptions; therefore it cannot be considered on this appeal, although it is copied into the record. *Hortzman v. C. & L. R. Co.*, 18 B. Mon. 218; *Nolan v. Feltman*, 12 Bush 119; *Dehoney v. Bell*, 30 S. W. 400, 17 Ky. Law Rep. 76; *Stafford v. Dyer*, 39 S. W. 708, 19 Ky. Law Rep. 155, and *McGrew's Ex'r v. Congleton, etc.*, 139 Ky. 515, 102 S. W. 1185, 31 Ky. Law Rep. 609. Therefore the only question for consideration is: Did the allegations of the original petition state a cause of action against the railway company?

It is not necessary for us to consider the petition with reference to the allegations against Meyers and Brownfield, as appellant, at the time he offered his amended petition, dismissed his action against them. The petition was inartfully drawn. We glean from it, however, the following facts: The railway company had a passenger car upon its track in the suburbs of Bowling Green, which was moved, or intended to be moved, through the city; that the car was stopped upon the track near the home of the parents of appellant's decedent, who was only thirteen years of age and small for his age; that Meyers and Brownfield forcibly took charge of the boy and dragged him to the rear of the car; that he was there received by the motorman of the car and dragged to the front platform; that the motorman held him with one hand and undertook to operate the car with the other that he put the car in motion and ran it very fast; that he told the boy, while he was dragging him along the aisle of the car to the front platform, that he was going to take him downtown and deliver him to the police; that the boy was very much frightened and was crying; that he begged the motorman to let him off the car, and said he wanted to go home to his parents; that the motorman refused to let him off, and he attempted to leap from the car, and the motorman tried to jerk him back, which caused him to fall under the wheels of the car, which ran over and killed him. It was alleged that all this was wrongfully and negligently done; that the railway company was negligent in employing and placing on its car to manage and control it an inexperienced youth, with but little, if any, knowledge of how to operate and control cars propelled by electricity, and that the motorman, on account of his youth and inexperience, was not capable of discharg-

ing the duties assigned to him. Many other allegations were made in the petition; but it is unnecessary to refer to them. The allegations already referred to, admitted as they were by the demurrer, authorized a recovery on behalf of appellant.

Appellee's counsel contend that the railway was not responsible for assaults and batteries committed by its agents and servants. This is true when they are not committed in their line of duty, or in the apparent scope of their employment. It is true the petition says that Meyers and Brownfield assaulted the boy; that they laid violent hands upon him and put him on the rear platform of the car; that he was assaulted by the motorman of the car, who laid violent hands upon him and took him through the car to the front platform, as before stated. The petition gives the particulars of the assault and battery committed by the agent of the railway company. The facts alleged show that the boy was carried onto the car for the purpose of carrying him into the city; therefore he became a passenger, and the motorman should have exercised care to conduct him safely. If he had a right to receive him as a passenger, under the facts stated in the petition, he had no right to compel him to remain a passenger upon the car, and it was negligence upon the part of the motorman in not stopping the car, so the boy could get off, when he requested that it be done; and the motorman was negligent in jerking the boy, when he attempted to leap off the car, which caused him to fall under the wheels.

Therefore, we are of the opinion that the lower court erred in sustaining the demurrer, and the judgment is reversed, and the case remanded for further proceedings consistent herewith.

COCKE v. DES MOINES CITY RY. CO.

(Iowa — Supreme Court.)

*Passenger; Injury by Collision of Street Car with Railroad Train;
Duty of Motorman to Look and Listen When Approaching Railroad
Crossing.*

DEFENDANT appeals from judgment for plaintiff. Reported 136 N. W. 221.

Opinion by WEAVER, J.:

The Chicago, Rock Island & Pacific Railway Company owns and operates a double-track line of railroad between its station in the city of Des Moines and the State Fair Grounds on the east border of the city. The defendant, Des Moines City Railway Company, owns and operates an electric street railway which crosses the Rock Island tracks and the tracks of other railroads a short distance east of the station aforesaid. Prior to the accident hereinafter mentioned, it had been the custom of the City Company to protect its cars and passengers in making such crossing by the use of a derailer switch, and by requiring the motorman to stop his car before entering the zone of danger and the conductor to walk over the crossing, and, if no train was approaching, to close the switch, and signal the

motorman forward. At the date of the accident the State Fair was in progress, and the passenger traffic upon both lines was heavy. During that period defendant spiked its derailer so that it could not be opened, and placed at the intersection a watchman whose duty it was to give the necessary signals to approaching cars to prevent accidents or collisions. The Rock Island Company also employed a watchman for the performance of similar duties at the same crossing. On September 2, 1900, the plaintiff, with others, were passengers on defendant's car No. 165, which was moving south over the crossing above described. The motorman stopped the car at the place where he had been accustomed so to do near the derailer switch about forty feet north of the Rock Island track, and where he could see, if he looked, about 190 feet westward along the last-named track. He testifies that he saw two flagmen on the crossing in front of him, the one nearest his car using a white flag and the one farther south a red flag, though he did not know by which company they were employed. According to his statement, the watchman with the white flag motioned him to come forward, and, as he was in the act of attempting the crossing, a train was discovered approaching from the west on the south track of the Rock Island Road, and the other watchman signaled the motorman to stop, but too late to avoid the collision which followed. In that collision plaintiff, with others of the passengers, received injuries of greater or less severity.

This is the same collision, and, with one exception, to which we shall later make reference, involves the same state of facts, so far as the question of negligence is concerned, which we had to consider in *Parker v. Railway Company*, 133 N. W. 373. The negligence charged consists of the alleged failure of the defendant's motorman to discover the approach of the Rock Island train and guard against the threatened collision, in failing to stop the car before entering upon the Rock Island tracks, and in entering upon said tracks with knowledge or means of knowledge of the approach of a train having preference in right of way at the crossing. The defendant denies all charges of negligence on its part. Upon the trial and in the argument, it is not seriously contended that there was no negligence in the matter of this collision, but it was and is the position of the defendant that the negligence to which the collision should be attributed was that of the Rock Island Company alone, for whose omissions and mistakes defendant is not liable.

1. The evidence is undisputed that the motorman stopped his car at a point near the derailer and about forty feet north of the Rock Island tracks, and looked for approaching trains. Buildings in that vicinity obstructed his view to the west beyond a point about 190 feet from the crossing. He could have stopped or looked again at a point nearer the track, giving a more extended view to the west, and the jury could properly have found that, had he done so, he would have discovered the approaching train in time to have prevented the collision. But, relying upon the signal of the watchman who motioned him forward as an assurance that the way was clear, he proceeded from his position at the derailer, and undertook to make the crossing without again stopping or looking to the west. Neither flagman testified as a witness upon the trial below. As bearing upon this state of facts, the trial court both in the *Parker* case and in the case at bar

instructed the jury as follows: "In determining whether or not this defendant was guilty of negligence, you will take into consideration the fact that the law requires of them the highest degree of care and prudence reasonably consistent with the practical operation of its railway. You will consider whether the motorman of the defendant's car, in charge thereof, used all his facilities of sight and hearing to ascertain the approach of danger; whether he stopped his car and looked and listened for the approach of the train on the Chicago, Rock Island & Pacific Railway; whether he used the degree of care above stated in all the things he did with reference to the management and operation of the said car. *And you are instructed that it was the duty of the said motorman to stop and look at the point where he might reasonably expect to see the approach of a train on the Chicago, Rock Island & Pacific Railway tracks.* The duty of the defendant, however, does not require it to act as an insurer of the lives and safety of its passengers. And when they have exercised the degree of care and prudence required, as hereinbefore explained to you, they are not responsible for accidents which occur from reasons beyond their control, and notwithstanding the existence of this prudence and foresight required." In our opinion in the Parker case the proposition of this instruction which makes it the duty of the motorman as a matter of law to stop his car before entering upon the track was disapproved, and because of such error a new trial was ordered. The reasons for this holding are there stated quite fully, and we need not here repeat them. That precedent controls upon the same point in this case, and we are not disposed to depart from it. It follows that the assignment of error upon the giving of the sixth paragraph of the court's charge must be sustained.

2. In the Parker case the plaintiff introduced in evidence the rules of the defendant company governing the duty of its motormen and conductors in the handling of cars at railway crossings, and his testimony was awarded weight in the discussion of the record upon appeal. In the case at bar the rules were not offered in evidence, and it is with respect to this feature of the trial that this record differs in any material respect from that in Parker v. Railway Co. This distinction is pointed out in argument as being sufficient to require a different conclusion upon the question of defendant's negligence. We cannot so hold. It is to be admitted that in the former case the rules were treated as an item of evidence worthy of consideration, but they constituted but one of many pertinent facts and circumstances affecting the merits of the claim and defense. Their absence in this case may to that extent lessen the strength or persuasiveness of the plaintiff's showing, but it by no means leaves the case so devoid of support as to require its withdrawal from the jury. For a more specific statement of the facts developed, aside from the company's rules, we refer to the opinion in Parker v. Railway Company, where they are stated with considerable particularity. It is enough here to say that they are amply sufficient to take the issue to the jury.

3. It is argued by counsel that the opinion in the Parker case misstates or misapplies the law, and a reconsideration of the holding there made upon the sufficiency of the evidence is asked. The point urged, when reduced to its briefest expression, is that the motorman, having been signaled forward

by one of the flagmen, could rightfully rely thereon, and this court should say as a matter of law that a charge of negligence cannot be predicated upon the fact that, relying upon such signal, the motorman took his car filled with passengers into collision with an on-coming train which he could easily have avoided had he taken the precaution to glance to the right after passing the derailer forty feet north of the place of the accident. If this be the law, we confess to having misapprehended its true import. It may be true, it doubtless is true, that the presence of the flagman and his signal are material facts bearing upon the ultimate question whether the motorman, and, through him, the defendant, exercised that high degree of care which the law imposed upon them for the protection of their passengers, but we must respectfully insist that there is no sound rule or principle of law and no decided case of recognized authority to sanction the holding that a motorman about to make a dangerous crossing with a load of passengers and receiving such signal may abandon all exercise of caution on his own part, and as a matter of law be held guiltless of negligence, although the peril into which he plunges his living freight could have been escaped had he looked and acted while still within the zone of safety. We have just upheld the defendant's contention that an instruction making it negligence as a matter of law for the motorman to enter upon the crossing without first stopping his car was erroneous, but we cannot follow counsel to the opposite extreme, and hold that as a matter of law the full measure of care required of the defendant and its motorman is satisfied when the latter undertakes to shift the whole responsibility for the safety of the crossing upon another person or another servant, and ceases to exercise any vigilance whatever on his own part against the possibility of a collision. Whether due care has been exercised under such circumstances is a question of fact and not of law, and it is for the jury, and not for the court, to determine it.

For the error in the instruction to which reference has been made, the judgment below will be reversed and a new trial ordered.

Reversed.

PADUCAH TRACTION CO. v. BARKSDALE.

(Kentucky — Court of Appeals.)

Injury to Person Standing in Street, Struck by Car; Negligence, Failure of Proof of; Peremptory Instruction in Favor of Defendant.

DEFENDANT appeals from a judgment for plaintiff. Reported 147 S. W. 40.

Opinion by WINN, J.:

Appellee recovered a judgment below against the appellant because of an injury sustained when knocked down by one of its street cars. The traction company appeals, insisting that there was no evidence against it to take the case to the jury, and that a peremptory instruction should have gone in its favor. Its position is sound.

Mrs. Barksdale, her mother, and her sister were standing out in the street, talking to a kinsman, who had driven up in a farm wagon. This wagon was standing in the gutter at one side of the street. Mrs. Barksdale was rather between it and the car track. She testifies that she saw the car coming; that it was running at the customary rate of speed; that she told her mother, who did not hear well, that the car was coming; that one of the mules began twisting about; and that she has no recollection of anything further until after the accident. She says she heard no bell, but that she saw the car coming. She does not say that it was running too fast, or was not under reasonable control, or that the motorman did not use due care. Her mother was then introduced, but confessedly could give no explanation of the accident. She was standing, talking to her kinsman, and did not look at the car. Her sister says that Mrs. Barksdale saw the car coming and cautioned her mother; that one of the mules threw its head up and as witness thought was getting scared; that she busied herself with her children who had climbed in the wagon. She did not see the collision. She says the car was running at the usual rate of speed. This is all the evidence about the occurrence introduced by the plaintiff. The defendant's motion for a peremptory instruction should have been sustained. There was no proof of any negligence nor of any fact from which negligence could be inferred.

The defendant then introduced its testimony. Mrs. Arnold, a neighbor, was looking at the little crowd around the wagon at the time. She says she saw the street car coming, and that it commenced ringing its bell; that the mules began to throw up their heads, when the driver struck them, which made them worse; that the motorman was trying to slow up; that the wagon backed; that Mrs. Barksdale was trying to get out of the way of both the wagon and street car, but went over toward the street car track, instead of toward the sidewalk. Mr. Houser, the kinsman who drove the wagon, was then introduced. He says that the motorman, before he got to an adjacent crossing, commenced ringing the bell; that one of the witness' mules threw his head up, frightened, and started to back; that he struck the mule with a hickory, and about that time the car struck his niece. The motorman in charge of the car testified that as his car approached he saw Mrs. Barksdale standing between the wagon and the street car track; that the wagon was on the left-hand side of the street car line, leaving some five or six feet between the wagon and the car line; that he saw she was standing pretty close, rang his bell, and before he got there began to slow down the car; that, when he got within forty or fifty feet, he saw one of the mules begin to get a little frightened, and that he slowed down the car yet more; that, before he could get the car to a standstill, the team began to back; that Mrs. Barksdale was facing the wagon, and paying not much attention to the car; that as the wagon backed she kept backing as well, and as the car went by it struck her; that the front part of the car passed her before the collision; and that the car rolled a length or two before it came to a stop, that he could not control the car to keep it from striking her.

This is all the evidence about the accident. The plaintiff made out no case, and the defendant could very well have stood upon its motion for a peremptory instruction. In the introduction of its testimony, however, it did not make

out the plaintiff's case; therefore, there is no making out of the plaintiff's case by the defendant, as in *Matlack v. Sea*, 144 Ky. 749, 139 S. W. 930. The error of the trial court in refusing the peremptory instruction was not cured by the introduction of the defendant's evidence. Mrs. Barksdale saw the car approaching. The motorman saw her. He was running at the usual rate of speed. He had the right to assume that she would not get upon the car track, standing still as she was with the car approaching. When the mule first frightened, he began to slow down the car. When it began to back, he slowed it down more, but could not stop it before Mrs. Barksdale had backed into the car.

The judgment is reversed.

MILLER v. LOUISVILLE RY. CO.

(Kentucky — Court of Appeals.)

Injury to Person Who Stepped in Front of Moving Car; Last Clear Chance.

PLAINTIFF appeals from judgment for defendant. Reported 146 S. W. 26.

Opinion by SETTLE, J.:

This action was brought by the appellant to recover of appellee damages for injuries alleged to have been received by him through the negligence of the motorman in charge of one of its cars in running the same against him. The trial resulted in a verdict and judgment in favor of the appellee, and from that judgment this appeal is prosecuted.

Appellant was knocked from his feet by his collision with the car, and fell with his head near the curbing of the street. It does not definitely appear from the evidence that his body was carried by the force of the collision immediately forward; on the contrary, as he fell near the curbing, instead of the railroad track, it is probable that he was knocked outward and diagonally from the track.

The accident occurred in the outskirts of Louisville, at the intersection of Ferndale avenue and the Bardstown road. Appellant had walked from his residence on Ferndale avenue half a square from the intersection of the streets, and was on his way to a grocery store, situated on the north side of the Bardstown road and a short distance east of Ferndale avenue. There was a heavy snow on the ground, and, as the pavements were slippery and less safe than the streets for travel, appellant was walking in the street. Appellee has a double track on the Bardstown road, in each of which there is a curve near the intersection of Ferndale avenue with that road. After reaching the first railroad track, and when at a distance of about forty feet from the intersection of the streets eastwardly, appellant's attention was attracted by the approach of a west-bound car, which seemed to be coming rapidly, and was ringing its gong as it neared Ferndale avenue. While watching this car and waiting for it to pass, in order that he might avoid a collision with it, an east-bound car approached him from the rear, which was, as he testified, not

seen or heard by him. After the west-bound car, which he was watching, had passed appellant and reached a point twenty-five to forty feet ahead of him, and while he was proceeding eastwardly by the side of the railroad track, and, as he claims, a distance of two to two and one-half feet therefrom, the east-bound car reached and struck him. He also testified that if the east-bound car sounded its gong, or gave other signal of its approach, he did not hear it; and that he did not know how the accident occurred or what struck him.

There were, however, two eye-witnesses of the accident, introduced in behalf of the appellant, Lancing Alsop and Dudley Alsop, who happened to be standing in front of a meat shop on the south side of the Bardstown road, a square from the point of collision. According to their testimony, they saw appellant watching the west-bound car as it came up, and also saw the east-bound car approach and strike him in the back, while he was still looking in the direction of the west-bound car, which had just passed him; that appellant was not on the track when struck, but near it, and if any signals were given by the east-bound car they did not hear them. These two eye-witnesses further testified that the appellant was knocked by the car a distance of fifteen feet from the point of collision, and that the rear end of the car, when it was stopped by the motorman after striking appellant, was about twenty feet from where his body fell on the street.

The answer of the appellee traversed the averments of the petition, and alleged contributory negligence on the part of the appellant. All of the witnesses introduced in behalf of the appellee, including the motorman and the conductor, testified that the east-bound car, by which the appellant was struck, sounded its gong in approaching Ferndale avenue; and, according to the testimony of the motorman, as the car rounded the curve, he saw appellant, who was at the time walking along the street, and far enough from the track to have missed a collision with the car; and that he would not have been struck by it but for his suddenly, and unexpectedly to the motorman, stepping on or near the track in front thereof and so close to the car that it was impossible for it to be stopped in time to prevent it striking him.

There is great doubt from the evidence whether the injuries sustained by the appellant were of a permanent character. None of his bones were broken by the collision, nor were any serious bruises found upon his person. He was, however, confined to his home for several days and attended by a physician, but about two weeks after the accident had recovered sufficiently to remove to the country with his family and take up his residence near Jeffersonstown, in Jefferson county. It goes without saying, however, that, though no permanent disability may have resulted from his injuries, in view of his having been knocked unconscious by the collision with the car, the injuries must have been such as to have caused severe pain and suffering, both physical and mental, as well as serious inconvenience and some loss of time.

Although numerous grounds were filed by appellant in support of his motion for a new trial, only one of them seems to be relied on for a reversal, which is that the court erred in giving instructions 3 and 4; it being insisted that each of these should have been qualified by the addition of the phrase, "provided that the motorman at the time was running his car at a reasonable

rate of speed." Instruction No. 3 is, in meaning, an instruction on "the last clear chance," and by it the jury were told that it was the duty of the motorman to run the car at a reasonable rate of speed and under reasonable control. Instruction No. 4 is based on appellant's theory of how the accident occurred. The criticism of these two instructions upon the ground urged would be sound, if there had been any definite testimony on the trial which conduced to prove that the motorman was not running his car at a reasonable rate of speed; in other words, as stated in *Goldstein's Adm'r v. Louisville Ry. Co.*, 115 S. W. 194: "If there had been any evidence tending to show that the car that struck the deceased was running at an unsafe or unreasonable rate of speed at the time of the collision, the court should have inserted in instruction No. 4, after the words 'the motorman in charge thereof,' the words 'if the car was running at a reasonable rate of speed.'"

The above excerpt is but a reiteration of the law as announced in the cases of *Lexington Ry. Co. v. Van Ladens' Adm'r*, 107 S. W. 740, 32 Ky. Law Rep. 1047; *Louisville Ry. Co. v. Buckner's Adm'r*, 113 S. W. 90; *Louisville Ry. Co. v. Gaar's Adm'r*, 112 S. W. 1130, and *Netter v. Louisville Ry. Co.*, 134 Ky. 678, 121 S. W. 636, in each of which the facts, unlike those of the *Goldstein* case and the case at bar, authorized the giving of an instruction containing the qualification now contended for by the appellant.

The only evidence introduced in appellant's behalf with respect to the speed of the car was furnished by the testimony of the Alsups. Lancing Alsup, upon that point, said: "The car was going at a pretty good rate of speed. I do not know how fast it would be. He [appellant] was on the curve there, where it hit him." In the deposition of Dudley Alsup, we find the following statement: "I could not say what speed it was running. It was running a good gait—pretty swift. Never stopped at Eastern avenue; never made any attempt to stop there. There was no one to get on. Kept up the same speed."

It will be observed that neither of the Alsups stated the car was running at an unusual, unreasonable, or unsafe rate of speed. They evidently had no idea of the rate of speed of the car, and therefore contented themselves with the indefinite statement, the one that it was running at a "pretty good rate of speed," and the other that it was running "pretty swift." The several witnesses introduced in behalf of the appellee testified that the car was running at a moderate rate of speed that was neither unreasonable or unsafe.

It is, however, insisted for the appellant that evidence of the high rate of speed at which the car was running was furnished by the facts of its knocking appellant a distance of fifteen feet from where it struck him; and that when stopped the rear of the car was twenty feet from the point where his body lay on the street; and, furthermore, that, as the car is forty-two feet in length, it traveled a distance of seventy-seven feet from the point of collision before it stopped. It must not be overlooked that these distances were fixed by the Alsups without measurement; and, as they were a square away at the time of the accident, it cannot be claimed that, under the circumstances, their opinions of the distances were more than speculative. The testimony of the motorman and the conductor was to the effect that the car was stopped much nearer the body of the appellant than as stated by the

latter's witnesses, referred to; and it was not made to appear from the evidence that the car, if running at a moderate rate of speed, could have been stopped within a shorter distance than it was. Indeed, the motorman testified that it could not have been stopped sooner than it was. The uncontradicted testimony of the motorman shows that appellant, until nearly reached by the car, was walking at a safe distance from the track, but suddenly stepped upon or so near the track in front of the car as to render it impossible to stop the car before striking him.

If, as shown by appellee's evidence without material contradiction, in approaching Ferndale avenue, appellee's motorman sounded the car gong, ran the car at a reasonable rate of speed, and had it under reasonable control, kept a lookout for the protection of persons upon the street on or near the railway tracks, and appellant, until about the time he was reached by the car, was walking at a safe distance from the track, and suddenly got in the way of and was struck by the car when it was so near him that the motorman could not, by the use of ordinary care, stop it in time to prevent his injuries, there should have been no recovery.

Appellant and his two witnesses failed to state that the car did not give the usual signals in approaching the intersection of Ferndale avenue and the Bardstown road, but merely testified that they did not hear the signals, if they were given. Such testimony is entitled to little weight, in view of the positive statements of the motorman, conductor, and others on the car that they were given, and of the further fact that the attention of the appellant and his two witnesses was more particularly attracted to the west-bound car, which was closer to them, and the signals of which they did hear.

In view of the facts manifested by the record, the instructions in the form given properly advised the jury of the law of the case; and, as the law and facts authorized the verdict, the judgment is affirmed.

GREEN v. MUSKEGON TRACTION & LIGHTING CO.

(Michigan — Supreme Court.)

Passenger; Injury from Collision Between Cars; Damages.

DEFENDANT brings error from judgment for plaintiff. Reported 136 N. W. 1112.

Opinion by MOORE, C. J.:

This case was brought to recover damages for personal injuries sustained by the plaintiff on August 18, 1911, in a collision between a car of the defendant company in which plaintiff was riding as a passenger and a car of the Grand Rapids, Grand Haven & Muskegon Railway Company, which corporation runs its cars over a part of the track of the defendant company. The plaintiff claims to have been thrown forward against the seat in front, and then jerked backwards, thereby sustaining injuries to her right arm, her ribs, her chest, and her right hip. The testimony is that plaintiff was assisted off the car, taken home in an automobile, and a doctor called, who found her right hip bruised and discolored, two ribs broken near the breast-

bone, and the biceps muscle of the right arm injured. Plaintiff's nervous system was impaired, and the doctor continued to treat her every day for about four weeks. She afterward developed pneumonia, and was treated for that. At the time of the accident plaintiff was fifty-seven years of age, a married woman living with her husband, and was keeping boarders with a profit to herself. She recovered a verdict for \$3,050. A motion was made for a new trial, which motion was denied. The case is brought here by writ of error.

The claim of appellant is stated by its counsel as follows: "Questions involved and the manner in which they are raised: While the examination of the jurors was in progress the panel became exhausted, whereupon the court directed the sheriff to summon a talesman from the room, and fill the panel. Counsel for plaintiff made no objection to this procedure until after the sheriff had summoned one Mr. Thompson, who stepped forward to take his place in the jury box. After counsel for plaintiff saw who had been summoned, he for the first time requested the court that names be drawn from the regular lists under the statute of 1911. Counsel for defendant insisted that plaintiff's attorneys could not sit by and see the court take action of this kind until they found out who had been called into the box, and then raise an objection. The trial court denied the request of counsel for defendant that Mr. Thompson be allowed to take his place in the jury box, exception was duly taken, and error has been assigned thereon, the peremptory challenges of defendant having been exhausted before the panel was completed. It is the claim of defendant that the plaintiff, being a married woman living with her husband, should not have been allowed to recover medical expenses as an item of damages, and that the court erred in his charge to the jury in that regard, and also in his refusal to strike out the testimony of the plaintiff that she became personally liable for the doctor bill. The other errors assigned relate to portions of the judge's charge concerning the rule of damages and to the refusal of the court to grant a new trial for the reasons stated in the motion therefor, it being claimed, among other things, that the charge of the court as a whole was argumentative and gave undue prominence to the claims of plaintiff; that the court erred in instructing the jury that the plaintiff was entitled to recover as an element of damage her loss of capability to perform ordinary labor; that the amount of damages awarded plaintiff is excessive and unreasonable in amount, is unsupported by and contrary to the great weight of the evidence and that the verdict and judgment is unjust, oppressive, and against the just right of the defendant."

Did the court err with reference to the selection of a jury? Act No. 194, Public Acts of 1911, provides: "When there shall not be jurors enough present to form a panel in any cause, the Circuit Court may direct the sheriff or other proper officer to summon a sufficient number of persons having the qualifications of jurors to complete the panel from among the bystanders or from among the neighboring citizens; and the sheriff shall summon the number so ordered accordingly and return their names to the court: Provided, that such court may, on his own motion, or in case either of the parties litigant demand it, then it shall be the duty of the court to order a sufficient number of jurors to be drawn from the regular lists." The record shows that while the examination of the jurors was in progress the following occurred:

"The Clerk: The panel is exhausted, your honor. The Court: Mr. Sheriff, summon a talesman from the room here and fill the panel. The Sheriff: Mr. Thompson. Mr. J. E. Turner: Now, if the court please, I submit that under this statute of 1911 this is hardly regular. The Court: It is regular all right, so far. Mr. J. E. Turner: We would ask at this time that the court direct that a few names be drawn from the regular list, and we make that request." The court then examined the statute, and directed Mr. Thompson, who had not been sworn, to stand aside, and new names were drawn from the regular list. It will be observed that all the above occurred in a very brief period of time. That counsel at once called the attention of the court to the statute. We do not think the court abused its discretion.

Did the court err in allowing the plaintiff to recover for medical expenses? The record shows plaintiff was doing business on her own account, that she employed the doctor, that he regarded himself as in her employ and looked to her for his pay. The court did not err as to this feature of the case. *Lacas v. Saginaw Co.*, 92 Mich. 412, 52 N. W. 745; *Vergin v. Saginaw*, 125 Mich. 499, 84 N. W. 1075. Particular stress is placed by counsel for appellant on that part of the charge of the court allowing plaintiff to recover as an element of damage her loss of capability to perform ordinary labor. We have already referred to the fact that plaintiff, though a married woman, was keeping a boarding house on her own account. What was said by the trial judge about which complaint is made should be read in connection with the rest of his charge, bearing in mind the work in which plaintiff was engaged. When so read, we think it appears that the charge was without error. See Act 196, Public Acts of 1911. It is said that in any event the verdict is too large, and should be reduced to \$2,000. A careful examination of the record in relation to the extent of the injury and the suffering of the plaintiff does not satisfy us that the verdict is excessive.

Judgment is affirmed.

BIRD and STIERE, JJ., concurred with MOORE, C. J.

Opinion by OSTRANDER, J.:

I think the verdict and judgment excessive. Unless plaintiff will remit all in excess of \$2,000, the judgment will be reversed and a new trial ordered. Appellant will recover costs of this court.

BROOKE, MCALVAY and STONE, JJ., concurred with OSTRANDER, J.

CRAIG v. AUGUSTA-AIKEN RY. CO.

(South Carolina — Supreme Court.)

Intoxicated Passenger Struck by One Car After Being Ejected from Another; Erroneous Instructions.

DEFENDANT appeals from judgment for plaintiff. Reported 76 S. E. 21.

The following are defendant's exceptions:

"(1) The presiding judge erred in charging the jury as follows: 'It is the duty of the railroad company to look out for people on its track, and, if the company discovers a person on its track, it is the duty of the people in charge

of that car to use the highest degree of care, to use every available means in their power to stop the car to prevent the taking of human life, if they can do so without endangering other passengers on their car'—the error being that it is not the general duty of a railroad company to keep a lookout for people on its track. And the said charge placed a higher duty on the defendant after discovering a person on the track than the law requires, was misleading to the jury, harmful and prejudicial to the rights of the defendant.

"(2) The presiding judge erred in charging the jury: 'When a person is on the crossing, they owe him the duty of ordinary care, and, of course, that is a stronger term than wilfully not to injure him'—the error being that said charge placed upon the defendant a greater duty than was possible for it to perform, was misleading and confusing to the jury, and prejudicial to the defendant's rights.

"(3) The presiding judge erred in charging the plaintiff's third request, especially the following part thereof: 'But people lawfully upon a public highway at a railway crossing are not trespassers, even though they are lying down thereon, in a helpless, drunk condition, and the railroad under these circumstances would be bound to exercise greater care to such person than if he were a bald trespasser'—the error being that a person under such circumstances would be a trespasser, and the defendant would owe him no duty except not to wilfully injure him after discovering him in that position. Furthermore, said request was a charge on the facts, in that it instructed the jury what facts would not constitute a trespasser, contrary to the provision of the Constitution which inhibits the presiding judge from charging on the facts.

"(4) The presiding judge erred in charging plaintiff's fourth request, especially that portion thereof which charges that if the motorman 'sees or could have seen an object on the track that from all appearances may be a human being, unable to avoid danger, it is his duty to resolve all doubts in favor of the preservation of life, and to immediately use every available means, short of imperiling the lives of his passengers, to stop the car in time to avoid the injury'—the error being that said charge was a charge on the facts contrary to the provision of the Constitution which inhibits the presiding judge from charging on the facts. And said charge was especially harmful because the undisputed proof showed that the plaintiff was down drunk, and asleep on defendant's track at the time he was injured.

"(5) The presiding judge erred in charging plaintiff's ninth request, which was as follows: 'That it is true a drunken person could not be run over by a car unless he were on the track, yet the fact alone that a person is on a railway track at a public crossing in a drunken and helpless condition need not necessarily be contributory negligence, nor will it necessarily defeat him from recovering damages for his injuries, for, if that were the law, then no drunken person on a railway track could ever recover damages. In such case the law does not bar the person from damages, even though his presence on the railway track in a helpless drunken condition may be due to negligence on his part, for, if the jury believe from the evidence that notwithstanding such person's condition the defendant's motorman could have avoided the injury by keeping a reasonable lookout ahead on the track, but failed to do so, then, if such failure to perform his duty formed the main or proximate cause of the injury without which it could not have happened, you should find a verdict in

favor of the plaintiff'—the error being that said request was a charge on the facts, in that it instructed the jury that certain facts would not necessarily constitute contributory negligence, when this was a question of fact entirely for the jury. Furthermore, the said request instructed the jury that, even if plaintiff's presence on the track in a drunken, helpless condition was due to his own negligence, they should still find a verdict for plaintiff if the defendant's negligence formed the main or proximate cause of the injury. Such charge completely destroyed defendant's defense of contributory negligence, and was error.

"(6) The presiding judge erred in charging plaintiff's tenth request, especially so much thereof as charged the jury that, if plaintiff was entitled to recover, they could compensate him for the damages sustained 'both present and prospective,' and that they could give him such damages as would equal the difference between what the plaintiff could earn before the jury and what he now earns after the injury over a length of time equal to what you may expect him to live, according to the mortuary table. And in charging the jury that, if they found that the plaintiff was entitled to punitive damages, in arriving at the amount of the verdict 'you have the right to take into consideration the proven wealth of the defendant'—the error being that said charge instructed the jury: (1) That they could enter the field of conjecture and award speculative and uncertain damages; (2) that said charge was a charge on the facts, in that it instructed the jury that they could compute the length of plaintiff's life merely from the time they expected him to live according to the mortuary table, when that table is only so much evidence to be considered in arriving at the length of time plaintiff would live, and thereby instructed the jury that they could enter the field of conjecture in arriving at plaintiff's damage; (3) because, as there was not a scintilla of evidence tending to show the wealth of the defendant, it was error to charge the jury that they could take into consideration the proven wealth of the defendant in forming their verdict if they found plaintiff entitled to punitive damages.

"(7) The presiding judge erred while commenting on defendant's first request in charging the jury: 'Or if his [the plaintiff's] injuries were the result of his own carelessness he could not recover, unless he shows that his injuries were caused by the negligence of the defendant'—the error being that, if plaintiff's injuries were caused by his own carelessness, he could not recover by showing that they were caused by the negligence of the defendant, because in such case his own contributory negligence would defeat his recovery.

"(8) The presiding judge erred in refusing to charge defendant's sixth request, the error being that as the testimony was not only conflicting, but practically conclusive that the location where plaintiff was injured and the surroundings thereof had been changed at the time the photographs and map offered in evidence were made, and were entirely different from what they were when the injury occurred, the said request stated a sound proposition of law which defendant was entitled to have charged to the jury.

"(9) The presiding judge erred in charging the jury on the subject of 'notice' at the verbal requests of plaintiff's counsel as follows: 'Mr. Foreman, if a motorman on a car has notice that a person is on the track, it is the duty of the motorman to watch out for him, it is his duty to exercise care, when he is notified that a person might be expected to be upon the crossing.

Now, if he simply neglects his duty inadvertently, that would be a case of ordinary negligence, to which contributory negligence, if proved, would be a defense, but, if his duty is called to his attention, then he fails to do his duty and injures some one, causes an injury to some one, you have a case of wilfulness, to which contributory negligence would not be a defense'—the error being: (1) That as there was no evidence that notice was given the motorman that the plaintiff or any other person 'might be expected to be on the crossing' where plaintiff was injured, or any other crossing, such charge was misleading, not applicable to the evidence and the law, and was prejudicial to the rights of the defendant. (2) That, as there was no evidence that the motorman's attention was called to his duty, such charge was misleading, not applicable to the law and evidence of the case, and prejudicial to the rights of the defendant. (3) The said charge was a charge on the facts contrary to the provision of the Constitution which prohibits the presiding judge from charging on the facts, in that said charge instructed the jury in effect that if the motorman received the notice testified to in the record, and then failed to look out for the plaintiff, you have a case of wilfulness. Such charge stated to the jury that such facts would constitute wilfulness when this was a question entirely for the jury. (4) That even if the motorman was told by the crew on the car going to Augusta to look out for a man put off the car, and he failed to do so, this would not amount to 'a case of wilfulness,' and it was harmful error to so instruct the jury. After such charge the jury was bound to find a verdict for plaintiff."

Opinion by Woods, J.:

The pleadings and issues involved in this cause are set out in the opinion of the Chief Justice in the former appeal. 89 S. C. 161, 71 S. E. 983. It is enough to say here that plaintiff became a passenger on defendant's car at Augusta, intending to get off at Langley, that, on account of his drunkenness and outrageous behavior, defendant's agents ejected him from the car, and that some time afterwards he was run over and injured by another car going in the opposite direction. The allegations upon which plaintiff based his charge of actionable negligence and wilfulness were (1) shoving the plaintiff from the car with great violence; (2) leaving the plaintiff in a helpless condition on or so near the track that defendant's servants knew or should have known that he was in great danger of being run over by other cars; (3) the failure of the servants of defendant in charge of the car which ran over plaintiff to keep a sufficiently vigilant lookout after they had been warned that he might be on the track. The defenses were (1) a general denial of the acts of negligence and wilfulness charged in the complaint; (2) the allegations that the plaintiff as a passenger so threatened the agents of the defendant with a knife and used such profanity and behaved so violently, to the terror and vexation of the other passengers, that the agents of the defendant ejected him, using only such force as was necessary; (3) negligence of the plaintiff in lying down on the track in an intoxicated condition as the sole cause of his injury; (4) contributory negligence in lying down on the track while intoxicated. On the trial of the issues thus made the jury found a verdict against the defendant for \$500.

The exceptions assign numerous errors in the charge to the jury. The requests were numerous and intricate, so numerous and intricate that possibly they seemed to the jury to obscure rather than elucidate the issues. There was error in charging that it is the duty of persons in control of a car, when they discern a person on the track, "to use the highest degree of care, to use every available means in their power to stop the car to prevent the taking of human life, if they can do so without endangering other passengers on their car." Due care, not the highest degree of care, is required under such circumstances. *Sentell v. Southern Ry.*, 70 S. C. 183, 49 S. E. 215. Whether due care requires the doing of everything short of injuring the passengers to prevent injury to the person on the track depends upon the circumstances, and is a question of fact for the jury. It is true, as urged by defendant's counsel, that it is for the jury to say what due care requires of a motorman who has notice "that a person might be expected to be on the crossing," but it is so clearly his duty under such circumstances to look out for such person that the charge to that effect cannot be regarded prejudicial error.

As a matter of law it cannot be said that photographs and diagrams of the place of the accident were not admissible, and could not be considered because there had been changes since they were taken. If the changes were not so great as to make the photographs and diagrams entirely misleading, they could be properly introduced; allowance being made for the changes. The exception on this point is not well taken.

The measure of damages and the items to be considered in estimating them were stated by the circuit judge in accordance with the law as laid down in numerous cases. There was no evidence of the wealth of the defendant. Therefore the charge that it might be taken into consideration in awarding punitive damages was erroneous. But the error could not be material, since it is very clear that the verdict of \$500 for the loss of an arm did not include punitive damages.

There was prejudicial error in the ninth request to charge which was given to the jury, especially that part italicized below, in that it specifically directed the jury that if a particular act of omission—the failure to keep a lookout—was the main or proximate cause of the injury, without which it would not have happened, the plaintiff could nevertheless recover, although it should be found that the plaintiff's being on the track in a helpless, drunken condition was negligence on his part. "That it is true a drunken person could not be run over by a car unless he were on the track, yet the fact alone that a person is on a railway track at a public crossing in a drunken and helpless condition need not necessarily be contributory negligence, nor will it necessarily defeat him from recovering damages for his injuries, for, if that were the law, then no drunken person on a railroad track could ever recover damages. *In such cases the law does not bar the person from damages, even though his presence on the railway track in a helpless, drunken condition may be due to negligence on his part, for, if the jury believe from the evidence that notwithstanding such person's condition the defendant's motorman could have avoided the injury by keeping a reasonable lookout ahead on the track, but failed to do so, then if such failure to perform his duty formed the main or proximate cause of the injury, without*

which it could not have happened, you should find a verdict in favor of the plaintiff." It is true that the circuit judge in charging this request and in other portions of the charge stated the general law of contributory negligence; but that by no means cured the error of selecting a particular alleged omission of the defendant failing to keep a lookout, and saying to the jury that if the defendant was negligent in that particular, and that was the proximate or main cause of the injury, the plaintiff could recover, although they should find to be negligent a particular act of the plaintiff — being drunk and helpless on the track. Even if the defendant was negligent in not keeping a proper lookout, the plaintiff could not recover if his being on the railroad track in a drunk and helpless condition was a proximate cause of his injury, and was due to his own negligence. The error of charging to the contrary was manifestly highly prejudicial.

The other points discussed in the argument do not require particular discussion, since the views of the members of the court have been recently stated in the cases of *Carter v. Railway*, 75 S. E. 952, and *Wilson v. Railway*, 75 S. E. 1014.

I think the judgment should be reversed.

HYDRICK, J., concurs. FRASER, J., concurs in the result. WATTS, J., disqualified.

Opinion by GARY, C. J. (dissenting):

This is the second appeal herein; the first being reported in 89 S. C. 161, 71 S. E. 983.

For convenience, we reproduce the statement then made by the court, which was as follows:

"This is an action for actual and punitive damages, alleged to have been sustained by the plaintiff through the negligence and wantonness of the defendant. The complaint alleges that on the 22d of September, 1906, the plaintiff became a passenger on the defendant's car at Augusta, Ga., for the purpose of being carried to Langley, S. C.; that soon after the car had started the plaintiff became so incapacitated as to be utterly helpless, and was forcibly ejected and left in a dangerous place by the defendant; that the defendant warned its servants to look out for the plaintiff while operating its other cars over said track, but that they negligently and wantonly failed to keep a proper lookout for the plaintiff, in consequence of which one of its cars ran over his arm, thereby rendering amputation necessary.

"The defendant denied the allegations of negligence and wantonness, and for a defense alleged: 'That at the time mentioned in the amended complaint plaintiff was a passenger on a car of the defendant's railroad in Aiken county, S. C., and being guilty of disorderly conduct, and drawing a knife, and therewith threatening the agents of defendant, and cursing, to the terror, annoyance, and vexation of a large number of other passengers on said car, the conductor of said car stopped his train, where such offense was committed, and ejected said plaintiff from said car, using only such force as was necessary to accomplish such removal.' The defendant also set up the defense of contributory negligence."

The jury rendered a verdict in favor of the plaintiff for \$500, and the

defendant appealed upon exceptions, which will be reported. The exceptions will be considered in regular order.

First exception. There are three reasons why so much of the exception cannot be sustained as assigns error on the part of his honor, the presiding judge, in charging the jury that it is not the general duty of a railroad company to keep a lookout for people on its track: (1) Because the language of the presiding judge forms only part of a sentence, and when considered in connection with the entire sentence, and the other portions of the charge, it will be seen that it is free from error. (2) Because a similar ruling as applied to the facts of this case was made upon the former appeal and is *res adjudicata*. *Jones v. Railway*, 65 S. C. 410, 43 S. E. 884. The case of *Butler v. Railway*, 90 S. C. 273, 73 S. E. 185, shows that such was the ruling of this court upon the former appeal herein, for it says: "It was held in *Craig v. Railway*, 89 S. C. 161 [71 S. E. 983], that it is the duty of a railway company to keep a lookout for persons and pedestrians on its track at a railway crossing." (3) Because the defendant recognized this principle, when his fourth request was charged, which began as follows: "The jury is further charged that while it is the duty of a motorman to exercise ordinary care, to keep a reasonable lookout for persons on the railroad track, on a public crossing," etc. The remainder of the charge set out in the exception merely states a well recognized rule of conduct, both in the civil and criminal law. Furthermore, there is nothing in this part of the charge, upon which the assignment of error, can be properly predicated.

Second exception. In the first place, this instruction when considered, as it must be, in connection with the entire charge, is free from error; and, in the second place, even if erroneous, it was not prejudicial.

Third exception. The exception contains only a portion of plaintiff's third request, which was charged by the presiding judge; and, when considered in connection with the entire request, it is free from error.

Fourth exception. The language of the presiding judge in the exception is only a part of plaintiff's fourth request which was charged with modifications. When it is considered together with the entire request and the modifications, it is free from error.

Fifth exception. The presiding judge modified the request, and, when the language thereof is considered in connection with the modification and the general charge, it is free from error.

Sixth exception. There was a lengthy modification of the request, and, when the charge is considered in its entirety, there is no error.

Seventh exception. When the charge as a whole is taken into consideration, it will be seen that the exception cannot be sustained.

Eighth exception. The appellant has failed to show that, even if there was error, it was prejudicial.

Ninth exception. The appellant has failed to show that, even if there was error, it was reversible.

For these reasons, I dissent.

GLEWWE v. ST. PAUL CITY RY. CO.

(Minnesota — Supreme Court.)

Passenger; Wrongful Ejection; Damages.

DEFENDANT appeals from judgment for plaintiff. Reported 136 N. W. 2.

Opinion PER CURIAM:

Action to recover damages, which the plaintiff claims to have sustained by reason of her wrongful ejection from a street car of the defendant upon which she was a passenger. Verdict for the plaintiff in the sum of \$150. The defendant appealed from an order denying its motion for a new trial, and assigns as error that the damages are excessive and appear to have been given under the influence of passion and prejudice.

The evidence on behalf of the plaintiff tended to establish these facts: On the afternoon of May 30, 1911, the plaintiff, accompanied by her husband, boarded the car at the corner of Market and Fourth streets, St. Paul, and occupied the same seat. When the conductor called for their fares, the husband handed him a 10-cent piece, which he refused to accept for the alleged reason that it was not money. After the car crossed Wabasha street, the conductor again demanded the fares of the husband, who then handed him another 10-cent piece, which was refused for the same reason by the conductor, who said to the husband that he had a regular collection of such money and was looking for free rides, and that he must leave the car, which was stopped at Minnesota street, and the conductor ordered the husband to get off the car. Thereupon the plaintiff and her husband left the car in compliance with the order. The conductor said nothing to the plaintiff; but the fair inference from the evidence is that she was included in the order to leave the car, and that she heard all that was said by the conductor. In answer to a question as to the effect of being ordered out of the car upon her, she testified that: "I was nervous and kinder ashamed of myself. It is not so easy to be ordered off of the car. I feel kind of ashamed, and all the people there looked at us as if we done something that wasn't right. We were willing to pay, but he wouldn't take it."

The evidence is practically undisputed that the dimes tendered for the fares were more or less worn, and that this was the reason why the conductor would not accept them. The evidence as to the condition of the dimes was conflicting, but the verdict establishes the fact that they were not so worn that they were not a legal tender. A consideration of the evidence has led us to the conclusion that the verdict is so excessive that there should be a new trial, unless the plaintiff consents to a reduction thereof to \$100.

Ordered, that the order appealed from be reversed, and a new trial granted, unless the plaintiff, within fifteen days after a remittitur is filed in the municipal court, files her written consent that the verdict be reduced to \$100, in which case the order stands affirmed, and judgment may be entered on the verdict as reduced.

GRIBBINS v. KENTUCKY TERMINAL & TRACTION CO.

(Kentucky — Court of Appeals.)

Injury to Pedestrian on Street Struck by End of Car Rounding Curve; Negligent Construction of Car; Complaint, Allegation that Employees in Charge of Car Knew that it Would Strike the Pedestrian; Speed of Car.

PLAINTIFF appeals from a judgment sustaining a demurrer to the petition. Reported 150 S. W. 338.

Opinion by LASSING, J.:

This is an appeal from a judgment of the Fayette Circuit Court sustaining a demurrer to a petition, in which appellant sought to recover damages from appellees for injuries alleged to have been sustained by her through the negligence of the agents, servants, and employees of appellees in the operation of one of its cars. It appears from the petition that the tracks of appellees run on South Broadway street, in the city of Lexington, Ky., to its intersection with Main street, at which point they turn north into Main street; that the tracks in turning from South Broadway into Main make a short sharp curve, and that the ends of cars in running around said curve extend out over the street beyond the line of the car tracks; that on the 28th of August, 1911, while appellant was walking from the southeasterly corner of South Broadway and Main streets to the northeasterly corner of said streets, she was struck by the rear end of a car, which was passing from Broadway into Main street, and severely injured. The petition further alleges that: "At said intersection of said streets the whole streets are surfaced and paved with bricks, and there is no well-defined place of crossing, but pedestrians on said streets cross from one side of the streets to another side, and from one corner to another corner, at all angles and directions, which is the usual method of traveling, and which was then well known to the defendants and to their agents and employees who had charge of and were operating said car; that plaintiff walked across said intersection of said streets as stated, and in so doing walked at a reasonable, and as she believed safe, distance from the track on which said car was running, coming north on South Broadway street behind and toward plaintiff, and passing her near the center of the curve in the track at said corner; that she did not know and did not believe that she was so near the said track that said car would reach or strike her in making the turn at said curve, nor did she know the great or unreasonable distance that the rear end of said car would extend out over and beyond the said track and toward the place where she was walking, but she avers that the agents and employees of defendants, who had charge of and were operating said car, well knew the distance that said car would extend over and beyond said track and toward the place where the plaintiff was walking, and said agents and employees saw plaintiff, and knew that the rear end of the car would swing or extend out over and beyond said track and toward plaintiff a sufficient distance to strike her, or by ordinary care could have seen her and known all of said things, but with gross carelessness and negligence the defendants and their said agents and employees in charge of said car failed and refused to warn plaintiff of the danger she was in turning said curve, said car would reach out to where she was or would

strike her, and so failed and refused to lessen the speed of said car which was then running at an unreasonable and high rate of speed, to wit, as much as six miles per hour; that after the said agents and employees knew, or by the exercise of ordinary care could have known, that plaintiff was in danger of injury and would be struck by said car, they could easily have stopped said car and prevented any injury to plaintiff, but through gross carelessness and negligence failed and refused so to do; that the rear end of said car projected out over and beyond the track and toward plaintiff, and, as it passed by, struck her on the back of the head and body, and felled her to the hard street, inflicting upon her head a severe wound, bruised her arms, shoulder, body, and limbs, injured her internally, shocked her nervous system, and injured and wrenched her back, causing her to suffer great pain and anguish, both mental and physical. * * * Plaintiff says that all of said injuries and mental and physical pain and anguish and damages were directly and immediately caused by and resulted from the gross carelessness and negligence of the defendants jointly in not providing and having on said car a reasonably safe and proper truck or running gear so attached to the car as to prevent the end of said car from extending out and beyond the rails of the track at said curve to an unreasonable and unusual distance as it then did, all of which defects were unknown to plaintiff, and she could not have then known same by the exercise of ordinary care, and by the gross negligence and carelessness of defendants and their employees and agents in charge of said car in not warning plaintiff of the dangerous position in which she then was, and in not telling her that said car would strike her and in not stopping said car so as to prevent it from striking her, though all of said things and conditions were well known to said agents, or could have been known by the exercise of ordinary care by them or any of them." It will thus be seen that the grounds of negligence relied upon as supporting her cause of action are two: First, that the defendants were operating a very long car, and that the wheels under this car were so adjusted that in turning the curve the rear end thereof projected as much as five feet beyond the track; and, second, that it was being operated at an excessive rate of speed, considering the character of the turn which it was required to make at that point, that those in charge of it saw, or by the exercise of ordinary care could have seen, that plaintiff was so close to the track that the rear end of the car would necessarily strike her, as it made the turn, and that, under these circumstances, they should have warned her of the danger.

As to the first proposition, the allegation in the petition that the defendants were negligent "in not providing and having on said car a reasonably safe and proper truck or running gear so attached to the car as to prevent the end of said car from extending out and beyond the rails of the track, at said curve, to an unreasonable and unusual distance," when read in connection with the further allegation that in rounding this curve the rear end of the car extended out over the rails a distance of five feet, is not sufficient to show any negligence in the construction of the car. A car of any length must necessarily extend over and beyond the rail some distance in rounding a curve, and that distance must, of course, vary with the length of the car and the character of the curve. As the only negligence charged in the construction of the car is that the wheels were so adjusted thereunder as to permit the rear end thereof,

in passing around a short, sharp curve, to extend as much as five feet beyond the line of the car track, it cannot be said as a matter of law that this construction is negligence. In fact, when the length of the car and the character of the curve are taken into account, it is difficult to see how it could have been constructed so as to prevent the rear end from extending as far, or even farther, beyond the track line, as it is alleged that the rear end of this car did extend. It does not appear that in the exercise of their franchise appellees may not operate cars of any desired length, and, in the absence of such allegation, we know of no rule prescribing or limiting the size or dimensions of traction cars. So long as in their construction they are not inherently dangerous, no ground of complaint is afforded because they are unusually long or of different lengths upon the same line. It is not alleged that a car of the length of that which struck appellant could be constructed upon lines different from that along which it was, in fact, constructed. It would be presumed that, in constructing their cars, appellees would have in view primarily the safety of the car as a passenger vehicle, and the wheels and trucks would be so placed thereunder as to adjust the burden which they had to bear in such a manner as to render the car least liable to leave the track, when in motion. In the absence of some allegation of faulty construction, other than the manner of the adjustment of the wheels, by reason of which the rear end of the car was caused to extend out over the street a distance of five feet, the trial court was warranted in holding that the allegation of negligence in the construction of the car was not sufficient to support a cause of action.

The next ground of negligence relied upon is that the companies were negligent in not warning plaintiff of the dangerous position in which she had placed herself by telling her that the car would strike her, and in not stopping the car, so as to avoid having the rear end thereof strike her. The petition upon this branch of negligence is faulty in two particulars. In the first place, the companies were under no duty of keeping a lookout for persons so as to prevent them from coming in contact or collision with the rear end of their cars, as was expressly decided in *South Covington & Cincinnati Street Railway Co. v. Besse*, 108 S. W. 848, 33 Ky. Law Rep. 52, 16 L. R. A. (N. S.) 890, and *Louisville Railway Co. v. Ray*, 124 S. W. 313. Not being required to keep a lookout for her safety or to warn her that she was liable to be injured by the rear end of the car, as it turned the corner, if she came too near the track, those in charge of the car owed her no duty whatever, unless they actually saw or discovered the peril of her position in time to have avoided injuring her. The petition alleges that the employees in charge of the car saw the plaintiff, and knew that the rear end of the car would swing out over the side of the track toward plaintiff a sufficient distance to strike her, or by the exercise of ordinary care could have seen her and known of said things. This, in effect, is but an allegation that, by the exercise of ordinary care, those in charge of the car could have seen her peril, and hence is not a sufficient allegation to support the plea of negligence; for, where no lookout duty is required, those in charge of the car must have had actual knowledge of her perilous position in time to have avoided injuring her before the companies can be held to have been guilty of actionable negligence.

The speed at which the car is alleged to have been traveling, to wit, six

miles an hour, cannot be attributed to appellees as an act of negligence; for the rear end of the car in rounding the curve was not thereby caused to extend any further beyond the track than it would have if it had been going at a much lower rate. Considered as a whole, the petition not only fails to charge any actionable negligence on the part of appellees, but, on the contrary, shows that in crossing the street at that point appellant, while aware of the presence of the car upon the track and that it would turn around the curve, felt that she was at a sufficiently safe distance to avoid coming in contact with the end of the car. She simply misjudged what would be a safe distance and continued on the way across the street, without looking to ascertain whether she was out of danger. The exercise of the slightest care on her part would have saved her from injury. The street at that point was of ample width as to have enabled her to cross in safety, and it is apparent that her failure to do so was more the result of lack of care on her part than of any negligence on the part of those operating the car. The facts in this case are very similar to those in *South Covington & Cincinnati Street Railway Co. v. Besse*, *supra*, and the reasoning of the court in that case applies with peculiar force to the case at bar. There the court said: "The street car must stop upon its tracks. In making a turn, as the trucks are not at the end of the car, the end must project more or less beyond the track, according to the length of the car and the degree of the curve. * * * It is therefore incumbent upon the driver of a vehicle passing a street car to keep out of the way, and at curves to drive farther from the car than at other points. He must expect the car to stay upon its tracks, and he must expect that the end of the car will swing out in turning a curve; and, if he does not make a sufficient allowance for the swing of the car, and drives so close to it that the car in turning strikes the vehicle, the fault is his own, and not that of the street car company. The motorman cannot leave his track. The driver of the vehicle has the whole street to drive on, and it is his fault if he does not drive far enough from the car to prevent the hind end of the car from hitting his wagon as he passes it." The principle announced in the *Besse* case was reaffirmed by this court in the later case of *Louisville Railway Co. v. Ray*, *supra*, where, like in the case at bar, the plaintiff was injured by coming in contact with the rear of the car as it was rounding a curve. Counsel for appellant cites and relies upon the case of *Mittleman v. N. Y. City Railway Co.*, 56 Misc. Rep. 599, 107 N. Y. Supp. 108. An examination of that case shows that the facts are wholly unlike the facts in the case at bar. There the tracks of the company ran along near an excavation, the space between the excavation and the line of the track being so narrow that there was no room for pedestrians to pass between the excavation and the track, and the employees knew this. While a pedestrian was passing along the track near this excavation the car was started and ran against the pedestrian, causing him to be thrown into the ditch. Here appellant was placed in no such difficulty. She had the entire street, outside of the car track, in which to walk. The car, of course, was limited to its track. It could not have struck her had she walked a safe distance from the track. She alleges that she thought she was at a safe distance, hence it is apparent that her injury was the result purely of her error in judgment, for which appellees were in no wise responsible. The demurrer was correctly sustained.

Judgment affirmed.

INDEX-DIGEST—VOLUMES 1-8 INCLUSIVE.

(For Index to Notes, see *ante*, p. ix.)

ABANDONMENT. (See *Franchise; Monopoly; Removal.*)

ABUTTING OWNERS. (See *Additional Servitude; Consents of Abutting Owners; Constitutional Law; Construction of Railway; Damages; Eminent Domain; Evidence; Franchise.*)

Access to highway from abutting premises may not be shut off by construction of railway. I, 469.

Access to highway,—railroad need make only reasonable provisions by crossings for ingress and egress. I, 385.

Ingress and egress to premises are not damaged even though cars project a few inches over sidewalk and at first occasionally run off the track at that point. III, 726.

Access to property of plaintiff not shown to be interfered with. IV, 56.

Construction of railway,—person not establishing title to fee in street is not entitled to restrain. III, 689.

Ownership to middle of highway only does not entitle abutting owner to restrain construction of railway on opposite side of highway. I, 708.

Construction of railway in New York City,—restraining under the statute. VI, 718.

Construction and operation of railway,—right to restrain. VIII, 728.

Operation of railway,—suit by, to enjoin. VIII, 726.

Use of streets by,—injunction will lie to prevent unauthorized laying of tracks near curb. VI, 364.

Use of alley by railway without authority,—abutting owner may restrain. V, 6.

Rights where occupation of highway by railway unauthorized. II, 806.

Steam railroad company unlawfully occupying street,—right to maintain ejectment against. II, 727.

Private easements in abutting street stated. V, 42.

Reservation of action against railway on change of title; estoppel. VI, 721.

Permission to lay tracks in turnpike does not confer right of eminent domain against abutting owners. I, 735.

Burden on,—fact that railway is to carry express, baggage and mail does not constitute it a burden on abutting lands. III, 182.

Lineal feet of property necessary to authorize municipal consent to construction,—cross streets to be omitted in estimating. III, 647.

Narrow street,—railway held to have right to build in. IV, 19.

(For Index to Notes, see *ante*, p. ix.)

ABUTTING OWNERS — (Continued).

Nearness of location of track of railway in highway to land of abutting owner under provisions of statute. I, 357.

Nearness of location of track of railway in highway to land of abutting owner does not entitle the latter to compensation. I, 385.

Discharge of surface water on abutting property caused by construction of roadbed, — injunction to restrain or action for damages will lie. V, 308.

Noise and vibration, — recovery for, may be had. VII, 40, 44.

House damaged by running heavy cars, — action will lie by person selling property pending settlement of suit. VI, 383.

Right of action for injury to crossing maintained between land owned on both sides of highway because of construction of street railway. I, 248.

Fences erected in highway by abutting owner may be removed if interfering with construction of street railway. I, 248.

Change of grade of highway, — abutting owners are entitled to damages when raising of grade shuts off access to premises. I, 469.

— abutting owners are not entitled to compensation for such change by a railway. I, 385.

Change of grade of highway authorized in construction of railway. IV, 471.

Special injury suffered by, action to restrain. VIII, 588.

Special damage, — sufficiency of allegations as to. V, 48.

Remedies, — where abutting owner suffers special damage he may sue for damages or to enjoin continuance of injury. V, 42.

Depreciation of value of property, — abutting owners entitled to compensation when caused by use of street for railway purposes. II, 867.

Parties, — not proper parties to bill by township to restrain collection of excessive fare. III, 769.

Laches will bar abutting owners from relief from construction of tracks when objection is unreasonably delayed. I, 735.

Use of railway, — under agreement for use of right of way with railway may not question such use after several years' operation. III, 911.

Elevated railroad, — right of lessee of adjoining premises to recover damages against. II, 806.

Rights of, on construction and operation of elevated railroad. I, 78, 291.

Easements in light and air taken by elevated railway; measure of damages. VI, 761.

Elevated railroad, — compensation should be made for interference with use of vaults under the sidewalk on building of elevated railroad. IV, 876.

— compensation should be paid on building of third track. IV, 875.

Rights of, on construction and operation of electric railway. I, 248.

Subway, — compensation should be paid to abutting owners on changing plan of subway so as to run close to their property. IV, 875.

Viaduct, — rights of abutting owners on construction of, by railway. III, 278.

Installation of switch held not to interfere with enjoyment of abutting property. IV, 560.

Cross-over switches, — abutting owner cannot compel removal on ground of nuisance. II, 48.

(For Index to Notes, see *ante*, p. ix.)

ADDITIONAL SERVITUDE. (See *Constitutional Law; Damages.*)

Construction of railway on street does not constitute; sidewalks may not be invaded. VI, 724.

Street railway not deemed. II, 817.

Street railroad is not, even though municipality has only an easement in, not the fee of the street. III, 726.

Electric railway in question is not an additional servitude upon the highway. I, 248, 385; II, 973; III, 649; IV, 371.

Use of street for electric railway not an additional servitude. VI, 780.

Commercial railroad as distinguished from a street railroad is an additional servitude. IV, 185.

Operation of interurban cars is not an additional burden on abutting owners. VI, 383.

Construction of interurban railway in street as an additional servitude. IV, 1077.

Interurban railway deemed. II, 973.

Elevated railroad in a street is not an additional servitude thereon. I, 78.

Elevated railroad in a street deemed an additional servitude by statute. I, 291.

Subway not deemed. II, 444.

Increase of freight business does not constitute. V, 21.

ADMINISTRATOR.

Survival act of Michigan construed. VIII, 378.

ADVERTISING IN CARS. (See *Constitutional Law.*)

Publisher of newspaper may not question power of railway to place advertisements in cars. V, 524.

ALIGHTING FROM CAR. (See *Employee; Passengers.*)

AMUSEMENT PARK. (See *Park.*)

ANIMALS. (See *Biocyclist; Damages; Evidence; Vehicle.*)

Duty of motorman to prevent collision. II, 14.

Fences, — failure of railway to fence right of way not negligence *per se* where animal is injured. V, 263.

Statute making railroads responsible for injuries to, held not to apply to street railways. IV, 35.

Cow killed by car, — contributory negligence; negligence of railway as proximate cause. VII, 704.

Cow driven on tracks and injured, lack of contributory negligence shown. I, 390.

Cow in plain sight at distance of 150 feet, — duty of motorman to stop although owner negligent in permitting it at large. I, 397.

Cow, — when killing must be wanton to hold company liable. III, 425.

(For Index to Notes, see *ante*, p. ix.)

ANIMALS — (*Continued*).

- Dog, — railroad not liable for killing of. I, 69.
- company not liable unless killing is done wantonly. III, 736.
- motorman seeing dogs fighting must exercise reasonable care to avoid injury to them. V, 522.
- killed by car when motorman could have stopped, — company liable, VI, 846.
- rule forbidding carrying of dogs held reasonable. III, 724.
- company has no right to carry dogs on passenger car and is responsible for damages when violating rule. IV, 1070.
- Hog killed by car, — burden of proof is on plaintiff to show negligence. IV, 35.
- Horse killed by car while ridden by plaintiff's brother. VIII, 656.
- Horses frightened by car, — no presumption of negligence arises. III, 80.
- Horses, — where motorman stopped on seeing horses of plaintiff were frightened no inference of negligence arises. II, 642.
- duty of motorman on seeing horses are frightened. II, 254, 732, 875, 979.
- Horse frightened by car, — duty of motorman to check speed or stop. III, 11, 286, 409, 855.
- negligent operation of car; speed and unusual noise. VI, 836.
- Horse frightened by excursion cars, — negligence and contributory negligence questions for the jury. IV, 476.
- Horse frightened by car and rider injured, — negligence of motorman. VIII, 644.
- Horse unmanageable as car approached from rear, throwing rider under car, — no negligence on part of company shown. VIII, 770.
- Horse frightened by car, — no negligence of defendant shown. VII, 943.
- motorman required to use ordinary care only. V, 51.
- Horse, — motorman's negligence in frightening horse by sounding gong a question for the jury. IV, 323.
- Horse frightened by noise caused by sudden release of air brakes, — motorman negligent. VI, 373.
- Horse frightened by car, — contributory negligence precludes recovery. III, 317.
- Horses, — not contributory negligence as a matter of law to alight quickly from buggy to hold horse frightened at a car. III, 420.
- not contributory negligence as a matter of law to drive horse afraid of street cars along street used by railway. II, 1.
- person driving an unmanageable horse, and by his negligence contributing to the accident, cannot recover. III, 317.
- negligence in riding young and nervous horse on streets used by cars a question for the jury. II, 875.
- instruction as to negligence in driving fractious horse near track. II, 898.
- motorman must sound gong in time to allow horseman to get out of the way. III, 578.

(For Index to Notes, see *ante*, p. ix.)

ANIMALS — (*Continued*).

Horse running on tracks struck by car, — motorman not bound to sound gong while trying to stop car; plaintiff guilty of contributory negligence in allowing animal to be at large. VII, 878.

Horse rearing and plunging in front of car, — motorman held not negligent. IV, 963.

Horse, — foot caught between rail and guard rail; defendant negligent in maintaining unnecessary guard rail; contributory negligence. VIII, 25.

Horse injured by down wire, — negligence of defendant established. III, 581.

Horse killed by rotten post, — duty of company to maintain posts. VIII, 38.

Horse killed by running on dangerous bridge erected by railway in highway, — defendant held liable. VII, 249.

Horses, — company liable for killing of horse in narrow street by car run at excessive speed and unnecessary noise. III, 81.

— violation of ordinance requiring standing horse to be hitched does not preclude recovery unless the proximate cause, which is a question for the jury. II, 59.

Mule, — wanton negligence of motorman in injuring, held a question for the jury. IV, 19.

Mule frightened by car crossing steam railroad at high speed and with unnecessary noise, — company held liable. III, 81.

APPEAL.

Time of appeal; right to file exceptions *nunc pro tunc*. I, 735.

Severable issues, — judgment as to. VIII, 118.

Jurisdiction of appellate courts. I, 82, 89, 106.

Questions for review cannot be raised for the first time on appeal. II, 642.

Any grounds on which new trial was asked may be reviewed on appeal. IV, 69.

Uninfluential error not a cause for reversal. IV, 259.

Joint action against two defendants, — effect of error committed in favor of one defendant not appealing as to the other. IV, 83.

Question of absence of evidence of negligence on part of defendant, when not open for consideration upon error. I, 541.

Order directing judgment notwithstanding verdict, based on alternative motion for judgment or new trial, is appealable. I, 419.

APPLIANCES. (*See Animals; Constitutional Law; Electricity; Employee; Evidence; Fuse; Instructions to Jury; Passenger; Pedestrian; Vehicle.*)

Care, — company required to exercise ordinary care in furnishing. VIII, 145.

Construction of, — railway held to highest degree of care in construction. I, 763.

Defective, — use of, negligence *per se*. VI, 812.

— liability for use of. VI, 1.

Inspection, — what constitutes. VIII, 228.

Modern, — company required to use. III, 228.

Liability of railway must be determined by appliances in use at time of accident. I, 21.

(For Index to Notes, see *ante*, p. ix.)

APPLIANCES — (*Continued*).

- Res ipsa loquitur* to acts of servants operating machinery. IV, 1049.
 Use, — proper use is duty of employees, not of company. VIII, 145.
 Duty of company to show condition of appliances to exonerate it from liability for accident caused by breaking. I, 253.
 Appliances for avoiding accidents, — jury should be charged that negligence in providing, renders defendant negligent when no testimony introduced upon which to predicate charge. I, 21.
 Brakes, — company is only required to use ordinary care in selection and maintenance of brakes. I, 19.
 — failure to repair, raises inference of negligence. III, 443.
 — when brake fails to work there is a presumption of negligence, though brake held on previous trip. IV, 964.
 — promise to repair and injury caused by defect make *prima facie* case; evidence of defect a few days before admissible. III, 202.
 — conductor injured by car in rear with defective brake, when deemed to have assumed the risk. III, 596.
 — ordinance requiring air or electric brakes held reasonable. II, 460.
 — city has no right to compel equipment of cars with specified kind of brakes. VIII, 43.
 Air brake, — defendant not negligent where air brake failed to work. VI, 842.
 Chains, — company not negligent in not having guard chains on both sides of open car. IV, 967.
 Controller, — blowing out, raises presumption of negligence. IV, 1055.
 — where passenger is shocked by defective controller box negligence of company may be inferred. III, 264.
 — duty to inspect. VI, 616.
 Coupling, — negligence of company in using defective coupling a question for the jury. III, 6.
 Fenders defined. VI, 320.
 Fenders, — duty of company to provide. I, 649.
 — absence of fender is not of itself negligence. II, 668.
 — failure of company to provide as required by statute is evidence of negligence to be submitted to the jury. I, 649.
 — jury may predicate negligence on omission to provide. II, 789.
 — ordinance requiring cars to be equipped with, is reasonable. VII, 150.
 — ordinance requiring fenders does not apply to trailers. II, 902.
 Fuse, — burning out is not *prima facie* evidence of negligence; lack of care in placing fuse box, question for the jury. I, 330.
 Gates or guards, — violation of ordinance requiring maintenance on cars on side next to parallel track is negligence. VIII, 62.
 Gong, — failure to sound constitutes negligence. II, 619.
 — failure to sound, when negligence *per se*. VII, 423.
 — negligence cannot be predicated on failure to sound when person injured had knowledge of approach of car. III, 23.
 — error for court to direct particular attention to failure to sound gong when driver of vehicle saw car more than sixty feet from crossing. IV, 83.

(For Index to Notes, see *ante*, p. ix.)**APPLIANCES — (Continued).**

- Gong**, — purpose of sounding; failure of motorman not negligence if pedestrian knows of approach of car. II, 318.
- proper instruction as to motorman's duty to sound warning. I, 506.
- duty of motorman to sound on seeing person driving along track. II, 616.
- duty to sound, — where plaintiff testifies he saw the car coming, it is error to submit to the jury the question as to whether the gong was sounded. I, 509.
- what constitutes sufficient warning by. II, 520.
- conflicting evidence as to sounding, raises question of fact for the jury. II, 429.
- railway must comply with terms of franchise requiring sounding gong at certain places. IV, 266.
- Handhold**, — failure to provide proper rules for inspection constitutes negligence. IV, 378.
- Handhold pulling off and injuring conductor**, — manner of its becoming unsafe a question for the jury. IV, 378.
- Lights**, — instruction as to duty of company in regard to display of lights, held proper. I, 380.
- running car down steep grade at night without headlight is evidence of negligence. IV, 968.
- municipality cannot compel railway to light bridge or railroad. VIII, 370.
- Block-light system**, — company cannot be said not to have furnished sufficient system where employee merely failed to turn light on. V, 858.
- Motor handle**, — company held negligent for furnishing defective motor handle. IV, 190.
- Safety devices**, — railway cannot demand installation of safety devices by another railroad at grade crossings. III, 610.
- Sand boxes**, — company negligent in not equipping cars with automatic sand boxes. IV, 491.
- Signal device at covered driveway crossing track**, — negligence in failing to maintain question for jury. V, 190.
- Step**, — to defeat conductor's recovery for injury caused by broken step, his knowledge must have been that it was obviously dangerous. IV, 651.
- Switch**, — duty of company as to use of proper switch. VII, 434.
- railway operating in country is bound to use due care in furnishing safeguards against accidents on misplaced switches. I, 339.
- duty of conductor to inspect. VIII, 688.
- Toilets and water tanks in cars**, — interurban company bound to maintain under condition in franchise as to modern appliances. V, 515.
- Trap door sprung open admitting water when car driven through flooded street**, — negligence of motorman. VIII, 713.
- Turntable**, — company held liable for injuries to brakeman from defective turntable. III, 569.
- Mechanical device**, — when question arises as to its working, the safer plan is to produce the device in court. IV, 351.

(For Index to Notes, see *ante*, p. ix.)

APPLIANCES — (*Continued*).

Defective device for opening and shutting door hurting passenger and causing him to fall from car, — lack of evidence. II, 433.

ARREST. (See *Passenger*.)

ASSAULT. (See *Child; Park; Passenger*.)

ASSUMPTION OF RISK. (See *Appliances; Employee; Passenger*.)

ATTORNEY. (See *Evidence; Trial*.)

Assignment of portion of recovery to attorney as fee and stipulation not to settle without attorney's consent, — not enforceable against railroad. IV, 707.

Lien, — right of attorney having lien to recover notwithstanding settlement by parties without his knowledge or consent. II, 78.

AUTOMOBILE. (See *Vehicle*.)

BAGGAGE.

Company not liable for loss when its servants have not taken baggage into their custody. V, 64.

Cake of ice may be carried as. VII, 664.

BICYCLIST. (See *Electricity; Vehicle*.)

Duty of bicyclist to use same degree of care as driver of a vehicle. I, 106.

Degree of care, — an instruction limiting the question of due care to the conduct of plaintiff at the time of the injury, regardless of his conduct in placing himself in danger, is improper. I, 106.

Degree of care on part of defendant question for the jury. III, 151.

Exercise of ordinary care by motorman or contributory negligence by deceased questions for jury. I, 71.

Contributory negligence by bicyclist a defense where both parties are mutually careless and injury ensues to one of them. I, 133.

Last clear chance, — rule applied and company held on ground motorman could have stopped. II, 22.

Right of way, — cars and bicyclists have equal rights to use of the streets modified by circumstances. IV, 464.

Streets, — erroneous instruction as to presumption of use of. I, 71.

Crossing track on crowded street, — held not to have exercised due care. IV, 473.

Crossing track immediately in front of car, — held guilty of contributory negligence. II, 785.

Crossing track, — not guilty of contributory negligence when acting in emergency caused by defendant's negligence. IV, 834.

Swerving into track in front of car, — right of way; contributory negligence question for jury. VI, 737.

(For Index to Notes, see *ante*, p. ix.)

BICYCLIST — (*Continued*).

- Passing behind car and struck by another passing in opposite direction which she had previously seen, — held guilty of contributory negligence. IV, 833.
- Look and listen, — failure to before crossing track constitutes contributory negligence. III, 223.
- bicyclist failing to look again just before crossing track held guilty of contributory negligence. IV, 833.
- struck by car without headlight, not bound to dismount and look. V, 270.
- Riding on track when room in roadway, — not guilty of contributory negligence as a matter of law. V, 52.
- Riding along track struck by car from rear, — contributory negligence question for jury. VI, 738.
- Riding along track without looking behind, — held guilty of contributory negligence. II, 503.
- Stopping on track in front of car without looking behind not necessarily negligent when motorman gives no signal. I, 549.
- Motorman not negligent for failure to stop car seeing bicyclist riding beside track, but not in danger while keeping his course. III, 292.
- Riding along highway close to track struck by car coming toward him, — held guilty of contributory negligence. IV, 463.
- Riding along street close to track struck from behind by car, — due care of plaintiff and negligence of defendant question for the jury. IV, 464.
- Riding behind wagon forced near track by fright of horses, — negligence not shown. III, 751.
- Avoiding a vehicle and struck by a car coming from the rear without warning, — degree of care required. IV, 189.
- Obstruction unlawfully placed on track and removed to one side by defendant's employees, — company not liable for injury caused by bicyclist running into the obstruction. III, 808.
- Falling over obstructions in street closed because of alterations being made by city and railway, — guilty of contributory negligence in passing barriers erected to warn public. V, 455.
- Racing in street, — held guilty of contributory negligence. II, 22.
- Injury by collision with conductor alighting to assist passenger. I, 106.
- Struck by car when claiming to have been blinded by headlight. VIII, 643.

BLOCK-LIGHT SYSTEM. (*See Appliances.*)

BOARDING CAR. (*See Passenger.*)

BONDS. (*See Construction of Railway; Stocks.*)

- Guaranty of bonds of street railway company. I, 403.
- Redemption, — right should be asserted by tender and by a proper bill for redemption. IV, 738.

BRAKES. (*See Appliances.*)

(For Index to Notes, see *ante*, p. ix.)

BRIDGE. (See *Pedestrian; Trestle; Vehicle.*)

Maintenance, — contract as to between railroad and traction company held valid. III, 636.

Repair, — duty of railway. VI, 171.

Crossing steam railroad, — such bridge having become part of the highway the steam railroad cannot complain of its use by a street railway. I, 708.

Liability of railway to pay rent for county bridge. VII, 82.

BURDEN OF PROOF. (See *Evidence; Instructions to Jury; Vehicle.*)

CARE, DEGREE OF. (See *Animals; Appliances; Bicyclist; Child; Electricity; Employee; Fire Apparatus; Instructions to Jury; Passenger; Pedestrian; Speed; Vehicle.*)

Various degrees defined. IV, 364.

Ordinary, defined. I, 821; II, 607.

CARS. (See *Appliances; Criminal Law.*)

Modern, — company required to use. III, 228.

Operation, — negligence to run car along streets on dark and stormy night at high speed without headlight or giving warning sound; burden on defendant to prove contributory negligence. VI, 841.

Operation of cars of commercial railroad on tracks of street railway under Illinois statute. V, 172.

Freight cars, — running on street railway is a public nuisance. II, 459.

— legislature may authorize interurban railway to run freight cars without consent of municipal authorities. IV, 254.

Carrying coal for company's power house, — held, may properly be run on tracks of passenger railway. IV, 445.

Interchange of cars between street and steam railway may be required by the legislature. IV, 873.

Ordinance regulating maintenance, operation, schedule, crowding and fumigation of cars held within powers of city. VIII, 575.

Injury to car, — latter held personal property so as to render wilful injury to it a criminal offense. IV, 887.

Windows, — wilful breaking held not a violation of a certain section of the statutes. II, 291.

CHILD. (See *Constitutional Law; Electricity; Evidence; Instructions to Jury; Passenger; Pleadings.*)

Degree of care expected of children; application. I, 325.

Degree of care required of boy is that required of an ordinarily prudent boy. I, 475, 605.

Care required of child is that which might reasonably be exercised by the employment of his faculties. IV, 259.

Degree of care, — child must use care which ordinarily prudent children under the circumstances are accustomed to use. IV, 361.

Care expected is that reasonably expected of a child of his age and intelligence. IV, 835.

(For Index to Notes, see *ante*, p. ix.)

CHILD — (*Continued*).

Degree of care expected to be exercised by. VI, 733.

Care, — ordinary and reasonable care as applied to children defined. III, 58.

Sui juris, — whether boy thirteen years of age was *sui juris* is a question for the jury. IV, 97.

Non sui juris, — child of nine presumed to be. III, 229, 722.

Care, — company must exercise higher degree to child than toward adult. V, 83.

Extricating from beneath car after collision by the conductor, — exercise of ordinary care a question for the jury. II, 668.

Degree of care to avoid injury to children is ordinary, not extraordinary. II, 536, 597, 668; III, 146, 230, 451.

Duty to avoid injuries to, — employees of company must be on the lookout and take reasonable measures. II, 82.

Care, degree of, required toward infants compared with that required toward adults. III, 58.

Negligence, — state of facts justifying finding defendant negligent in running down child. I, 605.

Burden is on company to show proper means were used to avoid injuring child. IV, 128.

Negligence in operating open car without protection for small children a question for the jury. III, 849.

Run down by car, — liability of railway. VI, 729.

Degree of care to avoid injuring, — motorman must use ordinary care. IV, 304.

Lack of care by motorman is a question for jury. IV, 901.

Duty of motorman seeing children near track with probability of their placing themselves in the way of the car. II, 968.

Injury to child on track, — verdict in favor of defendant company allowed to stand where shown that motorman did everything possible to avoid the accident. I, 21.

Motorman seeing danger and giving warning not necessarily negligent for not stopping car if confronted by unexpected danger. I, 687.

Negligence of motorman in not using ordinary care to avoid injuring child walking on track renders company liable notwithstanding child's contributory negligence. II, 513.

Negligence of gripman in running down child, — evidence sufficient for submission to the jury. II, 536.

Motorman seeing very young child coming toward track is negligent when he merely sounds gong instead of stopping. III, 146.

Motorman cannot assume child of two and one-half years would turn back from impending danger. III, 229.

Motorman held negligent running at high speed where child could be seen for four or five blocks. III, 292.

Wanton negligence, — not error to refuse to charge specifically as to motorman's wantonness when cause submitted to jury entirely on his failure to exercise due care. III, 460.

(For Index to Notes, see *ante*, p. ix.)

CHILD — (*Continued*).

- Proximity of child to track does not require motorman to sound gong. V, 334.
- Failure to sound gong and speed of car may be factors in contributing to injury. IV, 907.
- Run over by car, — duty of conductor to warn children; negligence. VI, 731.
- duty of motorman to keep lookout; negligence in imposing conductor's duty on motorman. VI, 768.
- Struck by car, — duty of motorman to keep lookout. VI, 770.
- Contributory negligence of child is to be determined with reference to age and degree of care expected of one of her years. I, 606.
- Injury to child crossing street, — not negligence as a matter of law for young child to cross by a crosswalk a street used by railway. I, 325.
- Contributory negligence, — in the case of a child of two years of age there can be no question of contributory negligence. II, 668; III, 146.
- jury justified in finding child of seven and a half years not guilty of. II, 789.
- child of twelve cannot be held guilty of, as a matter of law. II, 910.
- boy four years of age may not be guilty of contributory negligence as a matter of law. III, 460.
- care to be exercised by child not to be measured by same rule as expected from adult. III, 521.
- child between five and six years cannot be charged with. VIII, 378.
- should use ordinary care; company need not have notice that driver of vehicle was a minor. II, 819.
- by young child in failing to look and listen, — defined and applied. I, 325.
- child of over five years may be charged with. III, 345.
- child of eight held guilty of contributory negligence. III, 58, 808.
- child held guilty of, after alighting from car and turning on to the other track in front of another car. III, 581.
- where no evidence to show lack of, on part of motorman, child's contributory negligence held to preclude recovery. IV, 63.
- Imputed negligence, — negligence of parents in permitting child of two and a half years to be on street cannot be imputed to child. III, 229.
- negligence of parents is not imputed to child when child a passenger. III, 849.
- negligence of parents in allowing boy four years old to go on street where cars are operated cannot be imputed to the child where car was negligently operated. IV, 128.
- contributory negligence of mother cannot be imputed to child between five and six years, nor to father as administrator of such child. VIII, 378.
- Mother held not negligent in placing child at end of seat in open car. V, 278.
- Negligence of father in allowing child to play on street is a question for the jury. II, 427; III, 460.

(For Index to Notes, see *ante*, p. ix.)

CHILD — (Continued).

- Struck by car when carried by mother, — contributory negligence of mother question for jury. VII, 909.
- Carried in father's arms, injured by car suddenly increasing speed, — negligence and contributory negligence question for jury. IV, 836.
- Crossing track at crossing, struck by car, — care required of children; evidence of care. VIII, 287.
- Attempting to cross street, struck by car, — degree of care required of. VIII, 737.
- Crossing track in front of approaching car, — exercise of due care question for jury. VIII, 737.
- Passing around obstruction on sidewalk, — exercise of due care question for jury. VIII, 746.
- Crossing tracks, — care required of; negligence and contributory negligence questions for jury. V, 454.
- falling and injured by car, — motorman negligent in not stopping car. IV, 654.
- killed by car moving rapidly down steep grade, — defendant held liable. IV, 661.
- motorman not negligent; question of competency of motorman. VI, 303.
- duty of motorman to have car under control. VII, 158.
- Crossing street, run over by car, — duty of motorman; negligence of parents; imputation of negligence. VII, 892.
- Oblivious of approach of car, crossing tracks in sight of motorman, — latter negligent in not having car under control; mother and child not guilty of contributory negligence. VIII, 301.
- Approaching and crossing tracks in full sight of motorman, — duty of motorman; burden of showing negligence is on plaintiff. VIII, 321.
- Attempting to cross street, killed by car, — negligence of motorman. VIII, 737.
- Crossing tracks, struck by car following one he allowed to pass, — contributory negligence question for jury. V, 549.
- Passing behind car, struck by car on other track, — contributory negligence question for jury. VIII, 320.
- Attempting to cross just ahead of horse car, — contributory negligence. V, 771.
- Crossing track and run over by car, — when act is the result of unthinking impulse or reckless daring she is guilty of contributory negligence. IV, 361.
- Crossing tracks in front of car, — held guilty of contributory negligence. V, 406.
- Crossing street diagonally, struck by car, — negligence; proof not justifying recovery. VIII, 764.
- Coasting, injured by car, — defendant not shown negligent. VII, 929.
- Coasting, struck by car after motorman had notice of approach of sled, — negligence and contributory negligence questions for jury. VIII, 314.

(For Index to Notes, see *ante*, p. ix.)

CHILD — (Continued).

- Slipping off snowbank onto tracks, — contributory negligence and negligence of motorman questions for jury. VI, 732.
- Falling on track is not necessarily the proximate cause of the collision, — which may be the negligence of the motorman. II, 597.
- Falling on track, — motorman not negligent when seeing child and stopping car presented a single situation, although the car might have been stopped in time. II, 788.
- evidence held insufficient to show negligence of the motorman. II, 789.
- Running suddenly in front of car, — duty of motorman. VIII, 485.
- Jumping from behind covered wagon in front of car, — motorman need not anticipate unusual or unforeseen conduct of pedestrians. IV, 331.
- Running in front of car, — negligence of motorman leaving post to wave him away. VI, 96.
- negligence of motorman in not watching track. VII, 932.
- Running unexpectedly on track in front of rapidly moving car, — company held not responsible. IV, 336.
- Running suddenly on track where view obstructed, and injured, — company held not negligent. IV, 469.
- Running directly in front of approaching car, — nonsuit proper. VIII, 760.
- Stepping on track in front of rapidly moving car, — guilty of contributory negligence. VII, 930.
- Negligence of child five years of age in running in front of car and of parents in allowing it to be unattended on the street questions for the jury. IV, 836.
- Foot caught in track, run down by car, — motorman held negligent. V, 116.
- On track, — duty of motorman; negligence of parents. VII, 896.
- On track, killed by car, — negligence in running car at high speed over frequented thoroughfare. VII, 931.
- Playing on track, struck by car, — motorman held negligent. VIII, 396.
- Injured playing about car left unguarded in street, — company must take reasonable precautions to protect from injury; contributory negligence a question for the jury. IV, 97.
- Running beside car in response to call from motorman, injured, — negligence question for the jury. V, 83.
- Walking on ties, struck by car from behind, — duty of motorman to keep lookout question for jury. V, 601.
- Standing on track, struck by car, — contributory negligence question for jury. V, 603.
- Waiting for car, struck by car on other track, — motorman negligent in not giving warning. V, 611.
- Invited by conductor to help push car, injured by sudden start, — contributory negligence; use of streets by pedestrians and railway, care in operation of cars. VI, 451.
- Standing beside track, hit by running board, — contributory negligence; care required of child; presumption that motorman will exercise diligence. VIII, 512.

(For Index to Notes, see *ante*, p. ix.)

CHILD — (Continued).

- Look and listen, — child need simply exercise ordinary care of a person of its age and discretion. IV, 662.
- admissibility of evidence as to intelligence of child of ten years. IV, 1046.
- Riding on platform as passenger, — contributory negligence a question for the jury. II, 857.
- Riding on front platform with permission of motorman, — company held liable for injury caused by negligent handling of car; but where child jumped while in motion that is the proximate cause. III, 833.
- Riding on step of car is a trespasser to whom those in charge of car did not owe duty of discovering his peril. II, 312.
- company liable for injury to, caused by wanton negligence of motorman. II, 416.
- thrown off by motorman shaking door, — negligence of motorman; contributory negligence of parent. VI, 734.
- Riding on running board, — guilty of contributory negligence unless not having discretion to understand. IV, 1042.
- Newsboy, — company owes no duty to newsboy trespasser on car except to refrain from wantonly exposing him to injury. II, 147, 448.
- as trespasser, — duty of defendant's servants. VI, 430.
- falling from car frightened by conductor, — defendant not liable. V, 450.
- pushed from car by motorman, — as to whether latter was acting within scope of employment is a question for the jury. IV, 835.
- When a trespasser on tracks in street, — liability for injuring. VI, 235.
- Assault on boy attempting to steal ride, — company liable for act of conductor. III, 725.
- Allegation that motorman struck child on hand causing him to lose his hold is sufficient to allow evidence to show that motorman was acting within scope of employment. III, 489.
- Falling from car, frightened by conductor, — duty toward, though trespassing. VI, 21.
- Wrongfully ejected and thinking conductor about to grab him, jumping, injured by car on other track, — railway liable. VII, 862.
- Ejection of, by conductor, — when company not liable. VIII, 645.
- Forced to jump from moving car after being permitted to board car and ring gong, — defendant's employees guilty of negligence. VIII, 751.
- Jumping from car in apprehension of danger after breaking of trolley pole, — not guilty of contributory negligence. III, 928.
- Ejected in outskirts of town on cold day for failure to have fare, — company held liable. V, 606.
- Alighting from slowly moving car, — defendant not negligent in not having railings on platform, nor motorman in increasing speed; conductor negligent in not stopping car on signal; contributory negligence question for jury. VIII, 216.

(For Index to Notes, see *ante*, p. ix.)

CHILD — (*Continued*).

Alighting and passing behind car in front of car on other track, — guilty of contributory negligence. VIII, 940.

Boarding car slackening its speed, — not negligence *per se*. IV, 183.

Whether fender, properly lowered, would have passed over child is question for jury. V, 806.

Run over by car, — whether fender was as near track as practicable is question for jury; negligence; contributory negligence. VII, 150.

Derailment, — child injured in shed struck by car derailed by stone on track. VIII, 643.

Injured by freight car backed around curve on crowded street, — negligence a question for the jury. IV, 259.

Injured playing on abandoned turntable, — negligence of company must be shown. V, 800.

Raised in air and thrown by cable being raised to poles by defendant's employees, — *prima facie* case made out requiring submission to jury. VIII, 772.

Burned by hot soot deposited by railway in open lot, — child held a trespasser and company not liable. IV, 126.

Passenger, — child young enough to be carried free may be a passenger. IV, 21.

Exemplary damages proper where conductor kicked boy boarding the car as a passenger. III, 514.

Punitive damages, — father cannot recover for wanton injury to minor son in absence of statute. III, 20.

Struck by car going at excessive speed, — vindictive damages awarded. VIII, 684.

Rates for school children, — statute regulating, held constitutional. III, 351.
— statute providing for, held constitutional. III, 852.

COLLISION. (See *Bicyclist; Bridge; Child; Employee; Fire Apparatus; Instructions to Jury; Passenger; Pedestrian; Speed; Vehicle.*)

COMMERCIAL RAILROAD. (See *Railroad.*)

COMPROMISE. (See *Evidence.*)

CONDEMNATION OF REAL PROPERTY. (See *Eminent Domain.*)

CONDUCTOR. (See *Child; Damages; Electricity; Employee; Evidence; Passenger.*)

CONSENT.

Connection of street railway not authorized under general law without consent of municipality. V, 508.

Construction of statute requiring application to municipal authorities within two years after grant of charter. IV, 926.

(For Index to Notes, see *ante*, p. ix.)

CONSENTS OF ABUTTING OWNERS.

- Construction of street railways. I, 528.
- Consents to construction of elevated railway. VI, 722.
- Injunction to compel removal and enjoin operation when no written consents; estoppel. V, 813.
- Use of street by railway without, restraint of. II, 768.
- Objections to validity of consents, when party not estopped from setting up. I, 528.
- Contract to give valuable option on purchase of company's stocks and bonds for consents, void. III, 649.
- Rule for valuing property in determining whether consents of one-half has been obtained. IV, 876.
- City may give consent as abutting owner and also grant franchise. V, 787.
- May not be limited to a particular corporation or individual. IV, 890.
- Evidence of consents. V, 813.
- Consents are in effect votes; consents containing proviso "but without switch" construed. VII, 232.
- Withdrawal, — consents, if withdrawn before filed, are not enforceable. II, 711.
- consents cannot be withdrawn after construction of the road, and abandonment of the road will not affect rights acquired. II, 768.
- Once given consents of abutters are sufficient under the statute. I, 528.
- Verbal consent sufficient. V, 819.
- Failure to acknowledge consents renders them not provable as such. I, 528.
- Acknowledgments to consents, sufficiency of certificate. I, 528.
- Filing of consents with county clerk not required under statute as construed. I, 528.
- Consent by township committee to construction of railway is evidence that that body found consents of abutting owners were filed according to statute. I, 528.

CONSOLIDATION.

- Prohibition as to competing railroads does not apply to street railways; fraud. VIII, 117.
- Quo warranto*, — parties defendant; pleading; burden of proof; judgment, when not a bar to proceedings. VIII, 117.
- Effect of, on liability for personal injuries of one of consolidated companies. III, 263.
- Parties, — consolidated company is a proper party to a proceeding to revise judgment against one of the constituent corporations. III, 20.
- Railroad not claiming that consolidated railway corporation is parallel or competing cannot contest consolidation. V, 343.
- Combination of street and elevated railroads and subways in New York City held to constitute a monopoly. VI, 856.

CONSTITUTIONAL LAW.

- Jurisdiction of federal court where violation of United States Constitution involved. V, 281.

(For Index to Notes, see *ante*, p. ix.)

CONSTITUTIONAL LAW — (Continued).

Construction, owning and leasing of street railway tracks by State or city is unconstitutional. V, 456.

Statute authorizing contract between railway and city providing for fixed payments in lieu of performance of certain duties and payment of certain fees, appointment of certain directors of company by city, and ultimate acquisition of railway by city, held constitutional. VII, 276.

Franchise tax is not unconstitutional. IV, 790.

Special franchise tax of New York is not unconstitutional as depriving of due process of law. IV, 805.

Taxation, — classification of street railways and steam railroads so as to impose a different rate is not constitutional. IV, 148.

California Constitution (art. 13, § 10) as to taxation of railways does not apply to street railways. II, 36.

Taxation of property of railway by city, — statute authorizing, is constitutional. I, 717.

Taxation, — contract between city and railway for changes in company's lines, but not importing any exemption from taxation, is not impaired by imposition of a subsequent tax. IV, 148.

Street car advertising, — privilege tax on, is unconstitutional. II, 879.

Statute forbidding location of track except in special spaces reserved in highways therefor, does not add additional servitude and is constitutional. I, 311.

Change of location of tracks, — power given municipality to require, held constitutional. IV, 877.

Joint use of streets, — to superimpose tracks of later company on tracks of railroad already built is unconstitutional. IV, 940.

Statute authorizing change of grade of highway by railway without compensation to abutting owners where the latter have been compensated for land condemned for highway, is not unconstitutional. V, 415.

Resolution of common council requiring railway to remove its tracks held to impair contract obligations under perpetual franchise. V, 281.

Ordinance requiring railway to move wires so as to permit moving of buildings, held valid. V, 229.

Trestle not an additional burden on abutting owners, — statute declaring is unconstitutional. III, 348.

Pavement of streets by railway, — obligation undertaken in franchise cannot be relieved by a statute subsequently passed. III, 707.

Pavement, — as to railway compelled by franchise to repair pavement a statute requiring pavement or repavement by it is not unconstitutional. V, 70.

Exemption from making street improvements in franchise may be modified by subsequent legislation. IV, 295.

Ordinance requiring vehicles to give fire apparatus right of way held constitutional. IV, 871.

Fare, — regulation of so as not to allow just compensation is unconstitutional. VIII, 547.

(For Index to Notes, see *ante*, p. ix.)

CONSTITUTIONAL LAW — (Continued).

- Fare, — statute providing rates for pupils of certain schools held constitutional. VIII, 564.
- legislature of New York has power to fix. VII, 574.
- Rates for school children, — statute regulating held constitutional. III, 51.
- statute providing for held constitutional. III, 552.
- Ordinance providing free transportation for policemen and firemen and half-rates for school children is constitutional. VI, 257.
- Statute requiring railways contracting for use of lines of another road to carry passengers for one fare is constitutional. I, 569.
- Transfers, — city ordinance providing for universal transfers declared unconstitutional. IV, 182.
- ordinance requiring issue of transfers by existing railway held invalid. VI, 781.
- statute authorizing railway to make regulations as to issue and use is constitutional. VII, 615.
- Grant to municipality power to provide ordinances for protection is not an unconstitutional delegation of legislative power. IV, 581.
- Ordinance limiting speed of heavy cars held not unreasonable. IV, 266.
- Ordinance against allowing passengers to leave or enter moving car held within the police power. IV, 647.
- Ordinance requiring conductor to go ahead at steam railroad crossing and give signal to start, held valid. V, 219.
- Ordinance requiring conductor to cross steam railroad tracks in advance of car held reasonable. V, 278.
- Vigilant watch ordinance, — held a proper exercise of the police power. IV, 581.
- valid, as it is simply declaratory of the common law. V, 549, 611.
- Ordinance requiring company to supply sufficient cars, to heat cars, etc., held within police power. V, 156.
- Derailing devices at crossing of railroad by street railroad, — statute requiring may not be attacked in a collateral proceeding. IV, 213.
- Fenders, — ordinance requiring use of fender made by a certain manufacturer or one equally as good held invalid as discriminating. IV, 227.
- Statute requiring screen or vestibule for protection of motorman within police power. VI, 184.
- Statute requiring vestibules for protection of motormen is within police power. VI, 777.
- Stool for motorman, — ordinance requiring is not unconstitutional. VIII, 747.
- Separation of races in cars, — act requiring is constitutional, despite exception as to nurses and despite power given conductor to fix the line of separation. IV, 992.
- Statute relieving plaintiff from burden of showing in his complaint absence of contributory negligence is constitutional. I, 157.
- Repeal of section of code authorizing a special verdict, held constitutional and does not abridge right of trial by jury. I, 157.

(For Index to Notes, see *ante*, p. ix.)

CONSTITUTIONAL LAW — (*Continued*).

Statute confirming certain franchises of railway and granting additional privileges held constitutional. VI, 780.

Traction companies act of New Jersey held constitutional. V, 699.

CONSTRUCTION OF RAILWAY. (See *Abutting Owners; Additional Servitude; Consents; Consents of Abutting Owners; Eminent Domain; Extension; Franchise; Streets and Highways.*)

Track and roadbed must be constructed so as not to obstruct ordinary travel. VII, 478.

Narrowness of street does not render construction impossible where company may acquire additional space by purchase from abutters. I, 753.

Change of curve, — city council authorized to permit. III, 451.

Negligence in construction of elevated not to be inferred from settling of pillars three-quarters of an inch. VI, 867.

Elevated railway, — right to construct under the statute. I, 749.

Ordinance authorizing railway to lay double tracks in streets for purpose of rendering efficient service valid; nor does it repeal former ordinance authorizing laying of single tracks. VIII, 56.

Reasonable time must be allowed to comply with ordinance authorizing. IV, 24.

Statute fixing time within which railroad must be constructed and operated held to apply to street railroads. IV, 878.

Breach of bond to construct within specified time, — liquidated damages or penalty; pendency of *quo warranto* proceedings no excuse. VII, 344.

Penalty of bond to lay tracks within specified time, — action to recover. VIII, 704.

Sum to be paid city on completion of work to be done by railway under a franchise is due on substantial completion of work. VII, 782.

Description of road to be filed with secretary of state, accuracy required. I, 528.

Location, — limits of. VI, 854.

— injunction will lie to prevent substantial deviations. VI, 364.

— variation if acquiesced in by authorities for ten years is ratified. IV, 942.

Railroad cannot be located in streets not designated in ordinance and remedy of landowners is action of ejection. IV, 779.

Joint use of streets, — municipality may not allow location of tracks of second railroad to straddle tracks of railroad already built. IV, 940.

Change of location, — determination of railroad commissioners is final. IV, 371.

Rights obtained under municipal ordinance when lawful designation of location not made. VII, 357.

Ordinance requiring held valid. VIII, 506.

Ordinance authorizing construction of electric street railway and erection of trestle in street, — validity and construction. VIII, 656.

(For Index to Notes, see *ante*, p. ix.)

CONSTRUCTION OF RAILWAY — (Continued).

- Private person may not compel railway to build line to a certain village, especially after being denied by public service commission. VII, 665.
- Removal of obstruction from highway may be done by railway if interfering with construction of its road. I, 248.
- Fences erected in highway by abutting owner may be removed if interfering with construction. I, 248.
- Jurisdiction of highway commissioners under the statute. III, 439.

CONTRACT. (See *Railroad*.)

CONTRIBUTORY NEGLIGENCE. (See *Animals; Biocyclist; Child; Constitutional Law; Electricity; Employee; Evidence; Fire Apparatus; Instruction to Jury; Negligence; Passenger; Pedestrian; Pleadings; Speed; Tracks; Vehicle*.)

- No defense under last clear chance doctrine. VIII, 731.
- Construction of Florida statute relieving plaintiff from showing freedom from. VIII, 352.

COW. (See *Animals*.)

CRIMINAL LAW. (See *Cars; Directors; Jurisdiction*.)

- Statute prohibiting throwing stones at railroad car includes interurban or traction railway car. VII, 617.

CROSSING BETWEEN LAND OWNED BY ONE PERSON ON BOTH SIDES OF HIGHWAY. (See *Abutting Owners*.)

CROSSING RAILROAD BY STREET RAILWAY. (See *Constitutional Law; Eminent Domain; Passenger*.)

- Right is implied. V, 343.
- Right of street railway to cross railroad, — street railway not an additional burden. VIII, 827.
- Right of way, — right of steam road to. VIII, 827.
- Rights and proceedings under the statute. III, 932.
- Right of street railway to cross tracks of steam railroad at grade under laws of Ohio. VI, 844.
- Court of Chancery has jurisdiction. II, 717.
- Jurisdiction of railroad and warehouse commission to regulate. V, 183.
- Decision of railroad commissioners as to permanent crossing does not bar order of court for temporary crossing. I, 597.
- Manner of crossing, how determined under the statute. I, 139.
- Manner of construction and maintenance is left under the statute to the discretion of the railroad commissioners. II, 376.
- Application to define mode in which one railroad may cross another under the statute, — what must be shown by applicant. IV, 690.

(For Index to Notes, see *ante*, p. ix.)

CROSSING RAILROAD BY STREET RAILWAY — (Continued).

Contract by street railway for crossing over steam road; consideration.

VIII, 827, 839.

Proceedings under the statute where agreement cannot be reached, described. I, 139.

Agreement as to crossing at grade held valid, III, 636.

Grade crossing, — construction of statute prohibiting crossing at, II, 847.

Overhead crossing cannot be compelled by the courts in the absence of legislation. V, 343.

Sufficiency of complaint in injunction suit to restrain railroad from preventing crossing. I, 139.

Cost of construction is to be paid by the new company. II, 717.

Safety devices, — held under the circumstances one railroad cannot demand installation by the other. III, 610.

Derailing devices, — time of installation under the Indiana statute. IV, 213.

Proceedings under the statute on petition for appointment of commissioners to ascertain compensation. I, 597.

Exceptions to award of appraisers does not suspend right to take possession pending determination of proceedings. I, 139.

Crossing track in front of steam railroad train held negligence. V, 219.

Car struck by train, — inference of negligence not strong enough to justify direction of verdict for plaintiff, a passenger on the car. IV, 20.

Negligence *per se* for engineer of locomotive not to stop at street railway crossing as required by statute. VII, 386.

Absence of watchman at crossing, — negligence of railroad company not imputable to decedent, a yardmaster. II, 480.

Full stop, — question for the jury as to whether motorman took required measures to ascertain if train was approaching. II, 480.

— statute requiring before crossing does not relieve steam railroad from operating gates. II, 818.

Ordinance requiring street cars to stop before crossing steam railroad track comprehends main line and spurs. IV, 1022.

CROWDED CAR. (See Passenger.)

DAMAGES. (See Abutting Owners; Eminent Domain; Employees; Evidence.)

Elements of, — former wages may be considered where plaintiff permanently incapacitated. VIII, 521.

— value of services for years after death of child killed by car competent. VIII, 378.

— comparison of plaintiff's physical condition at time of trial and before accident. IV, 1044.

— loss of usefulness and enjoyment of prospective life as well as loss of earning power are elements. IV, 374.

— decreased earning capacity may be considered. IV, 649.

(For Index to Notes, see *ante*, p. ix.)

DAMAGES — (*Continued*).

- Elements of, — evidence of father's salary and financial ability to educate child killed by car competent. VIII, 378.
- physician incapacitated by accident for months may show earnings for corresponding months of previous year. IV, 581.
- prospective damages are recoverable, to be measured by loss of earnings for period intestate would have lived but for the injury. I, 401.
- erroneous instruction as to value of deceased's services when not prejudicial to plaintiff's case. I, 21.
- expectancy of life is an element; age at which last two paternal ancestors died is material. IV, 374.
- evidence of insurance expert as to expectancy of life of child killed by car competent. VIII, 378.
- minor, — jury may allow damages for future services. IV, 1042.
- compensation for injuries signifies present compensation. IV, 1022.
- extent of married woman's family and household duties may be shown where she is incapacitated by the accident. V, 642.
- medical expenses may be recovered. VIII, 853.
- expenses of trip of person injured and his wife is proper item of damages; but itemized statement not admissible. VII, 840.
- parent entitled to compensation for loss of services of minor son and of family while nursing son. VI, 21.
- passenger alighting at unfamiliar place through fault of conductor may recover for illness received from exposure. V, 128.
- when development of tuberculosis by plaintiff after injury may be considered. VIII, 770.
- condition of heart, not existing before accident, may be considered. VIII, 794.
- jury may take into consideration pain suffered. V, 58.
- damages for future suffering may be awarded when injuries permanent. III, 443.
- jury may consider future suffering in view of injuries sustained. II, 190.
- permanency of injuries may not be considered when shown plaintiff had entirely recovered. VI, 860.
- prospective injury or pain can only be considered when reasonably certain to result. V, 614, 666.
- pain and suffering already endured and such as is reasonably likely to be suffered in the future may be considered. VIII, 674.
- after-suffering may be considered as. III, 141.
- jury may take into consideration after-effects of an injury. III, 859.
- liberal latitude should be given in cross-examination of plaintiff to establish previous condition of invalidism. VII, 714.
- propriety of instruction as to effect on question of damages of an injury formerly received by plaintiff, considered. I, 409.
- loss of sleep and appetite following accident may be shown. VIII, 682.

(For Index to Notes, see *ante*, p. ix.)

DAMAGES — (Continued).

- Elements of, — mental suffering and humiliation from loss of leg may be considered. V, 116.
- mental pain and fright may be considered. VI, 605.
- mental suffering and humiliation as. VI, 594.
- mental suffering, anxiety and wrong from insult may be considered. VII, 483.
- mental suffering may be considered when alleged. VII, 176.
- damages may be recovered for mental anguish. III, 906.
- pain and mental anguish may be considered by jury when plaintiff was ejected with malice and oppression. V, 536.
- fright may be considered where child wilfully and unlawfully ejected. VII, 114.
- fright may be considered as when associated with bodily injuries. III, 711.
- fright and anguish may be considered as where small child is ejected by conductor in strange place on cold day. V, 606.
- humiliation caused by wrongful ejection from car may be considered. V, 317.
- jury may consider humiliation and injured feelings, as when passenger insulted by conductor. III, 694.
- annoyance and worry may not be considered in Georgia. V, 146.
- noise caused by operation of railway as an element of damage to an abutting owner. I, 291.
- abutting owners on street through which interurban railway runs are entitled to compensation. II, 973.
- construction of elevated railway; evidence as to damages. VI, 722.
- noise caused by elevated railroad held an element of damage to abutting owners. IV, 464.
- fright of horses caused by elevated railroad annoyance not confined to abutting owners. IV, 465.
- what included as damages in statute providing damages for construction of elevated railroad in a street. I, 291.
- subway in street is not such an additional servitude as to entitle abutting owners to damages. II, 444.
- injuries must be pleaded to be. IV, 1013.
- in case of eminent domain, — injury to health is an element. IV, 480.
- Measure of, — stated. VIII, 76.
- in case of death is the amount deceased would have earned during the period he would probably have lived. III, 452.
- administrator is entitled to same damages as deceased. VIII, 378.
- in case of widow whose husband was killed through negligence of defendant. VIII, 164.
- rule stated when injured party is not killed. V, 332.
- extent of, is for determination of jury, and plaintiff may not state. VII, 840.

(For Index to Notes, see *ante*, p. ix.)

DAMAGES — (*Continued*).

Measure of, — instructions to jury stating minimum and maximum of verdict as penalty held proper. VIII, 551.

— instructions to jury as to maximum held not error. VIII, 457.

— amount in each case must be predicated on the facts of the particular case. VII, 883.

— charge as to amount of erroneous in absence of evidence. I, 71.

— plaintiff's habits of industry, sobriety, etc., admissible as affecting amount of damages. VII, 868.

— where passenger before accident suffered from physical conditions making her susceptible to injury received. VIII, 585.

— present physical condition not to be considered when doubtful that plaintiff's condition is due to the accident. III, 144.

— aggravation of injuries by plaintiff's neglect as related to his financial condition. III, 193.

— damages sustained by wife by reason of injuries considered. III, 913.

— employment of incompetent physician has no effect on damages if ordinary care be used in engaging such physician. III, 144.

— plaintiff may recover for loss of time or loss of ability to perform labor or earn money. III, 731.

— salary received by plaintiff for five years prior to the accident may not be shown. III, 143.

— loss of support by wife; evidence as to how husband lived for a year after injury of wife without her support or services properly excluded. III, 54.

— loss of hire of horses injured limited by value of the horses. III, 65.

— where passenger ejected for having defective transfer. VI, 727.

— damages in case of construction of viaduct is the value taken away from property of abutting owners. III, 278.

— when railway has raised grade of highway so as to shut off access to abutting premises. I, 469.

— for depreciation of value of lots of abutting owners. II, 867.

— in action by abutting owner on construction and operation of elevated railroad. I, 78, 291.

— where intoxicated passenger injured. VIII, 679.

Mitigation of, — provocation no mitigation in case of assault on passenger by conductor. III, 737.

— erroneous for court to leave it to the jury to reduce damages on ground of contributory negligence. III, 809.

— damages are not mitigated by insurance paid plaintiff under contract to which railway was a stranger. IV, 737.

Excessive damages, — in view of probability of time of plaintiff's recovery verdict for \$6,000 held excessive. III, 772.

— verdict of \$400 where passenger was ejected without physical force held excessive. IV, 230.

— verdict for \$500.05 is excessive where passenger was wrongfully ejected, but without force or abuse. V, 317.

(For Index to Notes, see *ante*, p. ix.)

DAMAGES — (*Continued*).

- Excessive, — verdict for \$15,000 held excessive in view of injuries received and plaintiff's income and age. IV, 656.
- verdict of \$150 for wrongful ejection of passenger without use of force reduced to \$100. VIII, 862.
- verdict for \$10,000 should be reduced to \$6,000 where plaintiff lost all toes of one foot, but was not prevented from working as a miner. VIII, 32.
- verdict reduced from \$8,250 to \$6,000. VI, 440.
- verdict for \$2,000 reduced to \$1,200. VIII, 138.
- verdict for child injured by contact with broken trolley wire reduced from \$20,000 to \$10,000. VIII, 626.
- verdict not excessive. VI, 285; VII, 484.
- verdict not excessive when within statutory maximum. VII, 291.
- instructions to jury allowing them to find damages in excess of amount alleged, held erroneous. VII, 853.
- verdict for \$500 compensatory and \$250 punitive damages held not excessive. V, 22.
- verdict for \$2,000 not excessive where deceased contributed to support of aged mother, his only next of kin. VIII, 406.
- verdict for \$25,000 is not excessive considering the position, income and family of deceased. I, 586.
- verdict for \$2,000 for injury to child held not excessive. III, 460.
- verdict of \$7,100 for boy seven years of age held not excessive in view of injuries, pain and necessity for three operations on foot. VIII, 751.
- where hearing and eyesight of child of ten years are permanently impaired, a verdict for \$6,000 is not excessive. I, 413.
- verdict of \$2,000 for pain and suffering for death of child not excessive. VIII, 378.
- verdict for \$4,000 is not excessive considering age, position, salary and injuries. I, 821.
- verdict for \$2,500 not excessive in view of plaintiff's age, health and injuries. VIII, 48.
- verdict for \$10,000 held not excessive in view of deceased's age, earning capacity and size of family. V, 219.
- verdict for \$1,600 held not excessive in view of injuries, age and incapacity for work after injury. IV, 1072.
- verdict for \$15,000 not excessive considering age, health and permanently disabling of plaintiff. VIII, 521.
- verdict for \$16,927 not excessive considering plaintiff's former earning capacity and physical condition and present physical condition. V, 512.
- verdict for \$4,500 not excessive considering prior health and extent of injuries. V, 642.
- verdict for \$2,000 not excessive considering injuries sustained. IV, 1047.
- verdict for \$14,000 held not excessive in view of injuries. IV, 1022.
- verdict for \$5,500 held not excessive in view of injuries. IV, 662.

(For Index to Notes, see *ante*, p. ix.)

DAMAGES — (*Continued*).

Excessive, — verdict for \$1,000 not excessive in view of injuries and expenses incurred. V, 58.

— \$800 not excessive where pedestrian was knocked down and bruised by wagon thrown on sidewalk by derailed car. VIII, 272.

— verdict for \$500 not excessive where passenger struck on head by trolley pole. VIII, 252.

— verdict for \$12,000 is not excessive considering the injuries and sufferings of plaintiff. I, 605.

— verdict of \$200 where plaintiff bruised by fall held not excessive. III, 233.

— verdict for \$1,900 not excessive where plaintiff was burned and eye injured. IV, 839.

— verdict for \$3,050 held not excessive. VIII, 853.

Adequate damages, — verdict for \$750 held adequate when plaintiff actively attended to business, but had to hire help. I, 552.

Inadequate, — verdict held not inadequate. VII, 690.

— verdict for \$171 is inadequate considering plaintiff's injuries, sufferings, financial losses and reduced earning capacity. I, 647.

— in discretion of court to grant new trial when plaintiff awarded \$1 in case of assault by defendant's employees. IV, 525.

— verdict of \$2,500 held inadequate considering injuries sustained by child of twenty months. VII, 892.

Substantial, — passenger refusing to pay second fare wrongfully demanded, if ejected may recover substantial damages. V, 317.

Nominal, — plaintiff not restricted to when assaulted by defendant's employee. IV, 525.

General, — may be recovered on ejection on presentation of defective transfer. V, 120.

Special damages, — court need not instruct as to when not pleaded nor evidence as to introduced. VII, 690.

— railway liable for, to abutting owners for negligent construction or operation. III, 182.

— may be recovered by abutting owner whose house is injured by running of heavy cars. VI, 383.

— while injury may interfere with business, the damage is special and must be specifically averred. IV, 240.

Remote, — loss of profits are speculative and remote. VII, 840.

— injury preventing bearing of children, damages resulting from too remote. IV, 879.

— evidence of loss of profits caused by delay in delivery of generator considered too conjectural. I, 804.

Punitive, — may not be collected from railway for acts of conductor neither authorized nor approved by it. III, 622.

— passenger wrongfully ejected not entitled to as a matter of right. VIII, 387.

— allowed where passenger ejected without justification. III, 566.

(For Index to Notes, see *ante*, p. ix.)

DAMAGES — (*Continued*).

Punitive, — may be awarded where passenger ejected by use of excessive force. III, 270, 622, 992.

— may be awarded only where negligence is wanton or gross. VIII, 836.

— award in discretion of jury when passenger wilfully and unlawfully ejected. V, 536.

— assessment of in case of assault on passenger by conductor during unlawful ejection question for jury. V, 629.

— for second eviction after refusal to accept transfer. VI, 123.

— allowed where passenger ejected for refusing to move seat where company not complying with statute requiring actual separation of races, IV, 543.

— carrier liable for punitive damages for wanton conduct of employee. V, 22.

— father cannot recover for wanton injury to minor son in absence of statute. III, 20.

— or vindictive awarded for injuries to child one and one-half years old, struck by car going at excessive speed. VIII, 684.

— damages may be awarded when car was run at high speed in a narrow street after dark and the gong was not sounded at a crossing. II, 311.

— not recoverable where through negligence of motorman plaintiff's horse was frightened and plaintiff injured. VIII, 644.

— when awarded for failure to stop car and admit passenger. VIII, 648.

— verdict of \$500 for loss of arm not deemed to include punitive damages. VIII, 855.

Exemplary, — it is for the court to say whether there is evidence for jury to base exemplary damages on. III, 286.

— jury may award where assault by defendant's employees was wanton, but he is not entitled to them as a matter of legal right. IV, 522.

— may be awarded for wanton assault on passenger by conductor. VIII, 362.

— brutal conduct by conductor justifying exemplary damages. I, 771.

— proper where conductor kicked boy boarding the car as a passenger. III, 514.

— verdict for reversed where passenger ejected because time of transfer had expired because of lateness of first car. IV, 42.

— may be awarded where by reason of car failing to stop at proper signal plaintiff missed engagement and had to walk three miles. III, 851.

DEATH. (See *Administrator*; *Child*; *Damages*; *Electricity*; *Fire Apparatus*; *Passenger*; *Pedestrian*; *Speed*; *Vehicle*.)

DERAILMENT. (See *Appliances*; *Child*; *Employee*; *Evidence*; *Passenger*; *Pedestrian*; *Vehicle*.)

DIRECTORS.

Criminal liability for injuries to passengers, — cannot be held for unless guilty of gross negligence. II, 688.

(For Index to Notes, see *ante*, p. ix.)

DOGS. (See *Animals*.)

DRAINAGE. (See *Streets and Highways*.)

DUST.

Ordinance which requires railway to sprinkle streets to prevent raising of dust by cars is valid. VII, 143.

EJECTION OF PASSENGERS. (See *Fare; Passenger; Transfers*.)

ELECTRICITY. (See *Animals; Employee; Evidence; Passenger*.)

Nuisance, — transmission not nuisance *per se*. VI, 192.

Degree of care, — company required to exercise highest degree of care to protect persons using the streets from injury by electric current. III, 254.

Company must use reasonable care to protect workmen of contractor in its employ from injury from electric wires. I, 639.

Trolley wires under telephone wires, — due care in maintaining a question for the jury. III, 870.

Fallen wire, — doctrine of *res ipsa loquitur* applied to case of boy injured by. III, 859.

— proximate cause falling of wire, not defective insulation. III, 859.

Bicyclist claiming to have been injured by shock from fallen wire, — held that case should have gone to the jury. II, 758.

Person injured by breaking or sagging of trolley wire, — court may instruct jury as to negligence. VI, 686.

Pedestrian injured by broken trolley wire, — *res ipsa loquitur* does not apply. VII, 361.

Person going near broken charged wire after warning is guilty of contributory negligence. IV, 908.

Neglect of broken charged wires affords *prima facie* evidence of negligence. IV, 908.

Stringing wires, — care required; inspection of wires; disarrangement. VI, 642.

Defective insulation, — company held liable for death caused by. II, 362.

Negligence of company when plaintiff injured because of defective insulation of wires. I, 639.

Evidence sufficient to find insulation of feed wire originally defective. I, 639.

Child injured by contact with telephone wire charged by contact with trolley wire as result of storm, — negligence because of defective insulation a question for the jury. IV, 487.

Workman killed by contact with imperfectly insulated wire in defendant's power house, — company held negligent and intestate not guilty of contributory negligence. IV, 634.

Workman on elevated structure injured by shock; defective insulation; inspection; *res ipsa loquitur*. V, 760.

Painter working on poles shocked because of defective arrangement and insulation of wires, — defendant held liable. V, 527.

(For Index to Notes, see *ante*, p. ix.)

ELECTRICITY — (*Continued*).

Employee of electric light company injured because of failure of trolley company to use guard wires, — negligence and contributory negligence questions for jury. IV, 413.

Steam railroad employee shocked by trolley wire stretched over tracks, — presumption of negligence arises. VIII, 188.

Lineman injured by shock from span wire, — negligence of defendant not shown. VIII, 178.

Pedestrian injured by live wires, — new trial granted because of inaccurate charge to the jury. IV, 151.

Person shocked by electrically charged rail, — *res ipse loquitur*; defendant not an insurer. VI, 850.

Rail charged with electricity, person injured by contact with after being wrongfully forced to leave car, — negligence of defendant's employees in not warning him of the danger and his own negligence are questions for the jury. III, 894.

Contact of trolley pole with steel brace, — company liable for extraordinary accidents. VI, 671.

Child injured by contact with live trolley wire broken because of wire attached by third party, — verdict for plaintiff sustained. VIII, 626.

Duty of railway company to protect and maintain wires in safe condition. VIII, 626.

Fire caused by live trolley wire, — evidence held insufficient. IV, 1062.

Motorman injured by shock from controller, — *prima facie* case of negligence. VII, 941.

Current of interurban railroad interfering with electric appliances of steam railroad, — injunction will not lie. VII, 127.

Injury by falling wire, — testimony sufficient to justify inference of negligence. I, 763.

ELEVATED RAILROAD. (*See Abutting Owners; Additional Servitude; Construction of Railway; Damages; Eminent Domain; Employee; Evidence; Pedestrian.*)

EMINENT DOMAIN. (*See Abutting Owners; Additional Servitude; Evidence.*)

Statutory authority of railway to condemn land and cross railroad. I, 173.

Right of under the statute. III, 145.

Right of under the statute in construction of elevated railway. I, 749.

Rights of railway under Minnesota statute. V, 531.

Right to exercise right should be determined in the condemnation proceedings. II, 193.

Exercise of the right of eminent domain is necessary before railway may enter upon and appropriate land of an abutting owner. I, 357.

Abutting owners, — right to condemn fee of. II, 806.

Right of does not constitute a railway an interurban railway. VII, 605.

(For Index to Notes, see *ante*, p. ix.)

EMINENT DOMAIN — (*Continued*).

- Land already appropriated to public use can be condemned by railway only under express power conferred by the legislature or by necessary implication, I, 173.
- Lands of another railroad, condemnation of, — necessity a question of fact; what may be condemned. III, 93.
- Public use, — interference of private advantage. VI, 192.
- Permission to lay tracks in turnpike does not confer right of eminent domain against abutting owners. I, 735.
- Injunction, — party aggrieved by ruling is not entitled to injunction; his remedy is by appeal. II, 193.
- Commissioner, — agent of railroad in procuring rights of way not competent as. VI, 764.
- Additional lands for right of way, — condemnation under the statute. III, 93.
- Additional strip of land along right of way, — held no authority to condemn under the statute. IV, 754.
- Consolidated railroad proper party to continue started by one of its constituent companies. III, 233.
- Condemnation proceedings by lessee authorized. VI, 192.
- Impairment of right by leasing; necessity; compensation to joint owners; appropriation of Catholic school. VI, 762.
- Condemnation of property for side tracks, stations, power houses, switches or turnouts, — necessity a question of fact. IV, 194.
- Transmission line, — condemnation of land for. VI, 192.
- Construction of line to carry high-tension current, — consent of local authorities, when not necessary. VIII, 92.
- Water power, — right of railroad to condemn land for water power upheld. IV, 1064.
- Damages, — compensation should be for damage to entire tract of land into which condemned portion belongs. II, 258.
- measure of. II, 733.
- Measure of damages and right of action stated. V, 21.
- Measure of damages to abutting property stated. IV, 1077.
- Measure of damages is the difference of the value of the real estate at the time of appropriation and the value after it is taken. IV, 284.
- Measure of damages is the entire loss sustained by the owner of the land. IV, 285.
- Measure of damages for land taken by railway. VII, 40.
- Damages on account of construction of elevated railroad, — date of beginning of construction should be considered; award subject to lien for mortgage debts. III, 360.
- Measure of damages; no deduction to be made for benefits. V, 263.
- Measures of damages same for interurban railroad as for steam railroad, and no deductions for benefits should be made. IV, 287.
- Measure of damages, — reduced mortgage value cannot be considered. IV, 478.

(For Index to Notes, see *ante*, p. ix.)

EMINENT DOMAIN — (*Continued*).

Measure of damages for injury to land by construction of railway; setting off of benefits. VI, 759.

Damages, — appreciation of value of property because of construction of railway not to be taken into consideration in estimating damages. I, 714.

Measure of damages to land stated; enhancement of value may be considered. V, 186.

Damages, — where railroad condemns land belonging to a street railway, the fact that the latter intends to turn such land into a park should not be taken into consideration. III, 865.

Damages resulting from danger to person or stock of owner of land are too remote. V, 268.

Competency of witness testifying as to value of land condemned. I, 714.

EMPLOYEE. (See *Animals; Appliances; Child; Electricity; Evidence; Lease; Park; Passenger; Pedestrian; Vehicle.*)

Conductor, — person having various duties on a coal car held not a conductor. IV, 445.

Liability for tort, — plea that tort was committed under directions of employer no defense. VII, 626.

Ordinance requiring motorman and conductor on each car does not apply to trailers. II, 902.

Motorman, — negligence held question for the jury. IV, 83.

Wanton negligence, — not error to refuse to charge specifically as to motorman's wantonness when cause submitted to jury entirely on his failure to exercise due care. III, 460.

Negligence of motorman is imputed to employer. VIII, 76.

Inexperienced motorman running car under direction of experienced one, — question of due care. IV, 39.

Inexperienced motorman learning under direction of experienced man, — not negligence to cause car to be operated by, VI, 772.

Motorman, — erroneous instruction as to experience. IV, 491.

Intoxication, — jury may consider evidence as to, together with all other evidence. II, 120.

Conductor injured running car for sick motorman, — company liable when plaintiff acts as an emergency assistant. VIII, 256.

Rules as to signals and conduct of employees in backing cars held reasonable, and not a question for the jury. I, 349.

Pleadings, — allegations of incompetency of motorman, defective construction of car and knowledge of defects. II, 206.

Scope of authority, — act of conductor in carrying passenger beyond destination and allowing to alight in a dangerous place without warning is within scope of his authority. IV, 220.

Scope of employment, — conductor held not to have been in, calling policeman as a joke to a discarded car to arrest crooks. IV, 469.

— arrest and prosecution of passenger by conductor when not within. V, 22.

(For Index to Notes, see *ante*, p. ix.)

EMPLOYEE — (Continued).

- Scope of employment, — company liable for act of conductor collecting fares in firing pistol on refusal of passenger to pay and injuring plaintiff, a pedestrian. V, 134.
- company liable for acts of conductor when clothed with police power. V, 146.
- company held liable for assault by inspector in examining wound of person injured by car. V, 338.
- motorman leaving post to wave child away from track within scope of employment. VI, 96.
- motorman undertaking to push heavily loaded wagon to clear tracks is acting within scope of employment. VI, 558.
- conductor wrongfully ejecting person for not having paid fare is acting within scope of employment. VII, 862.
- Master and servant, — labor on Sunday as affecting relation. V, 828.
- Fellow servant, — conductor may recover for negligence of company even though negligence of motorman was combined with that of defendant. IV, 658.
- whether servants of same master are fellow servants is a question for the jury. I, 89.
- question of who are is one of law, but on what based is for the jury. II, 156.
- there must be consociation in the same department of duty or line of employment. VII, 834.
- rule cannot be invoked where negligent employee was overworked and suffering from loss of sleep. V, 249.
- concurrent negligence of defendant in using unsafe operating system renders defendant liable notwithstanding negligence of fellow servant. VI, 697.
- complaint showing act of fellow servant. VIII, 145.
- motormen and conductors running cars on same line are fellow servants. V, 858.
- a conductor is a fellow servant of a gripman or motorman on another car. II, 156, 633.
- conductor riding home cannot recover for negligence of motorman; Employers' Liability Act not applicable. III, 724.
- person on car qualifying to serve as conductor is a fellow servant of motorman. VII, 612.
- act of starter sending out defective car is the act of a fellow servant to a conductor. III, 598.
- an employee being carried to and from work is an employee, not a passenger. III, 232.
- workman employed by company riding in workmen's car is a fellow servant of motorman. V, 427.
- switchman traveling on car to next switch is a servant, not a passenger. V, 828.
- lineman and driver of repair wagon are fellow servants. IV, 768.

(For Index to Notes, see *ante*, p. ix.)

EMPLOYEE — (Continued).

- Fellow servant, — watchman is a fellow servant of men working for company on a scaffold. III, 723.
- laborer laying tracks is a fellow servant of employees in charge of a car. II, 206.
- conductor and motorman on different cars held not fellow servants. VII, 941.
- motormen on different cars though on same line are not fellow servants under Kentucky "association theory." VII, 72.
- barn man and motorman are not fellow servants. IV, 190.
- foreman in car barn not a fellow servant of a member of the barn crew. IV, 206.
- car starter and car repairer are not fellow servants. II, 803.
- workman employed by company riding on pass is not fellow servant of motorman. V, 614.
- linemen who set pole not fellow servants of linemen afterwards stringing wires thereon. IV, 507.
- employee of contractor employed by railroad is not a fellow servant of latter's employees even though plaintiff was operating a car. IV, 782.
- act of starter in starting train is one of superintendence. III, 678.
- exercise of superintendence by a dispatcher is a question for the jury. V, 423.
- car dispatcher is a vice-principal. VI, 106.
- barn foreman held a vice-principal. III, 570.
- street railway not within provisions of Missouri statute. II, 633.
- Injured through negligence of superintendent, — company held liable. V, 433.
- Fellow-servant Act of Missouri, — application to interurban railway. VI, 106.
- Fellow servant, — provisions in New York Railroad Law apply to street railways. VIII, 348.
- Employers' Liability Act, — prior complaint in common-law action not equivalent to notice under statute. VI, 857.
- Employers' Liability Act of Indiana, — liability for negligence of switchman. II, 206.
- injury by employee having direction of plaintiff's movements. V, 273.
- Employers' Liability Act, — New York act not applicable to conductor or driver of a street car. III, 724.
- Employers' Liability Act of New York, — when case does not come within. VII, 899.
- Employers' Liability Act of New Jersey held not to apply to employees of street railway. VII, 354.
- Conductor injured because of incompetency of motorman, — assumption of risk when having knowledge of incompetency. VI, 757.
- Assumption of risks, — conductor assumes risk from known incompetency of motorman. II, 805.

(For Index to Notes, see *ante*, p. ix.)

EMPLOYEE — (Continued).

- Assumption of risks, — conductor assumes risk of collision of cars while he is replacing trolley. II, 861.
- by conductor killed by derailment caused by flat wheel and other defective equipment. VIII, 688.
- motorman assumes risk of collision with another car. II, 860.
- motorman removing trolley pole from its socket held to have assumed the risk of electric shock. III, 432.
- motorman assumes risk of injury if he fails to use sand on slippery track. IV, 491.
- a motorman familiar with the methods and rules of backing cars assumes the risks of such methods. I, 349.
- foreman crushed between car and partition in car barn held to have assumed risk. IV, 837.
- a lineman of years' experience assumes risk of falling of defective poles. I, 27.
- lineman held to have assumed risk while adjusting electric cable. III, 378.
- employee engaged in oiling cable wheels assumes risk of foreman neglecting to warn him of danger. II, 804.
- employee killed by passing truck on elevated track held to have assumed risk. IV, 838.
- employee held not to assume risk of defective flooring of which he had no knowledge. IV, 838.
- plaintiff does not assume risk unless defect he has knowledge of is a glaring one. V, 622.
- knowledge of risk not sufficient, there must be a voluntary exposure. IV, 407.
- employee not engaged in performance of duties and without knowledge of defects of switch, has not assumed risk. I, 339.
- superadded risks; atmospheric conditions; presumption of knowledge of employee. VIII, 145.
- conductor on running board struck by pole negligently erected held not to have assumed the risk. II, 288, 380.
- conductor held not to assume risk of derailment. IV, 786.
- motorman does not assume risk of defective brake when informed by proper employee that car could be used with safety. III, 571.
- employee engaged in moving car in a car barn without proper assistance held not to have assumed the risk. IV, 206.
- a servant does not assume the risk resulting from the employment of incompetent coemployees. I, 89.
- Injury to employee falling in a pit in a car shed, — employee's lack of diligence held proximate cause. II, 802.
- Safe place to work, — in the absence of rules for the guidance of employees question whether plaintiff was provided with a safe place to work was for the jury. II, 803.
- master's duty does not require following up details of work. VII, 899.

(For Index to Notes, see *ante*, p. ix.)

EMPLOYEE — (*Continued*).

Safe place to work, — company liable for failure to furnish, where lineman hurt by breaking of pole. IV, 507.

Conductor falling into pit in repair shop, — negligence of motorman in starting car. V, 761.

Picking up tools after derailment, struck by car, — held not bound to keep lookout. VII, 695.

Injury to employee caused by defective appliances; liability of the company. I, 339.

Res ipsa loquitur, — application in action by servant against master. VI, 616.

Motorman injured by shock from defective controller, — *prima facie* case of negligence. VII, 941.

Motorman injured by explosion of controller, — *res ipsa loquitur* does not apply. V, 623.

Shocked by defective controller, — presumption of negligence rebutted. VI, 616.

Injured by short circuit, — negligence of defendant question for jury. IV, 839.

Trolley placed on wire without conductor's ascertaining whether power was on car, — contributory negligence. VIII, 734.

Conductor killed by car while adjusting trolley, — conduct of conductor and motorman question for jury. V, 434.

Brakeman on car struck by sagging trolley wire, — violation of statute as to height of wire palpable negligence. VI, 860.

Defective brake, — where superintendent promised motorman he would repair defect, a finding is warranted that the motorman used car on such promise. III, 202.

Defective air brake, — sufficiency of allegations as to defect. III, 202.

Injured because of flaw in brake rod, — duty of company to furnish safe appliances stated. V, 272.

Injured by step giving way, — negligence of defendant question for the jury. IV, 467.

Alighting from moving car, injured because of absence of step, — assumption of risk; contributory negligence. VI, 766.

Conductor descending from top of car injured because of absence of step, — guilty of contributory negligence as a matter of law. VIII, 223.

Defective track, — company liable for, unless motorman was negligent in running car at excessive speed over it. III, 570.

Derailment resulting in injury to employee, — admissibility of evidence as to cause of accident. III, 659.

Motorman injured by "plow" of car catching in slot rail, — negligence; defective appliances. VI, 774.

Failure to sand track is negligence for which company is liable for injury to motorman. III, 220.

Defective turntable, — company held liable for injury to employee caused by. III, 569.

(For Index to Notes, see *ante*, p. ix.)

EMPLOYEE — (*Continued*).

- Car coupler, injury to, through negligent starting of train, — under the facts jury should determine the manner of the accident. III, 678.
- Lights at curve, — company not responsible for failure to maintain, though resulting in injury to a motorman. III, 571.
- Injured by defect in coal car of railroad, a third party, — defendant street railway not responsible for inspection of such car. IV, 470.
- Injured because of lack of red light on car preceding, — company held liable. V, 72.
- Conductor injured by pulling off of band to hold sign; defective appliances. V, 762.
- Objects erected in close proximity to the tracks, — railroad responsible for injuries to employees by. III, 86.
- Obstacles beside track, — conductor injured by contact with pole erected beside track, having knowledge of its position, held guilty of contributory negligence. II, 335, 893.
- Pole beside tracks, — electric light company not responsible for injury to employee of railway by collision with pole placed outside of railway right of way. III, 86.
- railroad not responsible for injury to employee by collision with telephone pole erected outside of its right of way. III, 830.
- Conductor on running board struck by pole, — not charged with knowledge of position of poles as having nothing to do with their inspection. V, 342.
- duty of company to warn new employee; contributory negligence. V, 829.
- Walking along running board, falling from car because of jerk, — assumption of risk; contributory evidence; proof of negligence of motorman. VIII, 825.
- Conductor injured by wagon pole driven into the car, — liability of employer of driver of wagon. II, 120.
- Boarding moving car, — contributory negligence question for jury. VII, 834.
- Conductor injured by sudden movement of car. VIII, 734.
- Conductor of another company injured by sudden jerk when his car was being drawn by car of defendant, — latter held not negligent. IV, 837.
- Motorman injured in head-on collision with another car of same line, — contributory negligence question for jury. V, 521.
- Motorman killed in head-on collision with another car, — held guilty of contributory negligence in not seeing peril in time. V, 619.
- Contributory negligence of motorman in not looking a second time at car approaching on tracks crossing those his car was on. I, 747.
- Injury to motorman caused by collision with another car backing up, — defective rails held not the proximate cause. I, 349.
- Motorman killed by collision with another car after being given right of way by dispatcher, — contributory negligence question for jury. V, 423.
- Injured in collision, — whether method of dispatching trains reasonably safe question for jury. VI, 697.

(For Index to Notes, see *ante*, p. ix.)**EMPLOYEE** — (*Continued*).

- Motorman injured in collision caused by failure of company to conform to time schedule, — negligence question for jury. VI, 775.
- Motorman injured by collision with another car, — held guilty of contributory negligence in violating traffic rules of company. V, 408.
- Motorman injured in collision with another car after leaving turnout by order of conductor and general orders of superintendent, — contributory negligence. V, 844.
- Motorman jumping from car to avoid injury in collision, — contributory negligence. VI, 106.
- Motorman injured in collision with wagon, — driver of wagon held negligent for leaving horse unattended. V, 359.
- Insulting language by conductor to passenger, — company liable. III, 694.
- Claims for wages, — a trustee under a mortgage deed is justified in paying wages due men who have struck that operation of road may be resumed. I, 37.
- Conductor discharged on complaint of patron, — latter not liable in damages, even though prompted by malice.
- Injury to lineman by fall of defective pole, — company not negligent after supplying proper bracing. I, 27.
- Lineman climbing pole struck by roof of car, — question of plaintiff's due care question for jury. V, 451.
- Injury to employee of telephone company caused in attempting to rescue fellow workman in peril because defective insulation of wire of railway company, — latter held liable. II, 362.
- Telephone company employee shocked because of disarrangement of trolley wires, — contributory negligence question of fact. VI, 642.
- Erecting telephone system, killed on elevated railway, — failure to show freedom from contributory negligence. VI, 857.
- Volunteers running a tower car, — company not responsible for death of motorman caused by their act. III, 329.
- Carpenter employed by defendant injured when car struck girder, — contributory negligence question for jury. V, 613.
- Carpenter working in car barn injured by electric shock, — contributory negligence question for jury. V, 619.
- Laborer employed in street killed by car, — negligence and contributory negligence questions for the jury. V, 47.
- Person employed in repairing street, — duty to look and listen. VI, 249.
- Working on pavement, struck by car, — want of due care; custom of ringing gong as warning not established. VI, 767.
- Working between tracks, struck by car, — duty of motorman; last clear chance doctrine. VII, 469.
- Working in trench under track so engrossed in work as not to heed gong, — guilty of contributory negligence. IV, 656, 663.
- Workmen employed by third party in trench struck by car, — contributory negligence. V, 706.

(For Index to Notes, see *ante*, p. ix.)

Laying gas pipe in street, struck by car, — use of streets; duty of motor-man; last clear chance; duty of plaintiff; sudden move by plaintiff to place of danger. VIII, 76.

Street cleaner crossing tracks without looking is guilty of contributory negligence. VII, 173.

Employee of subcontractor on construction of elevated, — company owes due care to avoid injuring him. IV, 407.

Exemption from liability by contract, — company not relieved from liability for injury to employee of subcontractor on construction work. IV, 407.

Stool for motorman, — ordinance requiring is not unreasonable nor beyond power of municipality to enact. VIII, 747.

EVIDENCE. (See *Appeals; Appliances; Consents of Abutting Owners; Damages; Electricity; Franchise; Instructions to Jury; New Trial; Passenger; Speed; Trial; Vehicle.*)

Negative and positive testimony, — relative value stated. V, 603.

Negative testimony, — when insufficient. VI, 33.

Conjectural, — cause of injury, evidence as to, held not too conjectural under the evidence.

Newly discovered, — evidence not produced on first trial, when not newly discovered. I, 586.

Cumulative not cause for new trial. IV, 44.

Leading question cured by question by court. VII, 802.

Circumstantial evidence to prove case when passenger killed. VII, 423.

Failure to produce witnesses by defendant may not be considered by jury, when. IV, 868.

Interrogatories, — findings on evidentiary matter; form. VIII, 199.

Deposition of plaintiff taken by defendant admissible on cross-examination though not filed. VII, 829.

Conflicting testimony, — conflict does not arise simply because one witness testifies contrary to another. III, 317.

— in case of, court should instruct as to difference between interested and disinterested testimony. III, 757.

— duty of court is to properly instruct jury and that testimony is sufficient to support the verdict. I, 793.

— where testimony of plaintiff and defendant's witnesses conflict it is for the jury to determine what occurred. I, 246; III, 37.

Conflicting evidence as to cause of injury, — question becomes one for the jury. II, 654.

Conflicting evidence is to be determined by jury. IV, 1005.

Conflicting evidence requiring submission of case to the jury. IV, 199.

Conflicting, — evidence under which it cannot be told whether the car or the vehicle ran into the other. IV, 345.

Conflicting testimony, — where jury not clearly wrong verdict will stand. III, 323.

Order of proof is always discretionary with the judge. I, 553.

(For Index to Notes, see *ante*, p. ix.)

EVIDENCE — (*Continued*).

Order of proof is largely in the discretion of the court. I, 793.

Order of proof when plaintiff has shown derailment of car. VIII, 272.

Preponderance of evidence defined. V, 512.

Preponderance of evidence "to the satisfaction of the jury" is not required to prove negligence. IV, 1042.

Preponderance of evidence, — jury may consider number of witnesses as an element. IV, 207.

Preponderance depends not on number of witnesses, but on weight of testimony. VIII, 68.

Weight of evidence for jury to decide. VIII, 352.

Weight of evidence, — when court is bound to declare verdict against the weight of evidence. IV, 853.

— case where verdict should set aside because of. VII, 334.

— court need not charge that if the evidence on each side is equal the verdict shall be for the defendant. I, 639.

— erroneous instruction as to, in case of passenger alighting from car injured by its starting up. III, 663.

Sufficiency, — where plaintiff was only witness for herself verdict for her held against weight of evidence. III, 716, 776.

— injury to passenger, — proof required. III, 588.

— verdict based on showing rails were raised above planking held against the weight of evidence. III, 417.

Nature of injury, — agreement between declaration and testimony. I, 409.

Variation between pleading and proof held not fatal. III, 563.

Proof required of injured passenger and carrier, respectively. III, 588.

Burden of proof does not shift to defendant on showing that injuries resulted from a derailment. IV, 669.

Burden of proof on issue of negligence does not shift during trial. IV, 677, 682.

Burden of proof of negligence does not shift during trial. IV, 1045.

Burden of establishing defendant's negligence is on plaintiff throughout the trial. IV, 848.

Burden of proof, — it is error to instruct that where plaintiff has proved he was a passenger and was injured the burden of proof is on defendant to show it was not guilty of negligence. III, 588.

— when negligence is proved. III, 588.

— is on administratrix to show deceased used ordinary care. VII, 224.

— when shown that passenger was injured. VIII, 252.

— held on defendant where passenger injured by explosion of fuse. III, 713.

— where passenger thrown down by sudden jolt. VIII, 585.

— on defendant to show derailment was accidental. VIII, 272.

— is on company when accident caused by breaking of appliance to show condition of things to exonerate it from liability. I, 253.

Res gestae, — expressions of pain made by person while being taken from wreck are admissible. VI, 606.

(For Index to Notes, see *ante*, p. ix.)

EVIDENCE — (*Continued*).

- Res gestæ*, — expressions of sufferings are admissible. III, 11, 193, 943.
- evidence of mother that son kicked off car by conductor was unconscious eight hours and that immediately on recovering consciousness he stated that conductor kicked him off, is admissible. VII, 698.
- statements of plaintiff to physicians as to bodily condition are competent. III, 126.
- exclamation of passenger made after falling admissible. IV, 301.
- exclamation by passenger that "the boy is off," when a boy was kicked off the car by conductor, is admissible. VII, 698.
- screaming of passengers when plaintiff was injured in alighting not admissible on redirect examination of conductor when defendant obtained evidence from witnesses in another form. VIII, 654.
- remarks of bystander are not admissible. III, 151.
- statement of deceased, killed while holding frightened horse, as to being "the biggest fool on earth" inadmissible. VIII, 194.
- statement of plaintiff after arriving home, some distance away, held not part of. V, 153.
- statement of defendant's superintendent made long after the accident is not admissible. V, 249.
- admissions by employee not a general agent and not engaged in performance of duty are inadmissible. V, 375.
- evidence as to arrest of motorman and conductor not admissible. III, 103.
- what was said and done by conductor and plaintiff when latter was carried beyond destination, going and coming, constitutes the gist of the action. I, 771.
- statement of conductor to passenger after accident when not part of. I, 14.
- statement of conductor made some time after is not admissible. III, 506.
- subsequent conduct of conductor not part of. V, 146.
- invitation of conductor to boys to help push car admissible to show conductor's having notice of boys' presence. VI, 452.
- in action for assault by conductor, profane language of the latter is part of *res gestæ*. II, 5.
- report of insult by conductor to company immediately after plaintiff arrived home admissible. VI, 758.
- statement of motorman immediately after the accident as part of. I, 380.
- statement of motorman three minutes after accident admissible. VIII, 521.
- motorman's description of accident made some time after is admissible for impeachment, but not for testimony. III, 422.
- statement of motorman made eighteen hours before accident hearsay. VI, 503.
- statement of bystander six minutes after accident and reply of motorman admissible. VIII, 521.

(For Index to Notes, see *ante*, p. ix.)

EVIDENCE — (Continued).

Res gesta, — statements of motorman, conductor and bystanders, admissibility of. VI, 706.

Immaterial statement of passenger. I, 14.

Written statement signed by plaintiff is admissible to impeach his testimony. III, 144.

Statement, — failure of passenger ejected when having wrong transfer to make statement may be considered. V, 792.

Statement of employees of railway that they were not instructed by company to carry bundles of papers not admissible in action by person struck and hurt by bundle thrown off car. VII, 690.

Statement of motorman made after the accident may be shown to discredit his testimony. V, 633.

Statement by adjuster of railway offering to pay plaintiff's claim in full properly admitted. VII, 942.

Statements by persons to employee of company not admissible. II, 75.

Statement of bystander admissible to explain evidence admitted. VIII, 521.

Hearsay evidence as to former injuries is not admissible. III, 103.

Hearsay, — car dispatcher's order given over telephone may be proved. VI, 106.

Conversation with conductor as to place where plaintiff wanted to get off not competent. III, 126.

Opinion as to rate of speed of car admissible. VI, 806, 831.

Opinion as to width of street, — witness may testify as to ability of teams to pass though not knowing measurements. VIII, 521.

Opinion of real estate expert as to damage to abutting property caused by building of elevated railroad held admissible. IV, 464.

Opinion of conductor as to swaying of car admissible. VI, 186.

Opinion of physician as to whether plaintiff is permanently injured not admissible. VIII, 470.

Opinion, — in action for injuries to rider of motorcycle injured in collision with car question asked of plaintiff as to whether there was anything he could have done which he did not do to avoid collision does not call for plaintiff's opinion. VIII, 744.

Conclusion of witness as to certain facts should be excluded. I, 557.

Conclusion of witnesses that motorman had no time to stop car inadmissible. VIII, 194.

Judgment of person injured as to possible danger admissible. VI, 754.

Credibility of witnesses is exclusively within the province of the jury. IV, 200.

Credibility of witnesses for jury to decide. VIII, 352.

Credibility, — physician, as expert for company, competent to show his compensation and that he is frequently so employed. II, 153.

— payment of expert witness does not affect competency, but may his credibility. II, 540.

— weight, — jury are the judges. IV, 83.

Child, — correct instruction of, to credibility. IV, 120.

(For Index to Notes, see *ante*, p. ix.)

EVIDENCE — (Continued).

Truth of, — where jury was not directed to pass on certain evidence its truth will be presumed on appeal. IV, 685.

Impeachment of defendant's witness by defendant, when properly excluded, I, 561.

Impeachment of deceased witness. IV, 669.

Witness may not be impeached by showing that he refused to testify at coroner's inquest on ground of incriminating himself. V, 607.

Falsity, — instruction as to effect of false testimony. IV, 567.

— of part of plaintiff's evidence does not raise the presumption of the falsity of all. I, 309.

Bias or impartiality of witnesses may be considered. III, 70.

Motorman is competent as a witness notwithstanding interest or bias. III, 111.

Interest of plaintiff may be taken into consideration when she testifies in her own behalf. IV, 83.

Surgeon in employ of defendant examining plaintiff without the latter's knowledge of the fact, proof of such relation. I, 731.

Prejudice of witness, a former motorman, may be shown. VIII, 535.

Precautions for safety taken after the accident, — fact may not be shown. II, 435.

Discharge of motorman after accident may not be shown. VII, 914.

Fact of placing watchman at place of accident after derailment, inadmissible. VII, 868.

Compromise, — evidence of, is not admissible. III, 65.

Offer of settlement may be admitted in rebuttal of plaintiff's alleged admission of carelessness. III, 126.

Compromise, — when plaintiff's attempt to may be shown. IV, 872.

Release of claim for injuries in writing, — parol evidence to show additional agreement improper. III, 830.

Similar accidents, — evidence as to admissible. IV, 491.

Similar occurrences at that particular curve and at other curves are admissible. III, 778.

— testimony of similar derailments admissible only where they happened in same locality and under same conditions. II, 784.

— at other places on line may be shown where horse is shocked by stepping on tracks. IV, 556.

— where horse caught foot between rail and unnecessary guard rail admissible. VIII, 25.

— removal of rotten posts near one which fell may be shown. VIII, 38.

— admissible in case where conductor on running board was struck by pole beside track. V, 342.

— evidence as to prior like assaults held competent. II, 245.

— evidence as to scraps of conductor with other passengers not admissible in action for assault on passenger. VII, 944.

Person lying on track helpless from drink or pleurisy and run over, — evidence as to former attacks of pleurisy properly admitted. IV, 324.

(For Index to Notes, see *ante*, p. ix.)

EVIDENCE — (*Continued*).

- Jerking, — evidence as to experience of witness admissible in rebuttal. VII, 474.
- Similar occurrences, — evidence as to missiles having been thrown at cars at certain point before excluded as too vague. V, 564.
- Speaking name of street to conductor to designate stopping place, — plaintiff may be asked to speak it as on night of accident. VIII, 32.
- Experiment made with another horse at the same place as the collision properly excluded because of the difference in speed of horses. IV, 330.
- Custom of running north-bound and south-bound cars on certain tracks may be shown to show car was on wrong track. I, 71.
- Custom in stringing wires, — evidence held not to have established. III, 870.
- Custom of using guard wires to prevent contact of trolley with other wires admissible where lineman injured. IV, 413.
- Custom of company to allow persons of both races to stand on rear platform may be shown. IV, 558.
- Custom not to have racks for bags and parcels admissible as to exercise of care. VI, 189.
- Custom of giving passes to employees and statement of manager that they are given as part consideration for services admissible to show pass is a gratuity. VI, 674.
- Custom of company to adjust claims not admissible. VII, 291.
- Warning to others than plaintiff to keep off trestle not material. I, 57.
- Flagging systems of similar railroads may be shown. VI, 697.
- Custom, — "white poles," evidence as to admissible to show customary stopping places. IV, 977.
- to allow passengers to board cars at car barn, — evidence as to admissible. III, 709.
- of passengers getting off at stop railroad crossing, though not a stop for disembarking, admissible. IV, 197.
- manner in which deceased usually crossed tracks inadmissible. VIII, 336.
- where person claims obstruction of view by wagon six or seven feet high, defendant may show that ordinary wagons are only five feet four inches high. III, 933.
- Habit of person injured while boarding car of frequently getting on and off cars in motion is not admissible. V, 332.
- Habit of driver of vehicle driving with loose rein not admissible because not tending to show carelessness. IV, 69.
- Eye witnesses' testimony that decedent was a careful and cautious man, inadmissible. VI, 320.
- Habit of decedent of exercising care in crossing tracks may be shown. VII, 547.
- Local custom as to right of way of fire apparatus may be shown only when alleged in declaration. II, 732.
- Electricity, — court will take judicial notice that electricity is a treacherous and destructive agent. IV, 487.

(For Index to Notes, see *ante*, p. ix.)

EVIDENCE — (Continued).

Judicial notice, — judicial notice will be taken that militia were called out on a certain date to suppress a strike. III, 783.

— court will take judicial as to sunset on a certain day. IV, 230.

— will be taken of dereliction of railways in failing to provide adequate accommodations. V, 97.

— of amount and character of traffic on street. VI, 750.

— will be taken of fact that conductor is in control of car. VII, 474.

— will be taken of practice of passengers desiring to have car stop to simply state name of street. VIII, 32.

— will not be taken that there is no contrivance to prevent trolleys from becoming detached from wires. VIII, 252.

— will be taken of custom of equipping cars with fenders. VIII, 378.

Fenders, — judicial notice will be taken of the purposes for which used. VI, 320.

Expert testimony should be confined to probable consequences based on reasonable certainty. I, 592.

Expert, — admission of is largely within the discretion of the court. VIII, 803.

— answer to hypothetical question and opinion as to cause of injury held proper. III, 540.

— where plaintiff's expert testifies to different causes than those alleged the court should instruct as to the probable causes. III, 757.

Surgeon's testimony as to plaintiff's condition, admissibility of. I, 300.

Expert testimony as to whether plaintiff was feigning injury. II, 84.

— is needed to prove nervous condition. III, 126.

Physician may testify as to future pain and whether swelling is traumatic or edematous. VII, 846.

Expert, — whether plaintiff's arm was fractured by fall from car is not a subject for expert evidence. VIII, 138.

— testimony of physician as to injuries sustained by plaintiff struck by car while crossing street. VIII, 682.

— testimony of physician as to injuries sustained by passenger. VIII, 692.

Hypothetical question, — physician may answer though he did not see plaintiff for some time after accident. VII, 585.

Expert testimony as to instinctive caution of pregnant woman while alighting from car. VIII, 722.

Expert evidence as to clouded mentality of plaintiff when testifying admissible as to question of contributory negligence. VIII, 602.

Expert testimony as to cause of derailment held improper. III, 659.

Insulators, — expert testimony as to admissible. IV, 488.

Expert evidence as to safety brake, when not admissible. VI, 849.

Expert, — plumber not an expert as to cause of settling of elevated pillar. VI, 857.

— testimony as to necessity of guard rail proper. VII, 942.

— effect of fog on visibility of lights not subject of. VII, 942.

(For Index to Notes, see *ante*, p. ix.)

EVIDENCE — (*Continued*).

Carlisle Mortality and Annuity Tables will be admitted in evidence without proof of their correctness. I, 57.

Carlisle tables, — error to admit when injuries not permanent. III, 772.

Expert, — evidence of insurance expert as to expectancy of life of child killed by car competent. VIII, 378.

Age of grandparents and ancestors competent in action for death of child. VIII, 378.

Examination of plaintiff's injuries before jury, — when court may refuse request of defendant. VII, 190.

Personal examination, — in the federal jurisdiction plaintiff cannot be made to submit to an examination by a physician. IV, 83.

Mental condition of plaintiff before and after the accident may be shown, and that by non-expert witnesses. III, 142.

Mental capacity of child, properly excluded where not pleaded, may be shown in rebuttal. IV, 254, 259.

After effects, — proper to show probable after effects of injury. III, 859.

Injury to horse, — evidence showing disposition of horse before and after admissible as to value. II, 1.

Nurse hire, — evidence as to amount admissible though no specific sum alleged. I, 506.

Loss of support by wife, — evidence as to how husband lived following year without support or services of wife properly excluded. III, 54.

Loss of profits of boarding house kept by wife, — estimates of profits may be introduced. III, 54.

Amount of doctor's bill for attendance on plaintiff, witness' son, held inadmissible. V, 603.

Widow of deceased may testify as to number of children. VII, 434.

Value of services for years after death of child killed by car competent. VIII, 378.

Father's salary and financial ability to educate child killed by car competent. VIII, 378.

Judges, — objectionable remarks by. V, 146.

Language of counsel in regard to inadmissible evidence not ground for reversal when jury was not influenced. I, 627.

Language of attorney as to excluded testimony held ground for reversal. II, 662.

Negligence, — insufficient evidence as to negligence of motorman in handling car. III, 625.

— sufficiency of evidence as to. V, 763.

— of plaintiff, — testimony of witness for plaintiff that the latter's negligence contributed to the injury is not conclusive on the plaintiff. I, 394.

Presumption of negligence, — proof of injury not sufficient to raise. III, 588.

Proof of condition of intoxicated passenger alighting at dangerous place, — admissibility of. VI, 628.

Evidence of intoxication is competent to show contributory negligence. IV, 991.

(For Index to Notes, see *ante*, p. ix.)

EVIDENCE — (*Continued*).

Reputation of motorman for incompetency and recklessness may be shown. I, 89.

Conductor's character, — evidence as to properly rejected when incompetency not alleged. III, 901.

Acquittal of crime where wantonness in issue, — evidence as to admissible. III, 622.

Wanton conduct of employee, — evidence as to held sufficient. V, 22.

Statutory requirements, — violations of in construction of railway not admissible where not pleaded. III, 689.

Ordinances declaratory of rules of law are inadmissible. III, 234.

Ordinance prohibiting persons jumping on or off moving cars is admissible to show contributory negligence. III, 833.

Ordinance requiring warning at crossings admissible though not pleaded. VI, 605.

Violation of a speed ordinance is not evidence of negligence. V, 337.

Speed ordinance admissible. IV, 651.

Ordinance, — admission of amendment without objection instead of original not reversible error. IV, 1005.

Recommendation of railroad commissioners as to a safeguard, admissible. II, 797.

Regulations of the company as to method of operation of cars is competent; but their rejection without prejudice is not reversible error. I, 854.

Regulations of company requiring motormen to stop at a certain place not relevant when plaintiff was unaware of them. I, 273.

Rule of company requiring car to stop where passenger was injured admissible. II, 999.

Rule of company to stop car at railroad crossing, and for conductor to go ahead and signal for start of car, competent as bearing on question of negligently starting car. IV, 197.

Rule of company as to use of doors by passengers and care in use of doors by employees, admissible. VIII, 770.

Schedule of time, — admission of is not prejudicial to defendant. III, 943.

Rule of defendant prohibiting cars passing on curves admissible to show negligence. VIII, 52.

Rules of company for safety of third persons, — violation may be shown to show negligence of motorman. II, 435.

Rules of company requiring car to yield right of way to fire apparatus admissible as to question of negligence. IV, 205.

Motorman, — evidence of duties of motorman are admissible to show that he recklessly disobeyed conductor's orders. III, 943.

Refreshing memory, — conductor may refresh memory from report written at the time of the accident. III, 757.

Privileged communications, — question of not raised as to certain documents prepared by defendant's motorman. VIII, 414.

Report of accident, — company may be compelled to produce in jurisdictions where adverse party may be compelled to testify. IV, 120.

(For Index to Notes, see *ante*, p. ix.)

EVIDENCE — (*Continued*).

- Discovery of papers is limited to those pertinent to the issue and does not include a confidential report by company employees. IV, 893.
- Records of company showing incompetence of employees admissible. V, 504.
- Failure to ring bell at other street crossings than where accident took place may not be shown. I, 759.
- Gong, — evidence as to gong being defective admissible on question of plaintiff's care. VII, 802.
- Automatic bell at crossing, — evidence of operation at indefinite periods before accident admissible. VIII, 236.
- Use of fenders, — improper to ask question as to use of fenders when no testimony introduced to show improper equipment or law or ordinance requiring use. I, 21.
- Distance of trolley pole from track, admissibility of evidence as to. I, 240.
- Couplers, — evidence as to kind used may be given by experienced motorman. III, 6.
- Unusual noise or motion of car, — evidence as to admissible. III, 711.
- Electrical appliances of car, — evidence as to admissible. VII, 215.
- Use of handhold inadmissible as obvious. VIII, 228.
- Pressing down of sand-plunger by motorman after accident may be shown. VIII, 318.
- Stopping car, — admissibility of evidence as to. V, 19.
- competency of showing means of. I, 57.
- distance within which car can be stopped, — propriety of question as to. I, 57.
- distance within which car can be stopped, expert testimony as to. I, 434.
- expert testimony may be introduced to show distance within which a car may be stopped. III, 226.
- expert evidence as to distance within which car may be stopped. VII, 291.
- motorman qualified to testify to distance within which car could be stopped. III, 292, 521.
- evidence as to best and quickest way to stop car admissible. VIII, 803.
- not error to allow motorman to illustrate method with his hands. VIII, 803.
- hypothetical question restricted to distance within which car containing specified passengers could be stopped, held improper. III, 521.
- hypothetical question as to distance within which car could have been stopped. VIII, 674.
- hypothetical question should exact condition of track and street and describe equipment for stopping car. III, 577.
- eye witness may testify that motorman stopped as soon as possible. IV, 1013.
- Cause of accident, — plaintiff need not show why car came to sudden stop; burden is on defendant to show freedom from negligence. III, 505.

(For Index to Notes, see *ante*, p. ix.)

EVIDENCE — (*Continued*).

Passenger frightened by electrical disturbance injured by jumping from car, — testimony as to excessive speed and incompetency of conductor admitted. IV, 303.

Speed, — qualification of witnesses as to. IV, 974.

— technical knowledge not essential to form opinion as to. II, 631.

— opinion evidence as to, admissible. II, 654.

— effect of curve on speed may be shown, and that by an expert in the running of steam railroads. I, 57.

— a civil engineer accustomed to time speed of cars, who was a passenger, is competent to testify as to speed of the car. I, 635.

— cross-examination of motorman as to speed of particular car in comparison with others. I, 821.

— of car may be shown by opinion of witness. VIII, 551.

— occupant of vehicle struck by a car is competent to testify as to speed of car, though not an expert. IV, 581.

— general knowledge of witness as to speed cars are run at in city held admissible. IV, 43.

— error to permit plaintiff to testify as to speed that "it looked very fast." III, 11.

— evidence as to speed of cars at same place ten days before admissible. II, 231.

— evidence of speed at which car started admissible. III, 126.

— lateness of car inadmissible to prove speed. VII, 942.

— where motorman is shown to have dashed through parade at high rate of speed wilful misconduct has been shown. III, 943.

— municipal ordinance regulating speed of cars admissible. II, 654.

— speed ordinance not admissible in absence of evidence that it was in force at time of accident. III, 460.

— evidence as to violation of speed ordinance, though not pleaded, is proper as bearing on question of general negligence. III, 572.

— witness testifying that car passed at rate of eighteen or twenty miles an hour may be asked by the court whether speed of car was subject of comment by himself or others to test his credibility. VIII, 667.

— evidence sufficient to find speed of car was as found. IV, 1072.

— answer to hypothetical question as to, properly ruled out. IV, 521.

— answer of witness supporting contention as to excessive speed held not incompetent because not responsive. II, 662.

Physical facts, — evidence as to held insufficient to refute plaintiff's evidence. III, 558.

Grades, cuts and curves of railway may be shown to show situation at point of accident. VI, 674, 697.

Grades, cuts and curves of railway may be shown to disprove contributory negligence. VI, 697.

Condition of pavement where deceased drove across tracks admissible. VII, 291.

(For Index to Notes, see *ante*, p. ix.)

EVIDENCE — (*Continued*).

Map of locality may be admitted in evidence as well as questions thereon. I, 553.

Locus in quo thickly populated, — evidence as to admissible. VIII, 803.

Photographs, — admission is within the discretion of the court. III, 323.

— showing physical conditions at time of accident admissible. VI, 106.

— of scene of accident taken some time after admissible. VIII, 236.

— and diagrams of place of accident are admissible. VIII, 855.

Model to illustrate position of tracks and platform admissible in discretion of court. VII, 96.

Condemnation proceedings, — jury must determine to what witnesses they will give the most credence. IV, 285.

Eminent domain, — competency of evidence to show diminution of value of property. IV, 478.

— testimony as to damage. IV, 480.

Rules of in action by abutting owner on construction and operation of elevated railroad. I, 78.

Ownership of railroad, — proof of. V, 666.

Ownership of road by defendant must be proved. VII, 906.

Notice to company as to condition of street crossing it had torn up and was bound to relay, admissibility of. I, 121.

Justification for plaintiff's leaving car while in motion may be shown. I, 790.

Age and size of parties, — evidence as to competent in action for assault by conductor. II, 5.

Passenger, — fact that boy had twenty cents with him is competent to show he intended to become a passenger and not to steal a ride. IV, 183.

Time, — evidence as to hour of day when crossing most used admissible. VIII, 803.

Identity of defendant, — evidence admissible to show. VIII, 772.

EXECUTION AGAINST PERSON. (*See Passenger.*)

EXPRESS COMPANY.

Employing electric railway for transportation purposes is a common carrier; railway may limit its express business to a single company. V, 363.

EXTENSION. (*See Franchise.*)

What constitutes, — construction of an entirely new road for a distance of seventy miles, which will become the main line, is not an extension. III, 725.

Construction of line to carry high-tension current, — when not extension; consent of public service commission. VIII, 92.

Extending franchise of main line not extension of branch line; consolidation does not extend franchise of consolidated company. V, 810.

Construction of tracks in streets where tracks are already authorized, under the statute. I, 721.

(For Index to Notes, see *ante*, p. ix.)

EXTENSION — (*Continued*).

Certificate of public convenience and necessity under the New York statute. II, 762; III, 725.

Filing exemplification of record authorizing under the statute. I, 721.

Ordinance authorizing construction of loop construed. VIII, 755.

FALSE IMPRISONMENT. (*See Passenger.*)

FARE. (*See Abutting Owners; Child; Constitutional Law; Franchise; Passenger; Tickets; Transfers.*)

Rate of fare is a question for determination of legislature, not of courts. V, 718.

Legislature of New York has power to fix. VII, 574.

Ordinance regulating held within power of city. VIII, 575.

Town selectmen in granting location to railway may not fix rate of fare under the statutes. II, 450.

Franchise containing conditions as to fare imposes a contractual obligation. III, 856.

Contract with village for reduced fare on grant of additional franchise construed. VIII, 421.

Railway subject to franchise granted by village notwithstanding franchise granted by a town. I, 366.

Limit within boundaries of city applies to territory thereafter added to city. VII, 889.

Ordinance regulating within city limits applies to territory annexed to city. VII, 945.

Merger of cities and towns in Greater New York did not change obligations as to fares. VIII, 106.

Consolidation, — effect of on rates of fare. III, 707.

Interurban railway not authorized to raise fare on purchase of competing lines under conditions of franchise. V, 515.

Five-cent fare on street surface railroads not applicable to leased steam or elevated roads. V, 718.

Rate as fixed on assets of consolidated railway. VIII, 117.

Agreement between railroad and street railroad that former will not reduce rates during a limited period is not contrary to public policy. III, 636.

Rate, time, place and manner of payment, — right of company to adopt rules for. V, 837.

Regulation of company held reasonable which required payment of additional fare on changing from motor to trailer. V, 1.

Reasonableness of rule requiring passenger to pay another fare if he leaves the station platform. VI, 850.

Rule of company prescribing \$2 as maximum amount for which conductor will make change, held reasonable. VI, 447, 592.

Passenger tendering ten-dollar bill in violation of rule of company may be ejected. V, 837.

Worn coin, — tender of. VII, 114.

(For Index to Notes, see *ante*, p. ix.)

FARE — (Continued).

- Canadian coin, — passenger ejected from on tendering held wrongfully ejected. VIII, 762.
- Extra fare may not be collected on ground that railway is acting as agent for bridge company. VII, 574.
- Excessive, — company not liable for charge of excessive fare when made in good faith. II, 807.
- Penalty for overcharge, — exemption under New York statute applies to mistake not amounting to gross negligence. IV, 828.
- Action by township for noncompliance as to rates, — abutting owners not proper parties. III, 769.
- School children's fares, — public schools include what. VIII, 441.
- Ordinance requiring half-fare for pupils construed to include students in business college. V, 841.
- Intersecting lines, — railways held intersecting lines and required to give "labor tickets" and transfers. III, 856.
- Interurban company required to sell family tickets on cars under conditions in franchise. V, 515.

FELLOW SERVANT. (See *Employee*.)

FENCES.

- Railway not liable for failure to fence right of way under the New York statute where highway intervenes between railway and land. III, 708.
- Interurban railway required to fence right of way under the statute even where located in highway. V, 577.

FENDERS. (See *Appliances; Constitutional Law; Evidence; Passenger; Pedestrian*.)

FIRE.

- Cutting hose across track by car held proximate cause of loss by fire. III, 21.

FIRE APPARATUS. (See *Constitutional Law; Evidence*.)

- Right of way, — driver of truck may assume that motorman will give him right of way. II, 781.
- Crossing track struck by car, — relative rights in use of streets; duty of driver and motorman. VIII, 597.
- Injury to fireman riding on truck by collision with car; conduct of firemen to be judged by their knowledge of a provision of the city charter giving them right of way. I, 581.
- Ordinance giving fire apparatus right of way admissible; construction of ordinance. V, 296.
- Ordinance giving right of way to, not applicable where passenger injured in collision of fire apparatus with a car. VII, 341.
- Fire engine crossing track struck by car hidden by obstruction, — contributory negligence of driver a question for the jury. IV, 205.

(For Index to Notes, see *ante*, p. ix.)

FIRE APPARATUS — (*Continued*).

- Crossing track in front of stationary car which suddenly started up, — contributory negligence of driver a question for the jury. III, 580.
- Crossing track struck by car, — contributory negligence question for jury. VII, 921.
- Injury to fireman riding on fire apparatus by collision with car; contributory negligence; due care. I, 198, 821.
- Colliding with car, — contributory negligence of fireman remaining on truck about to collide with car. VIII, 674.
- Struck by car, — care required of driver; violation of city ordinance by railway; contributory negligence question for jury. VIII, 463.
- Look and listen, — rule as to length of time plaintiff is required to look and listen. I, 821.
- Hose wagon struck by car, — negligence of motorman. VI, 440.
- Colliding with car, — negligence of motoneer. VI, 290.
- Presumption in favor of driver in assuming conduct of defendant's servants. I, 821.
- Speed, — rule as to what plaintiff is expected to know of the speed of an approaching car. I, 821.
- Sound of gong of fire vehicle, — efficacy question for the jury. I, 821.
- Imputed negligence, — negligence of driver not to be imputed to hoseman riding on cart. V, 296.
- Struck by car, — negligence question for jury; negligence of driver not imputed to plaintiff. VI, 752.
- Rules of fire department issued to members only, not admissible. V, 296.
- Fireman getting into wagon injured by collision with trolley pole in street, — negligence in locating pole question for jury. VI, 537.

FIREMEN. (See *Fire Apparatus*.)

FRANCHISE. (See *Constitutional Law; Construction of Railway; Extension; Fare; Lease; Monopoly; Passenger; Railroad; Removal; Streets and Highways; Transfers*.)

- Construed strictly. V, 810.
- Municipality may not grant greater powers than allowed by statute. VII, 574.
- Municipality may not enlarge powers given by charter. VIII, 588.
- Grant of franchise by a municipal council is a legislative, not judicial, function. I, 808.
- by municipal corporation, — nature of. V, 343.
- power of municipality. VI, 780.
- quorum of municipal council necessary to take action; illegal voting in council. I, 808.
- authority of common council under the statute; ordinance not subject to revision because of inexpediency or impropriety. I, 834.
- parol evidence admissible to show council had not convened in spite of the record of proceedings. I, 808.

(For Index to Notes, see ante, p. ix.)

FRANCHISE — (*Continued*).

Grant of franchise, — restrictions in ordinance held reasonable, and after long use of privileges railway and its successors are amenable. IV, 719.

— conditions imposed by vote of electors are not binding on selectmen. I, 303.

— does not confer right to erect signal tower in street. V, 42.

— ordinance does not affect rights of abutting owners to compensation as condition precedent to placing tracks. I, 834.

Granted pending an injunction is void. IV, 24.

Conflicting grants, — subsequent grantee may not interfere materially with first grantee's use of street. II, 808.

Time for construction, — connecting lines may be constructed after expiration of time prescribed for construction of railway. II, 487.

— action by township not required to complete forfeiture when road not constructed within time allowed. III, 769.

— where time has expired a state of facts excusing delay must be shown; an injunction against building a small part of the line is not a sufficient excuse. IV, 176.

Condition that unless company constructed an authorized extension within one year all franchises granted be void, held reasonable. I, 679.

Extension, — designation of additional streets for laying tracks is not an extension of period during which rights under original franchise were made exclusive. II, 260.

— resolution of city council when duly adopted. II, 260.

— of corporate existence under New Jersey statute. IV, 761.

Notice of application for franchise under the statute, requirements, purpose and publication. I, 806.

Certificate of necessity; injurious competition by paralleling steam railroad. VI, 855.

Ordinance requiring railway to obtain permit and give bond before commencing work does not interfere with franchise. V, 602.

Construed as to what streets may be used thereunder. VII, 261.

Granting use of street is exclusive to all others desiring to use the street for a similar purpose. VII, 261.

Abandonment, — acts not amounting to. IV, 873.

Forfeiture for nonuser, — adjudication that defective rails constitute a nuisance does not effect a forfeiture. VII, 531.

Forfeiture, — action for must be brought by attorney-general. VII, 531.

Lapse of because of non-acceptance, — acceptance essential to vesting of grant. VIII, 588.

Assignment, — obligations imposed on assignee. III, 31.

Authorizing construction of switch over sidewalk, — ordinance construed; not invalidated because of smallness of charge. V, 363.

Condition; removal of tracks to center of road; forfeiture; compliance impossible. V, 818.

(For Index to Notes, see *ante*, p. ix.)

FRANCHISE — (*Continued*).

Payment of bonus and tax on cars used; contract to make certain payments in lieu of amounts required under franchise; payments, when due; interest. VIII, 716.

Money deposited with city by prospective railway to cover cost of paving may be recovered when franchise expires without railway being constructed. VII, 945.

Rights of certain railroads in Atlantic avenue in New York City. VII, 393.

Connection of suburban lines authorized under franchise to construct railway through streets of certain villages of county. II, 487.

Extension of city boundary held to have deprived county of jurisdiction over railway. III, 19.

Traction companies act of New Jersey authorizes acquisition and operation of street railway being operated without legal authority. V, 699.

FREIGHT CARS. (*See Cars.*)

FRIGHT OF HORSES. (*See Animals.*)

FUSE. (*See Appliances; Evidence; Passenger; Presumption.*)

FUTURE SUFFERING. (*See Damages; Evidence.*)

GONG. (*See Appliances; Child; Evidence; Passenger; Pedestrian; Vehicle.*)

GOVERNMENT OWNERSHIP. (*See Constitutional Law.*)

GRADE CROSSING. (*See Crossing Railroad by Street Railway.*)

HEADLIGHT. (*See Appliances; Biocyclist; Evidence; Pedestrian; Vehicle.*)

HIGHWAYS. (*See Streets and Highways.*)

HORSE. (*See Animals; Vehicle.*)

HUMANITARIAN DOCTRINE. (*See Animals; Biocyclist; Child; Employee; Passenger; Pedestrian; Vehicle.*)

IMPUTED NEGLIGENCE. (*See Child; Vehicles.*)

INDEPENDENT CONTRACTOR. (*See Employee; Passenger.*)

INFANT SUI JURIS. (*See Child.*)

INJUNCTION. (*See Abutting Owners; Construction of Railway; Tracks.*)
Suit on injunction bond; recovery. VI, 253.

(For Index to Notes, see *ante*, p. ix.)

INSOLVENCY.

Receiver only necessary party defendant in action to abate nuisance. VII, 531.

INSTRUCTIONS TO JURY. (See *Appliances; Bicyclist; Child; Damages; Employee; Evidence; Fire Apparatus; Passenger; Pedestrian; Speed; Tracks; Vehicle.*)

General instruction, — where court has instructed generally as to rights of parties, it may refuse to instruct as to a general proposition of law. III, 70.

Scope of charge, — instructions to jury should be limited to facts and the rules of law which apply. I, 854.

Instructions can be made only on issues raised by pleadings and evidence. IV, 906.

Properly refused where not directed to any issue raised. IV, 266.

Pleadings, — instructions must conform to. VIII, 656.

Court must charge contentions of either party when in issue. V, 146.

Instruction need not state all the law of the case. IV, 199, 202.

Instructions omitting essential facts or elements are erroneous where verdict directed. VIII, 145.

Instructions undertaking to make prominent certain testimony are not favored. IV, 651.

Request to charge may be denied when subject covered by other instructions. IV, 651.

Charge fully covering requests need not be in exact language requested. I, 57.

Covering same ground, — properly refused. III, 323.

Inconsistent propositions presented. III, 234.

Inconsistent theories of negligence presented. III, 472.

Negligence, — proper instruction as to when negligence may be found. III, 23.

— erroneous charge as to when act not declared negligence by statute. III, 75.

Proximate cause, — vague and confusing instruction as to. I, 838.

Abstract, — instructions held erroneous as abstract. IV, 35.

Misleading instruction is properly refused. IV, 128.

Contradictory should not be given. VIII, 352.

Instructions are not to be considered as distinct propositions of law, but are interdependent members of the entire charge. IV, 208.

Referring to several counts of declaration, though no evidence to sustain some of the counts, is not improper though not approved. VIII, 470.

Requests for not put in separately may be all refused if one bad. VIII, 699.

Peremptory instructions, — what court is to consider on motion for. IV, 259, 262.

Nondirection not error. V, 632, 649.

Improper instruction prejudicial to successful party is not ground for reversal. I, 492.

(For Index to Notes, see *ante*, p. ix.)

INSTRUCTIONS TO JURY — (Continued).

- Clerical omissions and verbal inaccuracies do not constitute reversible error. IV, 292.
- Erroneous when not harmless. IV, 1032.
- Province of jury is invaded by an instruction that facts constitute *prima facie* proof of negligence in absence of statutory expression. IV, 151.
- Presumption that jury followed instructions. IV, 1077.

INTERURBAN RAILWAY. (See *Abutting Owners; Additional Servitude; Railroad.*)

INTOXICATION. (See *Employee; Evidence; Passenger; Pedestrian; Vehicle.*)

JOINT DEFENDANTS.

- Action against street railway and driver of vehicle for injury to pedestrian on sidewalk by vehicle thrown against him by car proceeding around curve. VIII, 647.

JOINT JUDGMENTS.

- Reversal as to one defendant does not involve reversal as to others. III, 86.

JOINT TORT FEASORS.

- Non suit properly granted when two railways were sued jointly but no joint relation was shown. III, 754.

JUDICIAL NOTICE. (See *Evidence.*)

JURISDICTION. (See *Constitutional Law.*)

- Right of plaintiff to recover is governed by *lex loci* and not by *lex fori*. V, 72.
- Law of place of accident governs. VIII, 597.
- Court of equity may not interfere with prosecution of criminal offenses under an ordinance. V, 156.
- Local decisions are persuasive in action in federal court. V, 445.

JURORS.

- Qualifications, — relations that do not disqualify. I, 246.
- Taxpayers are not disqualified in an action by city against railway. I, 372.
- Drawing, — validity of proceedings considered. I, 246.
- Discretion of court not abused under the statute. VIII, 853.

LACHES. (See *Abutting Owners.*)

LAST CLEAR CHANCE. (See *Animals; Biocyclist; Child; Employee; Passenger; Pedestrian; Vehicles.*)

(For Index to Notes, see *ante*, p. ix.)

LEASE. (See *Eminent Domain; Taxation.*)

Traction company leasing street railway and operating same on its own account enjoys privileges and becomes subject to liabilities of street railway. I, 717, 726.

Liability of lessor for negligence of lessee's employees. VI, 42.

Liability,— a leased railroad is liable for negligence whether operated by itself or the lessee. II, 341.

Lessor not liable for negligence of employee of lessee. VI, 738.

Liability of assignor of lease for negligence of assignee. V, 784.

Station,— company using station under a lease is responsible for injuries to passenger occurring there. V, 385.

Right of railway to occupy street under lease from company whose corporate existence has terminated. IV, 761.

Lease of tracks,— leasing company has right to use tracks. I, 686 (No. 2).

Use of tracks,— use of cars by lessee heavier than authorized by the contract is a violation thereof. III, 709.

Street railway may lease its railway to a traction company. I, 726.

Contract between railway construed to be a lease and not one creating agency or partnership. VI, 42.

Defendant lessee,— pleadings may be amended to substitute. III, 410.

Municipal consent to lease of street railway. VI, 42.

License fee imposed on each car under the statute,— lessee is liable for. II, 704.

Lease of street railway construed; liability of sub-lessee for taxes; covenant by lessee to pay franchise taxes. VIII, 711.

LIGHTS. (See *Appliances; Bicyclist; Child; Employee; Evidence; Passenger; Pedestrian; Vehicle.*)

LOOK AND LISTEN. (See *Bicyclist; Child; Evidence; Fire Apparatus; Passenger; Pedestrian; Vehicle.*)

MAIL CARRIER.

Injured by falling into pit at company's barns where he had gone to collect mail from car according to arrangement,— company must furnish safe access to cars; negligence and contributory negligence questions for the jury. IV, 292.

MASTER AND SERVANT. (See *Employee.*)

MOBS. (See *Passengers.*)

MONOPOLY. (See *Consolidation.*)

Contract whereby railway agrees to abandon its franchise rights gives to the other company a monopoly and is against public policy. VIII, 326.

(For Index to Notes, see *ante*, p. ix.)

MORTGAGE.

Payment of current debts; application of proceeds of mortgaged property. I, 37.
Relief of mortgagees of property of railroad where value of property is deteriorated by lease of a portion thereof. IV, 738.
Deed on foreclosure of property of street railway; merger. VIII, 839.

MOTORCYCLE. (See *Vehicle*.)

MOTORMAN. (See *Animals; Appliances; Bicyclist; Child; Employee; Evidence; Fire Apparatus; Instructions to Jury; Passenger; Pedestrian; Pleadings; Speed; Starting and Stopping Car; Vehicle*.)

MULE. (See *Animals*.)

MUNICIPAL OWNERSHIP. (See *Constitutional Law*.)

NEGLIGENCE. (See *Animals; Appeals; Appliances; Bicyclist; Bridge; Child; Collision; Contributory Negligence; Crossing Railroad by Street Railway; Damages; Electricity; Employee; Evidence; Fire; Fire Apparatus; Instructions to Jury; Ordinances; Passenger; Pedestrian; Pleadings; Speed; Tracks; Transfers; Vehicle*.)

Defined. VIII, 68, 76.

Actionable negligence defined. VIII, 38.

Presumption of negligence; burden of proof. VIII, 68, 76.

Ordinance, — violation as ground for inference of. VII, 341.

When question of law or fact. V, 83.

Functions of court and jury as to. VII, 834.

When question of fact for jury. VIII, 52, 68.

Negligence is a question of law where facts are undisputed. I, 234.

Where personal injuries result in part from the negligence of the defendant, and in part from plaintiff's voluntary intoxication, but such intoxication is not a contributory cause of the injury, the plaintiff may recover for the injuries that he would have suffered if sober. VIII, 679.

NEGROES. (See *Damages; Evidence; Passenger; Pleading*.)

NEWSBOY. (See *Child*.)

NEW TRIAL.

Order granting new trial will not be disturbed if it could have been granted on any of the grounds assigned. I, 19.

Where no exceptions are shown to have been taken to judge's denial of motion for new trial, court cannot consider merit of motion. IV, 128.

Cumulative new evidence not cause for. IV, 44.

Evidence not so inherently improbable as to require granting of new trial. I, 413.

(For Index to Notes, see *ante*, p. ix.)

NEW TRIAL — (*Continued*).

Verdict contrary to law and evidence, — held not error to refuse new trial on such grounds under the evidence. I, 57.

Motion for new trial and time for filing bill of exceptions under the statute. I, 128.

NOISE. (See *Animals; Damages.*)

NOTICE.

Statutory notice of injury not necessary when condition of pavement due to defendant's own act. IV, 451.

Notice of injury not required under the statute where place of accident is private property of defendant. I, 323.

Notice of injury by married woman is sufficient in action by husband. III, 50.

NUISANCE. (See *Cars.*)

ORDINANCE. (See *Animals; Appliances; Constitutional Law; Construction of Railway; Dust; Employee; Evidence; Franchise; Negligence; Passenger; Pedestrian; Speed; Starting and Stopping Car; Streets and Highways; Train Service; Transfers; Vehicle; Vigilant Watch Ordinance.*)

ORDINARY CARE. (See *Animals; Care, Degree of; Child; Employee; Passenger; Pedestrian; Vehicle.*)

PARK. (See *Eminent Domain.*)

Railway company is bound to protect persons in an amusement park maintained by it. II, 245; III, 906.

Railway company not liable for negligent setting off of fireworks by servants of contractor employed by railway in an amusement park maintained by it. III, 725.

Person waiting for car thrown under car by crowd at amusement park conducted by railway, — negligence in not providing railing, barriers, etc., a question for the jury as was plaintiff's contributory negligence. IV, 500.

PASS. (See *Employee; Passenger.*)

Issued to policeman, — not given for consideration. V, 832.

PASSENGER. (See *Appliances; Child; Damages; Employee; Evidence; Fare; Fuse; Pedestrian; Pleadings; Stations; Tickets; Transfers.*)

Falling from crowded car, — jury justified in finding for plaintiff from the evidence; degree of increased risk assumed in riding on a crowded car. I, 838.

Permitting large number of passengers to occupy car not negligence *per se*. VII, 445.

(For Index to Notes, see *ante*, p. ix.)

PASSENGER — (*Continued*).

- Compelled to transfer to "car ahead,"—no actionable breach of carrier's contract. VI, 861.
- Notice by conductor to transfer when car is stopped is notice that car is stopped for purpose of transfer. I, 281.
- Kicked by horse of horse car after it had fallen,—negligence in driving horse too fast held not the proximate cause. II, 801.
- Injured by conductor falling against her,—company liable for his incompetency. III, 341.
- Ordinances,—violation is negligence *per se*. III, 582.
- Injured by being crowded over ticket-chopping box,—company held not negligent. III, 710.
- Injured by flames from burning house near track,—company held negligent. III, 852.
- Standing between tracks, struck by person boarding moving car,—negligence of plaintiff question for jury. IV, 840.
- Crossing tracks in front of car assuming car would stop at station,—contributory negligence. V, 769.
- Signal light as invitation to cross tracks; contributory negligence. VI, 278.
- Failure to furnish seat,—negligence question for jury. VI, 489.
- Injured on defendant's car operated on tracks of connecting line,—defendant held liable. VI, 789.
- Separated from baby by sudden starting of car after she had placed it on car,—injuries received through exposure to rain in efforts to recover child proximate result of defendant's negligence. VII, 65.
- Injured by giving way of culvert maintained by municipality and railway,—latter held liable. VIII, 244.

Alighting from Car.

- Care required of company. VI, 795.
- Not having become a passenger,—defendant was bound to use ordinary care only. IV, 474.
- Injured,—negligence and contributory negligence questions for jury. VIII, 654.
- VIII, 670.
- Passenger injured in attempt. VIII, 703.
- Opportunity for passengers to alight is a more onerous duty by street railway than steam railway should not have been given to jury as an instruction. I, 14.
- Injured when car was run into by another car,—answer that husband of plaintiff saw impending danger and failed to give warning insufficient. VII, 714.
- Car starting when she is alighting makes *prima facie* case of negligence. I, 281.
- Injured by sudden start,—*facie* evidence of negligence under the rule of *res ipsa loquitur*. IV, 1049.
- *prima facie* case of negligence made out. IV, 81.
- VIII, 740.

(For Index to Notes, see *note*, p. ix.)

PASSENGER — (Continued).

Alighting from Car — (Continued).

Injured by sudden start, — evidence sufficient to justify finding of negligence. III, 849.

— company though not an insurer must use highest degree of care. III, 861.

— proper instruction as to degree of care. IV, 207.

— contributory negligence a question for the jury. III, 142, 715, 860.

— degree of care to be used by passenger question for the jury. III, 715.

— intoxication as contributory negligence. VI, 784.

— company liable if car was stopped even though she was not alighting at regular stopping place. III, 282.

— it is the conductor's duty to ascertain if passenger has alighted before starting car. III, 230, 472.

Injured by sudden jerk, — negligence. VI, 790.

About to alight thrown by sudden jerk of car, — presumption of negligence held to arise. IV, 82.

Thrown from car by sudden jerk; cannot recover in absence of evidence as to cause of jerk. III, 450.

Injured by sudden start of car stopped at railroad crossing, — negligence of company. VI, 803.

Injured by starting of car, — negligence of defendant not shown. VII, 592.

Injured by sudden start where car had stopped at railroad crossing and conductor gone ahead, — case properly submitted to jury. IV, 788.

Injured by premature start, — defendant held negligent. V, 648.

— negligence and contributory negligence questions for jury. VIII, 501.

— railway held not an insurer of passenger's safety. IV, 42.

Thrown by sudden start, — negligence of conductor who had issued transfer to plaintiff to be used at a point further on is a question for the jury. IV, 684.

Injured because of premature start, — care required of defendant's employees. VIII, 402.

And crossing platform of car blocking way injured by sudden start of latter car, — not guilty of contributory negligence as a matter of law. IV, 853.

Suddenly starting up, — contributory negligence question for jury. I, 644; II, 731.

— not contributory negligence not to look for car on other track. II, 626.

Attempting to save herself on car suddenly starting is not guilty of contributory negligence. II, 624.

Thrown from car by lurch, — negligence; contributory negligence; duty to assist passenger to alight. VII, 453.

Injured by starting of car, — negligence; contributory negligence. VII, 197.

— erroneous instruction as to weight of evidence. III, 663.

(For Index to Notes, see *ante*, p. ix.)

PASSENGER — (Continued).

Alighting from Car — (Continued).

Claimed to have been injured by sudden start, — plaintiff's story held against the weight of evidence. IV, 852.

Stopped at unusual place, injured by sudden starting, — justified in believing she was invited to alight. IV, 517.

Thrown by sudden starting, — instructions as to plaintiff's right to recover. IV, 204.

Verdict justified when car suddenly starts up. I, 14, 30; II, 503, 900.

Thrown by sudden jerk, — jerk held incidental to ordinary running of car. IV, 520.

Stopped at railroad crossing, not a regular stop, injured by car suddenly starting, — conductor required to exercise reasonable care only. IV, 364.

In view of the facts it is error to charge that it was conductor's duty to ascertain whether passenger was in perilous position or alighting before the car started. I, 14.

Court should refuse to instruct that if car stopped a reasonable time defendant was not bound to look after the movement of all its passengers. I, 793.

Questions of negligence of conductors in giving signal to start before plaintiff had alighted and contributory negligence of plaintiff are for the jury. II, 456.

Conductor must do more than wait a reasonable time. V, 411.

Reasonable time should be allowed. II, 624.

Duty of company to take precaution that no one is in the act of, before starting car. II, 927.

Thrown by sudden acceleration of speed, — duty of operators of car; contributory negligence. VI, 206.

Injured by premature start, — duty of employees to ascertain safe position of passenger. VII, 846.

— conductor must see that no passenger is alighting before starting. IV, 42.

— degree of care required of company; time of stoppage; negligence of conductor. VI, 350.

— if signal is given by a third person plaintiff cannot recover in the absence of proof of negligence. III, 716.

Without notifying conductor of intention, — defendant held not negligent. II, 441.

Stopped car without knowledge of conductor, — last clear chance; contributory negligence; acts in emergencies. VII, 103.

Injured by sudden start, — company not liable if signal given by unauthorized person. IV, 977.

Injured when signal given by another passenger, — defendant not negligent. VI, 803.

Warning posted in car that cars stop at cross streets does not excuse negligence of conductor when car has stopped elsewhere for passenger to alight. I, 273, 281.

(For Index to Notes, see *ante*, p. ix.)

PASSENGER — (*Continued*).

Alighting from Car — (*Continued*).

Thrown by too sudden stopping of car, — duty to stop on request of passenger; care required toward passenger. VII, 414.

Injured by sudden stop, — if proper care was exercised by conductor and motorman plaintiff cannot recover. IV, 561.

While in motion is *per se* negligence. I, 697.

While in motion constitutes contributory negligence. II, 927, 988.

Slowly moving car, — contributory negligence question for the jury. IV, 398.

While in motion, — jury may find passenger not negligent when speed is slackened in response to signal to stop. III, 840.

Moving car, — evidence of contributory negligence. III, 291.

— before it reaches stopping place is negligence as a matter of law. III, 829.

— not guilty of contributory negligence as a matter of law. IV, 1049.

— contributory negligence must be proximate cause to preclude recovery. VIII, 609.

— not negligence *per se* when car going slowly, not to fail to take hold of rail before alighting. III, 141.

— negligence and contributory negligence questions for jury. VIII, 221.

— erroneous charge as to care to be used by a passenger. III, 452.

— when carried beyond destination, — duty of conductor; contributory negligence. VI, 311.

— at night, — nonsuit properly granted. III, 83.

Running at excessive speed and thrown off by sudden stopping, — erroneous charge as to negligence. III, 851.

Verdict for plaintiff reversed when preponderance of evidence showed she alighted before the car stopped. I, 602.

While in motion, — verdict for plaintiff not sustained. I, 539.

— if so nearly stopped plaintiff was justified and by motorman starting up suddenly she was thrown, recovery may be had. II, 250, 625, 626.

— held precluding from recovering for injuries. IV, 78, 79.

Duty of employee of company to listen for signal to stop. I, 780.

Descending to step while car in motion, — contributory negligence question for jury. V, 258.

Standing car is an invitation to alight; not negligence *per se* to arise and step to side of car coming to a stop. IV, 757.

Leaving seat and stepping down on running board while car in motion is assuming risk. I, 694.

Not negligence *per se* to get off by front platform or go on platform before car reaches stopping place. III, 560.

Passenger attempting to signal conductor to stop while on edge of open car held guilty of contributory negligence. I, 743.

Moving car, — ordinance providing conductor shall not permit ladies or children to leave or enter moving car construed. VII, 947.

Slipping on tobacco spit on step, — railway not negligent. VIII, 290.

(For Index to Notes, see *ante*, p. ix.)

PASSENGER — (*Continued*).

Alighting from Car — (*Continued*).

- Slipping on ice on step of car, — defendant liable. VII, 777.
- Injured by stepping on icy step. VIII, 668.
- Injured by handhold becoming detached, — negligence of company question for jury. VIII, 228.
- Injured because of failure of conductor to let down movable step, — company held negligent. IV, 301.
- Injured because of height of step from the ground, — company held not negligent. IV, 286.
- Injured by misjudging distance to ground which was two or three feet, — contributory negligence question for jury. V, 261.
- Injured when dress caught in sand-plunger, — not guilty of contributory negligence; duty of motorman. VIII, 318.
- Injured when dress caught on something not identified, — *res ipsa loquitur* held not to apply. V, 383.
- Injured when foot caught in rope attached to car, — *res ipsa loquitur* applies. VII, 748.
- Injured by foot being caught in running board, — *res ipsa loquitur* does not apply. IV, 986.
- Catching heel on step, — negligence of company in permitting projection on step. VIII, 48.
- Injured by contact with chain on rear fender, — inference of negligence. V, 709.
- At end of route and tripping over fender, — defendant not negligent. IV, 854.
- Duty of conductor to assist question for jury. VII, 365.
- When passenger should be warned or assisted is a question for the jury. IV, 1019.
- Injured by falling, — conductor need not give assistance. VII, 201.
- Statement of plaintiff's counsel that it was duty of conductor to assist plaintiff does not justify reversal. III, 290.
- Injured because of slippery step, — duty of carrier to assist active passenger; defective appliances. VI, 801.
- Duty of conductor, especially with regard to aged and infirm persons. I, 771.
- Injured by sudden start, — duty toward aged and infirm passengers. III, 231.
- While pregnant, thrown and injured. VIII, 722.
- Jumping because of explosion of controller, — *res ipsa loquitur*. VI, 812.
- Found on ground after explosion of controller, — properly nonsuited where evidence failed to show how he came there. VI, 814.
- Concurrent negligence of steam and street railroads held proximate cause where passenger jumped from car in fear of collision. IV, 1022.
- Injured by jumping or being pushed out of car when passengers frightened by explosion, — *prima facie* case of negligence made out. V, 645.

(For Index to Notes, see *ante*, p. ix.)

PASSENGER — (*Continued*).

Alighting from Car — (*Continued*).

- Jumping from car, — a well-grounded fear of collision is a justification; extent of presumption of negligence. II, 839.
- because of apprehension caused by an electric explosion, — circumstances must appear to justify such action. III, 293.
- frightened by electrical disturbance, — evidence as to justification should be left to jury; burden of proof not shifted. IV, 44.
- when frightened by explosion and injured, — company just as culpable though injuring her directly. V, 649.
- in confusion arising from breaking of span wire, — instruction that recovery could only be had if she were thrown from the car is erroneous. III, 713.
- at instance of motorman when collision with truck appeared imminent, — may recover when it is shown car could have been stopped in time; contributory negligence. VII, 585.
- in fear of collision, — negligence of motorman question for the jury. IV, 477.
- over which control has been lost, — not guilty of contributory negligence. III, 443.
- In dangerous place, — negligence; assumption of risk. VI, 210.
- when car stopped not at usual place, — company held negligent. V, 314.
- while intoxicated, — duty of defendant's servants. VI, 628.
- At dangerous and improper place, — held railway must use highest degree of care, there was implied invitation to alight, duty of knowing dangerous condition is imposed on defendant but not on plaintiff, and plaintiff was not guilty of contributory negligence. IV, 23.
- At dangerous place beyond regular stopping place, — *res ipsa loquitur* applies. IV, 22.
- Car should not be stopped at dangerous place in the road. I, 253; II, 221.
- In unsafe place, — when car stops and passenger cannot ascertain conditions company is liable. III, 83, 267.
- at invitation of conductor, — not guilty of contributory negligence. III, 559.
- after passing platform, — contributory negligence a question for the jury. III, 332.
- after passing station, — company held liable. III, 332.
- Transferring to another car at night, injured by stepping into hole dug for trolley pole, — company held negligent. V, 58.
- Stepping into depression, — negligence and contributory negligence questions for jury. V, 50.
- company must furnish safe place to alight. IV, 987.
- no presumption of negligence on the part of the company. VIII, 773.
- Injured by stepping into depression, — finding that depression was of such character as to charge defendants with negligence, against weight of evidence. VII, 937.

(For Index to Notes, see *ante*, p. ix.)

PASSENGER — (*Continued*).

Alighting from Car — (*Continued*).

- Should have been notified of yielding nature of place. I, 323.
- And falling into gutter, — held guilty of contributory negligence. IV, 478.
- Injured by stepping into gutter, — conductor not negligent in failing to give warning. V, 380.
- Injured by stepping on yielding ground, — defendant not liable. V, 434.
- And falling over spur track obscured by weeds, — company liable for dangerous condition. VII, 219.
- Carried beyond destination, — act of company not proximate cause of injury by fall on icy sidewalk while returning. II, 548.
- and alighting on rough spot, — act of company not proximate cause of injury. II, 622.
- and injured in dangerous place while walking back in the darkness, — negligence of conductor held proximate cause. IV, 220.
- company liable for injuries sustained in walking back. V, 324.
- After being carried beyond stopping place and injured returning, — company not liable. VI, 602.
- From subway and stepping into space between car and platform, — held not to have exercised due care and company not negligent. IV, 439.
- Plaintiff stepped off backward from car stopped at unusual place where car was high above pavement, defendant held not negligent. II, 863.
- Stopping car invitation to alight at such place. I, 323.
- At unusual place, — duty of defendant and passenger. VI, 482.
- Are justified in assuming that the officials have taken proper precautions for their safety. I, 253.
- And crossing parallel tracks, — failure to look and listen contributory negligence. III, 19.
- Crossing other track without stopping to look and listen, — guilty of contributory negligence. III, 259.
- Passing behind car struck by car on other track going in opposite direction, — guilty of contributory negligence. VIII, 663.
- Failure to look for car approaching on the other track is contributory negligence. II, 818.
- And crossing other track engrossed in reading a paper is guilty of contributory negligence. IV, 655.
- And crossing other track without stopping or looking is guilty of contributory negligence. IV, 659.
- Struck by car on other track, — contributory negligence. VI, 810, 811, 812.
- verdict for defendant when shown that plaintiff saw car and took a chance. III, 291.
- conductor's invitation to transfer at that point was somewhat of an assurance of safety and may be taken into account in determining contributory negligence. III, 714.
- right of way in use of streets; duty of motorman approaching car discharging passengers; contributory negligence; negligence. VI, 543.

(For Index to Notes, see *ante*, p. ix.)

PASSENGER — (*Continued*).

Alighting from Car — (*Continued*).

Struck by car on other track, — strict rule as to steam railroad crossing not applicable. III, 721.

Is guilty of contributory negligence in failing to look and listen before crossing other track; rule of company that car on other track should stop does not excuse. III, 19.

Passing behind car struck by car on other track, — negligence and contributory negligence questions for jury. VII, 793.

— motorman passing standing car should have his own car under control and take precautions. V, 334.

— gross negligence for car to pass standing car in violation of ordinance; plaintiff not guilty of contributory negligence. VIII, 277.

Struck by car approaching on the other track, — held evidence sufficient for submission to the jury. II, 786.

Injured by car while crossing opposite track, — contributory negligence a question for the jury. IV, 44.

Crossing track without looking immediately before crossing, — not guilty of contributory negligence as a matter of law. IV, 854.

Transferring to another car struck by a third car, — contributory negligence question for jury. V, 646.

Falling in crossing other track at night when she knew rails projected above ground, — guilty of contributory negligence. III, 885.

Moving car on parallel track in front of car, — guilty of contributory negligence. VI, 800.

From off side of open car, — contributory negligence question for jury. VII, 219.

Crowded car, on off side, — not contributory negligence as a matter of law. VIII, 62.

Boarding Car.

Care required. VI, 796.

Care required; negligence. VI, 796.

Company is not an insurer of his safety, but must use a very high degree of care. III, 556.

Company must use highest degree of care. III, 913.

Duty of company toward. VI, 226.

Embarking are justified in acting on the assumption that the officials have taken proper precautions for their safety. I, 253.

Moving car, — duty of conductor; assumption of risk. VII, 474.

Injured by sudden start, — company must use utmost care and diligence of very cautious persons. III, 555.

— care required of defendant's employees stated. V, 340.

— when guilty of contributory negligence as a matter of law. III, 654.

— negligence of company question for the jury. III, 710.

— court properly declined to take case from jury. IV, 206.

— company held liable. III, 731.

— instructions as to actions of aged man held erroneous. IV, 841.

(For Index to Notes, see *ante*, p. ix.)

PASSENGER — (*Continued*).

Boarding Car — (*Continued*).

Injured by sudden start, — rule of company requiring cars to stop at spot admissible. II, 999.

— evidence as to admissible. II, 792.

— contradictory evidence of plaintiff's witnesses. II, 932.

Killed by sudden start, — conductor-not negligent unless it be shown he should have seen deceased intended to board car. IV, 1071.

With baby in arms injured by car starting before she was seated, — defendant held liable. VII, 939.

Injured when car is started on signal given by a passenger, — company not liable. VII, 334.

Injured by negligent starting thereof. VIII, 720.

While in motion is *per se* negligence. I, 697.

After signal to start given is contributory negligence. III, 912.

Moving car, — assumes risk when motion is the sole producing cause of the injury. III, 652.

— not necessarily guilty of contributory negligence. IV, 1032.

— fact that car was not carrying passengers and was proceeding to the shed does not make him guilty of contributory negligence. III, 558.

— when contributory negligence is and is not a defense. III, 555, 766.

— ordinance providing conductor shall not permit ladies or children to leave or enter moving car construed. VII, 947.

— after signalling for stop, — contributory negligence; greater danger in boarding trailer. VI, 509.

Failure to stop in response to signal is negligence. III, 840.

Liability of railway for failure to stop car and admit passenger. VIII, 648.

While in motion not contributory negligence as a matter of law. II, 791; III, 554.

While moving slowly, — negligence question for jury. II, 629.

— does not assume risk from sudden and negligent increase of speed. III, 557, 652.

Moving car injured, — evidence that another person boarded car after it slowed down. VIII, 733.

Slowed down by motorman, — latter must keep car under control. III, 557.

Injured, — guilty of contributory negligence as a matter of law. VIII, 662.

Crowded car, — question of contributory negligence is question for the jury. I, 157.

— not *ipso facto* negligent. VI, 794.

Crowded platform of car, pushed off, — defendant not liable. VI, 806.

Crowded under car by persons boarding it, — evidence as to similar crowds at same place on prior occasions excluded. II, 663.

Turning suddenly onto track in front of car to board car, — motorman held not negligent. IV, 339.

(For Index to Notes, see *ante*, p. ix.)

PASSENGER — (Continued).

Boarding Car — (Continued).

- Struck by another car while still on step, — invitation to board car where no regular stop; last clear chance. VIII, 569.
- Injured by contact with pole before reaching safe place on platform, — company held not negligent. IV, 390.
- From position not outside reach of car, — held guilty of contributory negligence, IV, 473.
- Injured because of unsafe approach, — defendant liable. VII, 491.
- Thrown off and run over by car on other track, — negligence; last clear chance. VIII, 205.
- Duty of conductor when car open at both sides to receive passengers. III, 762.
- From wrong side, struck and killed by another car. VIII, 741.
- At car barns, when customary for company to allow, — reasonable opportunity must be given. III, 709.
- At car barns is contributory negligence when place is unsafe. III, 887.
- At switch, — where customary public assume it is place for reception of passengers. III, 249.
- Kicked by passenger entering through window, — where such mode of entrance had been permitted for a long time, question of defendant's negligence is for the jury. III, 712.
- Injured by motorman closing gate too soon, — care required of railway toward passengers. VII, 487.
- With armful of packages, — contributory negligence is a question for the jury. III, 249.
- With armful of bundles, — not negligence. III, 913.
- Injured, — ownership of road by defendant must be proved. VII, 906.

Riding on Platform.

- Because of lack of seats, — company must exercise higher degree of care. III, 911.
- Person standing on platform negotiating with conductor for use of the car on an extra trip, though not a passenger, must be shown same care. III, 565.
- Thrown from car while rounding curve at excessive speed, — company should use ordinary care to protect him. II, 793.
- When there is room inside, — is negligent as a matter of law. III, 770.
- When room inside, — contributory negligence. VI, 808.
- Standing on platform, — freedom from contributory negligence must be shown. IV, 842, 843.
- Contributory negligence depends on whether there was room inside. IV, 953.
- Voluntarily, — should have gone inside if apprehensive of danger. IV, 850.
- Riding on front platform, — contributory negligence; negligence of driver striking stumbling horse. V, 768.
- Not negligent as a matter of law. III, 806.

(For Index to Notes, see *ante*, p. ix.)

PASSENGER — (*Continued*).

Riding on Platform — (*Continued*).

Not negligence *per se*. III, 911; IV, 188.

Standing on platform preparatory to alighting, — not negligence *per se*. V, 628.

Not negligence *per se*; right to rely on "winter door" to maintain equilibrium; sudden lurch; *res ipsa loquitur*; negligence of conductor in opening door. VI, 804.

Outside of gate on side toward the other tracks, — contributory negligence a question for the jury. II, 527.

Standing on platform and thrown from car, — contributory negligence a question for the jury. IV, 202.

Standing on platform, injured by rear-end collision, — contributory negligence question for jury. IV, 196.

The platform is not a known place of danger, and a passenger riding thereon is not prevented from recovering when servant of defendant is negligent. I, 9.

Of crowded car, — cannot recover for being thrown from car and injured when negligent operation of car is not shown. I, 240.

Standing on vestibuled platform and falling between cars, — negligence of defendant not shown. IV, 851.

And thrown from car on opening of gate, — burden is on defendant to absolve itself from presumption of negligence. II, 631.

Thrown at curve when car was started by a passenger after motorman had left his post, — motorman guilty of gross negligence. VI, 772.

Passing from rear to front car and thrown off at a curve, — held, the conductor was negligent in not warning her. IV, 188.

Standing on platform, thrown between grip car and trailer, — failure of conductor to fasten guard chain held proximate cause. V, 632.

Riding on front platform with sanction of defendant's employees, thrown by car rounding curve too rapidly, — may rely on gates; duty to slow down at curve. VII, 883.

Falling from platform and killed because of gate not being securely fastened, — burden of proof as to what happened to the gate is on the company. IV, 351.

At invitation of motorman, injured by turning of brake handle, — inference of negligence authorized. III, 561.

Riding on crowded platform, — negligence; contributory negligence. VI, 680.

Despite rules of company, if permitted so to do, — company must still exercise extraordinary care. III, 75.

When notice of danger posted, — contributory negligence and assumption of risk question for jury. V, 97.

Having knowledge of defendant's rule against so doing, — held to assume risk. V, 375, 440.

(For Index to Notes, see *ante*, p. ix.)**PASSENGER** — (*Continued*).**Riding on Step, etc.**

Of platform of crowded car with permission of conductor, — company must use highest degree of care; act of passenger not negligence *per se*. IV, 192.

Assumes risk ordinarily incident to such position, and company is not bound to change its usual rate of speed. II, 794.

Contributory negligence question for jury. V, 182.

Preparatory to alighting, — not guilty of contributory negligence as a matter of law. IV, 1070; V, 336.

Standing near step preparatory to alighting, thrown by sudden jerk, — railway negligent. VII, 829.

Getting down on step while car in motion, — is negligent as a matter of law. III, 770.

Sitting on step, — question of contributory negligence is for the jury where company did not prevent passenger so riding. I, 9.

Thrown off on rounding sharp curve, — negligence and contributory negligence questions for jury. VII, 542.

Standing on platform step, injured by rounding curve at high speed, — contributory negligence; speed. VI, 806.

Riding on rear seat of open car, thrown off while car rounding curve, — company held guilty of gross negligence. IV, 431.

Standing on step, struck by pole, — conductor negligent in failing to give warning; contributory negligence. VIII, 173.

Standing on rear projection, — question of contributory negligence was for the jury. III, 6.

Riding on bumper, — risks assumed. VIII, 252.

Riding on rear bumper, — negligence; contributory negligence. VI, 786.

Riding on Running Board.

Care required of railroad. IV, 974.

Duty owing to; negligence. VI, 375.

When company accepts passengers in that position there is an implied assurance that such places are reasonably safe. II, 796.

Not negligence as a matter of law to permit; degree of care demanded. I, 94.

Standing on running board, — held under the circumstances guilty of contributory negligence. IV, 78.

Walking on running board at invitation of conductor, — contributory negligence and assumption of risk questions for the jury. III, 631.

Contributory negligence question for jury. VIII, 1.

Moving along footboard, — contributory negligence a question for the jury. III, 562.

Standing on running board without objection by the conductor is not guilty of contributory negligence as a matter of law. III, 164, 231.

When no room inside, — not negligence *per se*. IV, 974.

(For Index to Notes, see *ante*, p. ix.)

PASSENGER — (Continued).

Riding on Running Board — (Continued).

Intoxicated, riding on running board, — intoxication not negligence *per se*; degree of care required of plaintiff and defendant. II, 945.

Standing on running board with back to the front, — contributory negligence a question for the jury. IV, 475.

Assumes risk. VI, 134.

Standing on running board when there is room inside, assumes risk, and is guilty of contributory negligence as a matter of law. IV, 547.

When room inside, assumes risk. IV, 962.

Does not assume risk of extraordinary violence. IV, 974.

Standing on running board preparatory to alighting, — held to have assumed risk. IV, 965.

— Injured by sudden jerk, — negligence of defendant not shown. V, 435.

Negligence of conductor. VI, 809.

Negligence and contributory negligence questions for jury. IV, 960.

Standing on running board, — custom of company to permit may be proven. III, 323.

Struck by pole, — not guilty of contributory negligence as a matter of law. IV, 283.

Struck by pole beside tracks, — negligence and contributory negligence questions for jury. V, 436.

Passing along running board, injured by trolley pole, — company not liable. V, 725.

Injured by iron post of bridge, — contributory negligence question for the jury. IV, 240.

Standing on running board, struck by projecting plank, — invitation to ride on running board; failure of proof. V, 767.

Struck by plank at place where tracks were being repaired, — care required; negligence; contributory negligence. VI, 380.

Standing on running board, injured by collision with vehicle, — owner of vehicle held liable. III, 231.

— crushed against horse, — negligence of driver of horse considered. IV, 463.

Injured by collision with wagon following derailment of car, — negligence and contributory negligence questions for jury. V, 438.

Standing on running board by direction of conductor, — derailment; contributory negligence. VI, 809.

Status.

Commencement of relationship of passenger and carrier. II, 627.

How relation created; rights of person excluded. VI, 598.

When a question for the jury. IV, 198.

Relation may be proved by the circumstances. IV, 200.

When person signals for stop and motorman answers by whistle or setting of brakes, relation of passenger is created. VI, 278.

Stop of car at customary place is an implied invitation to become a passenger; payment of fare is not essential to become. IV, 262.

(For Index to Notes, see *ante*, p. ix.)

PASSENGER — (*Continued*).

Status — (*Continued*).

Person becomes a passenger when car is stopped at his signal the instant he steps upon the car. I, 157.

Person approaching to take passage is not a passenger. III, 405.

Person boarding a car is a passenger. IV, 656, 1032.

Person attempting to enter car and caught by closing door is a passenger. VIII, 66.

One mounting car, though not having paid fare, is a passenger. III, 6.

Person signalling for stop and taking hold of railing to get on after car has stopped is a passenger. VI, 796.

Person boarding car at car barns is not a passenger. III, 867.

Person attempting to board car on side opposite from platform is a trespasser. VI, 653.

Person boarding car from wrong side is not a passenger. VIII, 741.

Mere knowledge of conductor of person's attempting to board car with intent to take passage does not as a matter of law constitute him a passenger. VI, 796.

Mother placing baby on car and about to embark herself is a passenger. VII, 65.

Person entering car and paying fare is a passenger, though intending to continue previous controversy with conductor. V, 22.

Person may become passenger before taking seat or purchasing ticket. VII, 491.

Person may be a passenger though his fare be not paid or demanded. IV, 649.

Person failing to pay second fare when due ceases to be a passenger. III, 394.

Person permitted to ride on bumper because of crowded car is a passenger. VIII, 252.

Person on running board not having paid fare, is not as a matter of law a passenger. III, 840.

Person riding on platform in violation of company loses rights as a passenger. VII, 840.

Relation exists till passenger leaves roadway of railroad. VI, 210.

Person alighting on platform is a passenger for reasonable time to enable him to leave. VII, 96.

Where passenger had alighted and his foot was caught in a rope attached to the car, the relation of passenger had not ceased. VII, 748.

Where a passenger is unlawfully ejected his relation as a passenger is not terminated. IV, 567.

Passenger alighting followed by conductor and assaulted is still a passenger. VI, 229.

On leaving car person ceases to be a passenger. IV, 465.

Relation exists until passenger is safely landed at destination. V, 153.

Relation ceases after passenger has safely alighted. VI, 602.

(For Index to Notes, see *ante*, p. ix.)

PASSENGER — (Continued).

Status — (Continued).

As passenger is lost on alighting to intervene in fight between conductor and another passenger. V, 713.

Passenger waiting in car for connecting car of another carrier is still a passenger. VIII, 419.

Person to whom defective transfer has been issued is a passenger on the second car. V, 33.

Person transferring mounting second car is a passenger. III, 652, 731.

Person compelled to alight in transferring to another car is still a passenger. V, 58.

Possession of transfer as evidence of plaintiff's status as a passenger. II, 124.

Whether employee riding on pass exempting defendant from liability is a passenger for hire is a question for the jury. V, 432.

Employee of defendant riding home on a free ticket is a passenger. V, 219.

Workman employed by company riding on pass is a passenger. V, 614.

Flagman riding on tickets issued as part of wages is a passenger. V, 820.

Employee riding on a pass given as part consideration for services is a passenger; conditions waiving right to damages for negligence are void. VI, 674.

Workman employed by company riding in workmen's car is not a passenger. V, 427.

Section hand riding on car free to work not a passenger. VI, 765.

Child young enough to be carried free may be a passenger. IV, 21.

Newsboy jumping on car to sell papers is not a passenger. IV, 835.

Boy permitted to board car by gripman not a passenger. VI, 21.

Boy asking for a free ride and ready to pay his fare is a passenger. VII, 862.

Person carried free is a passenger. IV, 270.

Person carried gratuitously at invitation of carrier is a passenger. V, 215.

Policeman riding free under ordinance is a passenger though the ordinance prove invalid. VI, 585.

Policeman riding on pass injured, — unconstitutionality of ordinance requiring railway to issue passes to policemen does not relieve company from liability for injuries to policeman riding on a pass so issued. V, 863.

Waiver of right to insist that person was not a passenger on chartered car. IV, 968.

Care.

Toward, required of railway. IV, 199, 1032, 1044, 1049; V, 385; VIII, 244, 419, 798.

Degree of care, — company, while not an insurer, must use highest degree of care. IV, 393.

— required of railway to protect passengers is the highest, but it is not an insurer of their safety. I, 157, 234, 238.

Railway is not an insurer of its passengers. IV, 669.

(For Index to Notes, see *ante*, p. ix.)

PASSENGER — (*Continued*).

Care — (*Continued*).

- Degree of care, — company owes highest toward passengers. V, 189, 190.
- to avoid injuring, — extraordinary care must be used. IV, 301.
- required to protect passengers is the highest. II, 221, 839, 927.
- company bound to use high, not highest. III, 879.
- toward free passenger, — company should use greatest possible care and diligence. IV, 270.
- to protect passengers, — company bound to exercise utmost skill and foresight, and are liable for slightest negligence. III, 506, 582, 588, 850, 879.
- Required in an emergency, — not required to use same deliberation and foresight in an emergency as otherwise. IV, 165.
- Degree of care, — instruction that it is the highest, even though definition of "highest degree of care" was not given, is not erroneous. II, 586.
- Degree of required of street railway in carriage of passengers. VIII, 676.
- Degree of care to protect passengers, — erroneous instruction as to going outside of negligence alleged in the complaint. I, 157.
- required, — erroneous instruction as to. I, 94.
- instruction as to, not erroneous because of use of word intelligence after prudence. III, 126.
- Steepness of grade and heaviness of load may be considered as to the care required. IV, 1047.
- Protection of; failure to remove passenger in snow-bound car to place of warmth and shelter. V, 825.

Assault on.

- Liability of company and duty to protect. I, 1.
- By third persons, — carrier agrees to use utmost care to protect passengers from. IV, 419.
- Railway must protect passengers from violence and insult of strangers, co-passengers and its servants. VII, 108.
- Provocation no mitigation of compensatory damages. III, 498.
- Aggravating conduct of passenger may be considered in determining damages. II, 802.
- Abusive language does not justify; question for jury to determine if necessary to eject. II, 5.
- By employees, — carrier absolutely liable for. IV, 419.
- Assaulted by conductor, — liability of railway. VI, 725, 726.
- Company liable for wilful assault on by conductor. III, 568.
- By conductor, — instruction as to liability of company held not erroneous. II, 632.
- Company liable for assault by conductor when acting within scope of his employment. III, 498.
- By conductor while attempting to board car, — evidence; damages. VIII, 794.
- When conductor is acting within scope of his employment. III, 498.

(For Index to Notes, see *ante*, p. ix.)

PASSENGER — (*Continued*).

Assault on — (*Continued*).

Where conductor uses excessive force in ejecting passenger, and follows him to street and assaults him, company is liable. V, 592.

When attempting to leave car by conductor, after refusal to accept transfer, company liable. III, 567.

By conductor after leaving car, — liability of company; duty of company to protect; use of insulting words by passenger. VII, 204.

Assaulted by conductor, — when company liable; insulting language no excuse. VIII, 362.

Assaulted by motorman after alighting to intervene in fight between conductor and another passenger. V, 713.

By special officer, — company held liable. IV, 482.

By fellow passenger, — railway bound to give protection. VII, 539.

Injury to by another passenger, — company held liable. V, 6.

Assaulted by drunken fellow passenger, — company liable for negligence of conductor in exercising supervision over drunken passenger. VII, 936.

By drunken passenger, — duty of company to protect. VII, 483.

Struck by missile thrown at motorman by stranger, — company not liable. V, 564.

Injured by wad from cannon fired from street, — company not liable. V, 379.

When carrying cumbersome package, — complaint held insufficient. III, 715.

Right to execution against person of plaintiff on verdict for defendant. IV, 842.

Insulted by conductor, — liability of company. VI, 758.

Ejection of.

Amount of force that may be used. II, 632; VII, 840.

Amount of force that may be used. VII, 840.

Where excessive force used plaintiff may recover though not a passenger. III, 232.

With unnecessary violence, — verdict for plaintiff sustained by evidence. VI, 285.

From car without justification and arrested at direction of railway's "road officer," — defendant liable. V, 536.

On refusal to pay fare, — use of force; contributory negligence. VI, 148.

After reasonable time after demand for fare passenger may be ejected notwithstanding a tender thereof before expulsion completed. I, 267.

After reasonable time after demand for fare passenger may be ejected; reasonable time determined by circumstances. I, 592.

Defendant not liable when plaintiff was ejected from second car for not paying his fare after paying fare on first car, which did not run as far as his destination. III, 901.

When refusing to pay fare, — when policeman not authorized to arrest conductor. VIII, 666.

(For Index to Notes, see *ante*, p. ix.)

PASSENGER — (*Continued*).

Ejection of — (*Continued*).

Not justified because of tender of worn coin for fare. VII, 114.

Ejected for tendering Canadian coin held wrongfully ejected. VIII, 762.

Carrying small cake of ice wrapped so as not to leak, — railway liable for refusal to carry. VII, 664.

Intoxicated, — may be ejected. V, 6.

— ejected from car, run over by another car some time after, — duty of motorman of latter car. VIII, 855.

Rule requiring, when passenger does not pay fare or produce ticket, is reasonable. IV, 114.

Passenger for smoking, — rule of company held reasonable. V, 592.

Conductor may not eject passenger, however otherwise justified, when car in motion. IV, 1072.

By conductor and injured, — verdict for plaintiff held against weight of evidence. VIII, 714.

From car by threats and hostile demonstrations of conductor, and injured. VIII, 716.

Injury to newsboy selling papers compelled by conductor to alight while car in motion. I, 115.

Arrest of.

Company not liable for arrest by conductor unless he was acting within the scope of his authority. II, 684.

Company not liable where passenger arrested for resistance to ejection for failure to produce transfer. II, 453.

When malicious prosecution by conductor not shown. III, 568.

Verdict of \$1,500 actual and \$1,000 exemplary damages set aside as excessive. II, 592.

Separation of Races.

In street cars, — city may pass valid ordinance to provide under the general welfare clause of its charter. IV, 136.

— ordinance requiring is reasonable and does not delegate unauthorized authority to the railway. IV, 136.

— ordinance requiring, but excepting nurses in charge of children and invalids, held reasonable. IV, 142.

Discretion given railroad is exercised at its peril, and it is for insult given white passenger by conductor by intimating that she is a negress. VII, 135.

Movable partition may be used, but passenger may not be put in wrong compartment by moving of partition when there is no seat in the compartment thus newly established for his race. VIII, 454.

Company liable for ejection of passenger refusing to move where company employing subterfuge to comply with law. IV, 558.

Collision.

Res ipsa loquitur applies where passenger hurt in collision. VI, 674.

Injured by collision, — when presumption of negligence arises. II, 630, 839.

(For Index to Notes, see *ante*, p. ix.)

PASSENGER — (*Continued*).

Collision — (*Continued*).

Injured by collision of cars, — care required of company as to condition of brakes; negligence of motorman. VI, 503.

Degree of care required of each company where passenger injured in collision with car of another company. II, 799.

Injured in collision due to failure of employee to communicate instructions of dispatcher, — railway negligent. VI, 674.

— of cars, — presumption of negligence. III, 562, 563, 406.

Injured by glass from window broken by collision, — evidence sufficient to warrant submission to jury. III, 565.

Injured by cars colliding with adjoining car while rounding curve, — defendant not shown negligent. IV, 846.

Injured in car standing on siding run into by second car; negligence of motorman of second car. VI, 136.

Injured in collision caused by boy throwing switch, — negligence of company in not having switch locked is a question for the jury. IV, 193.

— caused by obstruction on track, — degree of care to be used by company; presumption of negligence. VI, 317.

Injured by shaft of wagon penetrating car, — defendant only obliged to use a "high degree of care." II, 801.

Care, degree of, to be used by company in case where plaintiff was struck by shaft of wagon puncturing side of car. II, 801.

Injured in collision with vehicle, — no presumption of negligence arises. IV, 195.

Injured by collision of car with a vehicle, — burden is on plaintiff to show collision was caused by negligence of defendant. III, 373, 449.

— with truck, — defendant not shown to have been at fault. IV, 847.

— with truck, — negligent rate of speed makes company liable. III, 139.

Injured by collision between car and wagon, — negligence of motorman a question for the jury. III, 607.

— of car with vehicle, — negligence of driver of vehicle does not excuse negligence of company. II, 798.

Injured by flying glass in collision with wagon. V, 710.

Injured by collision of car with a vehicle, — evidence sufficient to support judgment against defendant. III, 140.

— with truck, — verdict for defendants held not in accordance with evidence. IV, 80.

Struck by vehicle, — fact of collision does not establish liability of the company. II, 906.

Injured by collision with railroad train, — company liable where its servant, acting within scope of authority, signals motorman to cross tracks. III, 563.

— with train, — negligence of conductor in signalling for start when he knew train coming held proximate cause. IV, 203.

(For Index to Notes, see *ante*, p. ix.)

PASSENGER — (*Continued*).

Collision — (*Continued*).

- Injured by collision of trolley car with steam car, — negligence of steam railroad does not relieve trolley company from its negligence. VIII, 470.
- of street car with railroad train, — duty of motorman to look and listen when approaching railroad crossing. VIII, 845.

Jolts and Jerks.

- Injured by sudden start, — whether injuries were proximate cause of death from tuberculosis is a question for jury. IV, 845.
- held guilty of contributory negligence. VI, 797.
- Starting car before passengers seated, — no inference of negligence. VII, 934.
- while passenger passing to a seat, — defendant liable if found negligent. II, 909.
- Walking to seat, thrown by sudden starting of car, — conductor need not wait till active person is seated. IV, 477.
- Starting car while passenger passing from platform into car not negligence. II, 332.
- Starting heavily loaded car, — actual management of car, not resultant effects, should determine question of negligence. III, 625.
- Injured by sudden start because no strap available, — contributory negligence question for the jury. IV, 847.
- Finger caught in door because of sudden start, — negligence; nonsuit. V, 768.
- Hand caught by door when car lurched, — negligence; contributory negligence. VIII, 770.
- Thrown from open car by sudden lurch, — held car negligently operated. II, 586.
- Thrown down while standing in car by sudden jerk, — negligence must be shown, and that it was the proximate cause. II, 797.
- Thrown by sudden jerk, — liability for jerk of car. VII, 215.
- Thrown from car by sudden jerk, — defendant must show freedom from negligence. IV, 844.
- Standing inside car, injured by jerk of car, — no presumption of negligence. VI, 689.
- Thrown down by sudden jolt, — presumptive proof of negligence if unexplained. VIII, 585.
- Injured by sudden jerk of car, — what plaintiff must show to make out case. VII, 937.
- Thrown from seat in open car by sudden jerk, — question for jury. VII, 940.
- Injured when arm forced out of window by lurch, — contributory negligence question for jury. V, 633.
- Leaving seat after signalling for stop, injured by sudden jerk of car, — defendant held negligent. IV, 80.
- Arising to signal conductor of open car and thrown off, — contributory negligence question for the jury. IV, 396.

(For Index to Notes, see *ante*, p. ix.)

PASSENGER — (*Continued*).

Collision — (*Continued*).

- Thrown down by sudden lurch, — evidence sufficient to find negligence.
- Falling on floor of car for cause not shown, — no presumption of negligence. VII, 462.
- Thrown from car not under control, — care required of carrier stated. V, 55.
- Injured by abrupt stop of car, — *prima facie* case of negligence made out. V, 642.
- Thrown from car by sudden stop occasioned by explosion, — error to direct verdict for defendant. IV, 849.
- Injured by sudden stop of car whereby a fellow passenger was thrown violently against her, — sufficiency of allegation as to proximate cause. II, 865.
- Injured by sudden stopping of car in an emergency, — question of exercise of judgment by motorman in an emergency. III, 405.
- Injured by sudden stopping of car, — fight between conductor and another passenger not such an emergency as to justify. III, 564.
- Thrown from car at curve, — negligence; excessive speed; violation of rules by employees. VI, 186.
- Thrown from open car rounding curve with guard rail up, — company not guilty of gross negligence. IV, 472.
- Thrown from car rounding curve while in intoxicated condition. VIII, 679.
- Thrown from body of car to platform and thence to street by sudden starting of car on curve, — verdict for plaintiff sustained. VIII, 769.
- Pushed from crowded car, — overcrowding not proximate cause. V, 764.
- Thrown from car when to conductor's knowledge she did have room enough to be securely seated, — negligence of conductor a question for the jury. IV, 865.
- Thrown from crowded car, — negligence in permitting car to be overcrowded. VIII, 789.

Injured by Appliances.

- Injured by door slammed by conductor, — company liable. III, 388.
- Hand caught in door of crowded car, — proximate cause. V, 763.
- Caught by closing door, — *res ipsa loquitur* applies. VIII, 66.
- Injured by defective device for opening door, and while in faint falling from car, — jury not justified in finding for plaintiff in absence of proof. II, 433.
- Injured when car driven through flooded street so that trap door sprang open, admitting water, — negligence of motorman. VIII, 713.
- Injured by falling window, — negligence of defendant must be shown. IV, 845.
- Guard rail, — fact that it is up is not an invitation to passengers to expose themselves to danger. IV, 547.
- Injured by letting down of guard rail, — nonsuit held improper. III, 84.

(For Index to Notes, see *ante*, p. ix.)

PASSENGER — (*Continued*).

Injured by Appliances — (*Continued*).

Res ipsa loquitur, — application of doctrine when fuse burning out injures passenger. I, 330.

Injured by explosion of fuse, — application of rule of *res ipsa loquitur*. III, 713.

— of controller, — exercise of proper care by defendant question for jury. V, 439.

Injured by fall of trolley pole, — highest degree of care for protection of passengers required. III, 851.

— presumption of negligence is on defendant. II, 124.

— presumption of negligence arises. V, 796.

Injured by trolley pole, — whether defendant should have anticipated accident question for jury. VII, 350.

Injured by wheel falling from trolley pole, — negligence in not discovering defect question for jury; duty of carrier to passenger. VII, 190.

Burned by overheated plate in floor of car, — overheating of plate raises presumption of failure to exercise care required. II, 800.

Injured in eye by conductor's punch falling from his pocket, — held a casualty for which company was not liable. III, 713.

Injured by fall of seat in front of her, — defendant held negligent. IV, 480.

Injured by fall of fare register, — doctrine of *res ipsa loquitur* applies. IV, 843.

Injured in eye by splinter of electric light bulb dropped by employee, — latter bound to use only ordinary care. IV, 844.

Injured because of defective car wheel, — company must test cars after purchase. V, 429.

Injured by stepping on electrified plate in car, — presumption of negligence arises. V, 636.

Switch, — injury caused by car running through when open. I, 409.

Injured by tripping over defective mat, — dangerous condition of mat a question for jury. IV, 846.

Falling through rotten trap door in floor of car, — *res ipsa loquitur* applies. V, 630.

Stumbling over bag in aisle, — negligence of conductor; care required. VI, 199.

Panic.

Injured because of panic caused by explosion in electric equipment, — *prima facie* case of negligence made out. IV, 165.

Injured in disturbance caused by explosion of controller box, — negligence and contributory negligence questions for jury. IV, 848.

Injured in panic caused by flames and smoke in car, — nonsuit held improper. III, 714.

Injured by falling in faint caused by fright, — company not negligent. III, 407.

(For Index to Notes, see *ante*, p. ix.)

PASSENGER — (*Continued*).

Panic — (*Continued*).

Injured in panic caused by ignition of passenger's dress by another passenger smoking, — proximate cause. V, 766.

Injured by fright caused by horse thrusting his head through car window, — *res ipsa loquitur* not applicable. III, 711.

Acts of Third Parties.

Stranger, — company not liable for tort of unless it could have foreseen and guarded against it. IV, 673.

Injured by negligent act of third persons attempting to board car, — company held not responsible. IV, 328.

Injured in car started by a child, — negligence of motorman in leaving car so that it could be easily started held proximate cause. VIII, 419.

Mob violence, — question of care used by defendant's employees in running car through a mob is one for the jury. I, 757.

Mobs, — calling out of militia not notice to railway of danger, but an invitation to operate cars. III, 783.

— railway not liable for elderly man falling from car in dismounting after being hit by a stone thrown by a strike sympathizer. III, 783.

Strike, — presumption of negligence after derailment rebutted by evidence of obstruction placed on track during strike. III, 806.

Derailment.

Injured by, — *res ipsa loquitur*. V, 767.

Caused by defective switch, — presumption of negligence is created. III, 564.

Injured because of derailment, — presumption of negligence arises. VI, 789.

Company must show exercise of ordinary care. III, 193.

Of car, — evidence as to negligence of driver of horse car sufficient for submission to jury. II, 18.

— negligence of company in failing to lock switch. II, 630.

— injury to passenger when caused by negligently excessive rate of speed. I, 242.

Passenger injured by derailment of car going at excessive speed. VIII, 692.

Of car, — negligent operation by rounding curve at excessive speed. II, 962.

Injured in derailment caused by brick placed on track by small boy, — diligence of motorman question for jury. V, 638.

Injured because of, — motorman not negligent for excessive speed resulting from defective appliances. VIII, 836.

Injured by intentional derailment of horse car to pass truck, — case should have gone to jury. IV, 850.

Injured because of derailment caused by act of railway and corporation employed by it, may recover against defendants jointly; independent contractor. VII, 626.

(For Index to Notes, see *ante*, p. ix.)

PASSENGER — (*Continued*).

Derailment — (*Continued*).

Derailment of car, — recommendation of state railroad commissioners as to a safeguard at the point admissible. II, 797.

Platforms and Stations.

Platforms, — company bound to keep in reasonably safe condition. III, 891.

Injured by falling of station platform, — negligence is a question for the jury. III, 540.

Falling between car and subway station, — warning by guard held to exonerate defendant. VI, 804.

Injured by footboard of car passing station platform, — in absence of evidence of specific negligence it is error to submit case to jury. II, 388.

Crowded off crowded platform, — negligence to maintain large enough platform and in allowing too many passengers to congregate thereon are questions for the jury. V, 441.

Injured by being pushed against car because of overcrowding of station, — held that negligence was a question for the jury. II, 801.

Injured because of crowd in subway station, — negligence of company question for jury; plaintiff did not assume risk as a matter of law. V, 385.

Passing Between Cars.

Injured while passing to another car under direction of conductor, — held an injury resulting was received in the running of the cars so as to raise the statutory presumption of negligence. IV, 164.

Required to leave car and board another, injured when excavation in street caused her to fall, — contributory negligence; negligence. VIII, 798.

Injured by falling between cars while passing from one car to another, — defendant held not negligent. V, 439.

Stepping into space between car of elevated train and the platform, — company not negligent. IV, 462.

Stepping into space between cars of elevated train, — company not negligent. IV, 461.

Aged and Infirm Persons.

Aged persons, — company owes more care to aged persons. III, 731.

Fleshy persons, — duty not to start car before old or crippled person is seated does not apply to active fleshy person. IV, 325.

Destination.

Right to be carried to destination. VI, 726.

Carried beyond destination, — liability of company. VII, 934.

Duty of company to carry passengers to points indicated on signs without transfer. V, 851.

Carried beyond destination is not entitled to ride back free; his remedy is for damages sustained. V, 155.

(For Index to Notes, see *ante*, p. ix.)

PASSENGER — (Continued).

Destination — (Continued).

Carried beyond destination when asleep, — defendant not obliged to furnish return passage. VI, 854.

Stranger, — fact that passenger was a stranger did not affect defendant's liability for carrying beyond her destination. V, 648.

Leaning from Car.

Leaning from side of car, is guilty of contributory negligence as a matter of law. III, 245.

Arm protruding from car, — when defendant not negligent. I, 541.

Arm injured by another car in rounding curve, — negligence and contributory negligence questions for jury. VIII, 52.

Sitting by open window, struck by passing car, — negligence; contributory negligence. VI, 786.

Leaning out of car, struck by pole, — question of contributory negligence is for the jury. II, 278.

Projecting head outside car and coming in contact with pole, — contributory negligence a question for the jury. IV, 160.

Injured by thrusting head outside of car and coming in contact with pole, — contributory negligence held conclusive. IV, 323.

Struck by projection from passing wagon, — presumption of negligence exists; question of contributory negligence is for the jury. II, 406.

Injured by hoe of third party being caught in car and striking him, — negligence of conductor. VI, 560.

Injured by extending head out of car above screens on becoming ill, by contact with pole, — held guilty of contributory negligence. IV, 306.

Putting head out of car window while nauseated, struck by obstruction, — negligence and contributory negligence questions for jury. VIII, 210.

Sick passenger injured by falling from car because of improper construction and lack of care of conductor, — proximate cause a question for the jury. III, 582.

Speed.

Passenger may assume that company will comply with speed law. V, 97.

Instruction as to duty of company to prevent car running at dangerous rate of speed, held not error. I, 242.

Gratuitous Passengers.

Contract limiting liability to gratuitous passenger is valid. V, 215.

Policeman riding on pass, — liability of company. V, 832.

Negligence.

Presumption of negligence does not follow unexplained injury. V, 360.

— when it arises. V, 636, 638.

— is created upon injury to passenger which is rebuttable. VII, 785.

— passenger is presumed to have been injured by carrier's negligence. III, 193, 582.

(For Index to Notes, see *ante*, p. ix.)

PASSENGER — (*Continued*).

Negligence — (*Continued*).

Presumption of negligence arises when shown that defect in appliances or acts of defendant's employees contributed to the accident. IV, 677.

— is raised when passenger is thrown from seat to floor by sudden stopping of car. III, 505.

Inference of negligence arising from facts proven, question of negligence should be submitted to the jury. IV, 734.

Injured in consequence of motorman losing control in going down hill, — negligence may be inferred. III, 443.

Prima facie case made out by proof of collision. V, 820.

Gross negligence defined; evidence authorizing recovery for. IV, 431.

Contributory negligence, — charge that if passenger's negligence solely contributes to bringing about injury he cannot recover, not erroneous considering theory on which the trial was conducted. I, 771.

— error to instruct that slightest degree bars recovery. III, 6.

— as a defense under the Indiana statute. IV, 220, 241, 254, 259, 262, 266.

PAVEMENT. (See *Franchise; Passenger; Pedestrian; Streets and Highways; Vehicle.*)

PEDESTRIAN. (See *Child; Employee; Evidence; Passenger.*)

Negligence, — burden of proving and that negligence is the proximate cause is on the plaintiff. II, 520.

Contributory negligence where evidence is conflicting is a question for the jury. IV, 651.

Wilful negligence not shown so as to require submission of question to the jury. I, 430.

Concurrent negligence, — where it is impossible to separate the negligence of the company and that of a pedestrian, the negligence of the latter precludes recovery. II, 921.

Conjectural cause, — if the evidence leaves the cause to conjecture, plaintiff must fail. II, 520.

Presumption of action arising from instinct of self-preservation, origin of the rule; no application where there is contributory negligence. I, 199.

Policeman regulating movement of cars at crossing forced for safety to get on step of car, injured in collision of cars, — defendant not entitled to verdict as matter of law. VIII, 582.

Girl attempting to save child not guilty of negligence *per se*. IV, 855.

Boarding car to see friends off is a licensee, — duty of company toward. VIII, 138.

Crossing a bridge, injured by car of defendant, when act amounting to negligence. I, 300.

Injured because of defective sidewalk on viaduct railway maintained under ordinance, — railway liable; effect of provision in ordinance requiring railway to save city harmless from damage resulting from acts of railway. VIII, 282.

(For Index to Notes, see *ante*, p. ix.)

PEDESTRIAN — (*Continued*).

- Injured by collision between car and truck, — company not excused by negligence of truckman. IV, 858.
- Derailment, — pedestrian injured by wagon thrown on sidewalk when car was derailed; negligence of motorman; derailment proximate cause of injury. VIII, 272.
- Injured while on sidewalk by vehicle thrown against him by car rounding curve. VIII, 647.
- Derailment of car, injured by, — evidence sufficient for submission to jury. IV, 171.
- Falling over cord stretched by company's contractor, — both held liable. II, 790.
- Falling over rail about which pavement was not laid, — company held not negligent. IV, 519.
- Injured by catching foot in knot hole in temporary passageway constructed by railway across street, — negligence of defendant and freedom from contributory negligence not shown. IV, 859.
- Falling into excavation made by railway, — unguarded condition of excavation the proximate cause. IV, 208.
- Injured by excavation in street, — negligence of watchman in failing to warn. VIII, 743.
- Injured by snow falling from elevated railway, — evidence not sufficient to sustain allegation. III, 400.
- Standing on corner, hit by papers thrown from car, — company would be liable if conductor committed the act. VI, 847.
- Struck in eye by hard substance when passing near stalled car whose wheels were revolving, — *res ipsa loquitur* does not apply. VII, 445.

Care.

- Dangerous crossings, — company must take extra precautions at. II, 351.
- Degree of in populous parts of the city, — question of negligence is for the jury. III, 151.
- Populous districts, — proper precautions must be taken by company's employees in. II, 351.
- To be exercised by motorman after seeing plaintiff in dangerous position. II, 520.
- Due care to avoid injury must be shown by plaintiff. II, 413, 422.
- Due diligence under the statute held not to have been exercised by a person put off a car as intoxicated and killed by the car on its return. III, 396.
- Due care, — greater care is not required of pedestrian when off sidewalk than when on. IV, 1.
- Intoxicated, — intoxication does not relieve one from care required from sober person. III, 795.
- Negligence of mother of child, — proper refusal of request for instruction as to care exercised by the mother. I, 605.
- Deafness is no excuse. I, 449, 465.

(For Index to Notes, see *ante*, p. ix.)**PEDESTRIAN** — (*Continued*).**Crossing Track.**

Behind stopped car, struck by car on opposite track, — negligence; contributory negligence; unavoidable accident; duty of pedestrian and motorman; use of streets by pedestrian and railway. VIII, 68.

Passing behind car onto parallel track, — care to be used to ascertain whether car approaching. VII, 224.

Avoiding car, injured by car on another track, — erroneous charge. III, 720.

When told by conductor of waiting car to hurry up, plaintiff was struck by car on the other track, held question of contributory negligence was for the jury. II, 756.

Crossing behind car struck by car on other track, — contributory negligence question for the jury. V, 772.

Duty of company to give warning of approach of cars and keep cars under control. I, 419, 492.

Killed by car at private crossing, — duty of company to give signals at private crossings. VIII, 164.

Aged, killed at crowded crossing, — defendant not shown negligent. V, 443.

Blind man crossing street struck by car, — proof of negligence insufficient. VIII, 813.

Struck by car, — negligence of defendant must be shown. VII, 734.

Although negligent, yet if motorman could have avoided accident, proximate cause is question for jury. I, 228.

Stopping of plaintiff on approach of car and then continuing gave motorman right to assume he intended to wait till car passed. I, 667.

Emerging from behind car on the other track, — jury may infer negligence of motorman in not recognizing possibility. II, 968.

Struck by car, — instruction as to wanton negligence of motorman erroneous when wholly unfounded on evidence. IV, 205.

Killed by car, — contributory negligence no defense where wanton misconduct of motorman shown. V, 20.

Crossing street struck by car, — negligence of motorman in violating company's speed limit. VI, 142.

With bundle on her head, — discovered peril. VI, 819.

Care required of motorman in populous city. V, 20.

Crossing street at night time in populous part of city, — duty of motorman to keep lookout. VIII, 699.

At crossing in populous district, struck by car, — defendant negligent in exceeding speed ordinance; right of plaintiff to assume observance of ordinance. VIII, 12.

Crossing street, — may not assume that motorman will slacken speed. III, 719.

At invitation of motorman and struck by car, — questions of negligence and contributory negligence are for the jury. III, 720.

After allowing car to pass, struck by car following, — negligence and contributory negligence should have been submitted to the jury. IV, 660.

(For Index to Notes, see *ante*, p. ix.)

PEDESTRIAN — (Continued).

Crossing Track — (Continued).

Injured by car, — negligence and contributory negligence questions for jury. IV, 1005.

Crossing in front of car, — negligence; contributory negligence; speed; presumption of due care. V, 663.

When car in sight, — duty to wait; excessive speed. VI, 265.

Continuing to cross tracks fifteen feet away when car 125 feet distant, — contributory negligence and motorman's negligence questions of fact. VI, 817.

Struck by car, — contributory negligence; speed at crossings. VI, 822.

At crossing, — duty to have car under control and keep lookout; last clear chance; contributory negligence. VII, 87.

In front of car, — rights of pedestrian and railway; precautions required of motorman and pedestrian; contributory negligence. VII, 370.

At street intersection, struck by car, — respective rights; duty of motorman. VII, 524.

Struck by car, — relative rights; negligence of defendant subsequent to contributory negligence as proximate cause. VII, 636.

— care required not same as in crossing steam railroad tracks; negligence; contributory negligence. VII, 802.

Frightened by mule backing up crossing in front of car, — defendant not negligent. VI, 832.

Injured crossing track, — when entitled to assume train will stop at station. IV, 862.

Stopping between rails when car was suddenly lighted, — act excused as one in an emergency. IV, 969.

Stepping suddenly on track while buying vegetables of huckster, — held guilty of contributory negligence. IV, 668.

Stepping in front of approaching car, when gross negligence. I, 492.

Stepping on track with knowledge he could not cross without being struck, — contributory negligence; duty of motorman. VIII, 803.

Seeing car approaching at rate of three miles an hour, struck by car, — exercise of due care question for jury. VIII, 738.

Although nearsighted, struck by car on clear day, with view of track for more than a mile, — guilty of contributory negligence as a matter of law. VIII, 736.

At street crossing, struck by car, — contributory negligence. VIII, 727.

Old man crossing track on lookout for approaching cars, struck by car when nearly across, — not guilty of contributory negligence as a matter of law. VIII, 661.

In broad daylight, struck by car, — held guilty of contributory negligence as a matter of law. VIII, 660.

Killed crossing tracks at night, — exercise of ordinary care by plaintiff question for jury. VIII, 406.

Killed crossing tracks, — contributory negligence of deceased proximate cause; last clear chance doctrine not applicable. VIII, 503.

(For Index to Notes, see *ante*, p. ix.)

PEDESTRIAN — (*Continued*).

Crossing Track — (*Continued*).

- Attempting to cross in front of rapidly moving car, — guilty of contributory negligence. VII, 932.
- In front of car, expecting car to stop because of his signal, — contributory negligence question of fact. VII, 928.
- Struck by car in full sight, — contributory negligence; what motorman may assume. VII, 763, 824.
- Crossing in front of car, — contributory negligence if it was necessary for him to run. VII, 596.
- Struck by car while relying on custom of cars stopping at other crossing, — contributory negligence question for jury. VII, 547.
- Struck by car, — degree of care required; contributory negligence. VI, 320.
- On foggy night, — care required; contributory negligence. VI, 821.
- "Taking a chance" at crossing where car usually stopped, — high speed question for jury; contributory negligence. VI, 821.
- After dark, struck by car, — knowledge of danger; failure to prove cause of death. VI, 815.
- Immediately in front of car "coming fast," — held guilty of contributory negligence. V, 445.
- Heedless of surroundings, — contributory negligence. V, 655.
- Struck by car on other track after waiting for car to pass, — contributory negligence. V, 668.
- Attempting to cross track seeing cars coming in both directions, — held guilty of contributory negligence. IV, 528.
- Struck by car in plain view, — guilty of contributory negligence. IV, 864.
- Killed at street crossing, — presumption of freedom from contributory negligence overcome by evidence. IV, 963.
- Attempt to cross track before approaching car, — pedestrian must not make nice calculations and accept imminent danger. I, 199.
- Under the circumstances held guilty of contributory negligence. I, 430, 522.
- Intoxication as contributory negligence. II, 921.
- In front of nonmoving car is not negligence *per se*. II, 621.
- Crossing in front of car, — contributory negligence where car was within ten feet. III, 747.
- care required of pedestrian. III, 408, 806, 878.
- Crossing street diagonally, — question of contributory negligence is for the jury. III, 142.
- Crossing street between crossings, — must use due diligence and wait to accord car its paramount right of way between crossings. III, 721.
- Struck by car when view obstructed, — instructions as to ordinary care and negligence held erroneous. VIII, 682.
- With view hidden, injured by car, — not precluded from recovery under last clear chance doctrine. V, 279.
- Negligence to come from behind obstructions to cross track without taking precautions to avoid danger. I, 199.

(For Index to Notes, see *ante*, p. ix.)

PEDESTRIAN — (*Continued*).

Crossing Track — (*Continued*).

Where view obstructed, — contributory negligence question for jury. V, 517.

Injured at street intersection, — verdict for plaintiff set aside on preponderance of evidence. I, 578.

On Track.

Drawing cart along tracks, — duty of plaintiff and motorman stated. III, 450.

Walking on tracks when sidewalks are sloppy, — negligence of plaintiff and lack of care of motorman questions for the jury. I, 465.

Walking between tracks, — not negligence *per se*; relative rights of railway and pedestrians. VII, 758.

Walking along track, struck from rear, — duty of motorman to be on lookout. VI, 706.

In parade, run down by car, — evidence of wilful misconduct of motorman. III, 943.

Walking on tracks and not a trespasser, is entitled to reasonable protection from unknown danger of one of the rails forming the track being charged with electricity. III, 894.

Walking between tracks when other parts of street are available, is guilty of contributory negligence so as to prevent recovery. I, 218.

Walking along track and struck by car from rear, — held guilty of contributory negligence so as to preclude recovery. IV, 395.

Aged and very deaf, walking on track, killed by car from behind, — held not in exercise of due care. V, 442.

Walking along track at night time, — contributory negligence question for jury. IV, 864.

Old man very deaf struck by car while watching workmen, — speed; warning signals; contributory negligence; last clear chance. VI, 33.

Standing on track, struck by car, — contributory negligence; failure of motorman to sound gong. VI, 341.

Struck by car on trestle, — contributory negligence; discovered peril. VI, 824.

Employee of city street cleaning department struck by car, — defendant must use reasonable diligence in seeing and avoiding him. IV, 863.

Struck by car, — care required of motorman to avoid injuring him. VIII, 664.

Standing in street and preoccupied in a crowd, run down by car, — motorman guilty of gross negligence. III, 464.

Struck by car, — last clear chance doctrine applied. VIII, 664.

Standing between double tracks, — person may assume that cars may pass while he is in that position. II, 351.

On hands and knees on track on stormy night, — pedestrian's negligence held proximate cause. III, 795.

Standing on track blocked by car on other track, hit by car running at excessive speed, — contributory negligence question for jury. VII, 242.

(For Index to Notes, see *ante*, p. ix.)**PEDESTRIAN** — (*Continued*).**On Track** — (*Continued*).

Slipping on track because of oil placed there by railway, — negligence; contributory negligence. VI, 288.

Intoxicated, lying on track, — motorman need only use due diligence after discovering him. III, 853.

— last clear chance. V, 660.

Intoxicated, killed on tracks at night, — no proof that motorman was negligent. V, 17.

Intoxicated, — approximate cause held walking on track while intoxicated. III, 807.

— lying on track in dark, — held guilty of contributory negligence. III, 772.

Insane person on track, — motorman is entitled to assume such person is of sound mind; not necessarily contributory negligence on part of custodian to allow him to be abroad. III, 807.

Near Track.

Walking along road and killed by car, — burden of showing due care by intestate is on the plaintiff. IV, 471.

Aged and deaf, walking near track, struck by car, — motorman may assume he will get out of the way. V, 337.

Walking near track, struck by car from behind, — contributory negligence; motorman's duty when view obstructed. VII, 788.

Walking beside track, struck by car from rear, — last clear chance. VIII, 850.

Alighting from wagon too near track, — contributory negligence; last clear chance. VI, 839.

Injured stooping near track, — held not to have exercised due care. IV, 460, 468.

Attempting to recover cap, struck by car, — negligence; duty of motorman. VIII, 816.

Standing near track, — when motorman should stop or give warning. III, 854.

— struck by car, — failure of proof of negligence. VIII, 848.

Struck by fender of car rounding curve, — freedom from contributory negligence not shown; motorman had right to assume plaintiff would step back. IV, 861.

Injured by fender of car backing round a curve, — plaintiff guilty of contributory negligence. IV, 964.

Standing near track, struck by rear fender of car rounding curve, — negligence; contributory negligence. VI, 825.

Struck by rear of car projecting on curve, — negligence; contributory negligence. VI, 533.

Struck by end of car rounding curve, — negligent construction of car; speed; duty of defendant to keep lookout. VIII, 863.

Struck by step of passing car, — freedom from contributory negligence not shown. IV, 861.

(For Index to Notes, see *ante*, p. ix.)

PEDESTRIAN — (*Continued*).

Near Track — (*Continued*).

Struck by running board, — to recover must have exercised some care to avoid injury. II, 67.

Struck by overhang of car on a curve, — company held not liable. III, 802.

Look and Listen.

Duty of pedestrian to. I, 199.

Care to be exercised in crossing tracks. VI, 816.

Rule as to stated in case of person crossing tracks. VII, 735.

Duty of person about to cross tracks. VIII, 128.

Duty of deaf person greater. V, 41.

Duty as to street railway in populous district not same as in case of steam railroad. VIII, 12.

Passenger on alighting becomes a pedestrian, and is bound to look and listen for car on the other track. I, 179.

When pedestrian can see car it is presumed that he will stop. IV, 666.

How chargeable upon doing so or failure to do so. II, 282.

Duty to on crossing tracks, — contributory negligence; haste or preoccupation; equal right to crossing; concurrent negligence. VI, 491.

Burden of proof of contributory negligence; reciprocal rights and duty; proximate cause; last clear chance. VI, 514.

Duty to; contributory negligence question of fact. VII, 1.

Crossing track without looking; presumption by motorman that person is aware of surroundings; last clear chance; contributory negligence. VII, 170.

Failure to, contributory negligence; proximate cause; last clear chance. VIII, 489.

Failure not negligence *per se*. VI, 357.

Failure to before crossing track not negligence *per se*; must be proximate cause to preclude recovery. VIII, 602.

Pedestrian's failure to look immediately before crossing track; contributory negligence question for the jury. IV, 865.

Duty to in populous part of city a question for the jury. I, 419.

Plaintiff, eighty-nine years of age, not guilty of contributory negligence in crossing tracks after seeing car move out of switch in opposite direction. V, 313.

Humanitarian doctrine. V, 653, 655.

Last clear chance. V, 650.

Utter neglect leaves no room for interposition of humanitarian doctrine. II, 504.

Humanitarian doctrine; assumption as to speed. VII, 816.

Plaintiff crossing track was absorbed in reading, — held plaintiff's action was not defeated where motorman relied on warning signal when he could have stopped. I, 449.

Opinion formed at distance may not be substituted. II, 323.

(For Index to Notes, see *ante*, p. ix.)

PEDESTRIAN — (*Continued*).

Look and Listen — (*Continued*).

Failure to not excused by excessive speed of car. II, 621.

Failure to, contributory negligence. II, 785.

Error to charge that failure so to do will not defeat plaintiff's recovery. III, 82.

Failure to on crossing track from behind car is contributory negligence as a matter of law. III, 666.

Pedestrian crossing track with attention diverted is precluded from recovering. IV, 661.

Failure to, when contributory negligence as a matter of law. IV, 856, 856.

Immediately before crossing track, — failure to is proximate cause of collision. IV, 1005.

Crossing tracks at night, — held guilty of contributory negligence. V, 56.

Failure to before crossing tracks not contributory negligence *per se*. V, 239.

Failure to see car in plain sight is contributory negligence. V, 444.

Failure to or looking carelessly constitute contributory negligence. VI, 820.

Failure to before crossing tracks renders plaintiff guilty of contributory negligence. VII, 872.

Failure to by person attempting to cross track held to preclude recovery for injuries sustained. VIII, 739.

Person crossing tracks from behind car without looking is guilty of contributory negligence, although he stopped and listened. III, 496.

Person unable to see because of sleet guilty of contributory negligence in stepping in front of car. VII, 933.

Failure to when view obstructed by pillars, — contributory negligence. VI, 814.

Failure to when view obstructed not contributory negligence. II, 788.

Where pedestrian failed to look and listen immediately before crossing tracks, but the car was going at excessive speed and no warning was sounded, contributory negligence is a question for the jury. IV, 305.

Failure to immediately before crossing track contributory negligence. VI, 817, 818.

Deceased is presumed to have looked and listened. IV, 651.

In absence of evidence to the contrary, a jury may infer from the instinct of self-preservation that a person about to cross track both looked and listened. II, 282; III, 772.

Presumption that deceased looked and listened before crossing track arises only where there is no eye witness. VIII, 503.

Inference of care by person killed cannot be drawn under the facts. IV, 865.

Failure of deceased under the evidence made the question one of law. I, 667.

Failure to before crossing tracks renders deceased guilty of contributory negligence as a matter of law. VIII, 336.

(For Index to Notes, see *ante*, p. ix.)

PEDESTRIAN — (*Continued*).

Right of Way.

Of pedestrian and cars. VI, 320.

Care required of pedestrian. VI, 357.

Pedestrian crossing street at street intersection has equal right with railway. III, 580.

Pedestrian may use any part of highway, and while walking on track may assume that she will not be run down by car going at excessive speed and giving no warning. V, 204.

Neither pedestrian nor railway has paramount right to use street. V, 239.

Pedestrian must yield right of way to cars except at regular crossings. II, 318.

Railway has superior or preferential right at street crossings. IV, 83.

Trespasser.

When a trespasser on tracks in street; duty of motorman. VI, 235.

Duty in removing from cars. VI, 21.

Injured when pushed off slowly moving car by conductor, — care required toward trespasser; whether injury actionable question for jury. VIII, 411.

Foot caught in safety device, — trespasser; last clear chance; contributory negligence. V, 658.

PHYSICIAN.

Furnished by railroad, — liability for malpractice by. VII, 210.

Liability of railway for employment of physician under rule of company requiring conductor to summon one in case of injury. VII, 186.

PLATFORMS. (*See Child; Employee; Passenger; Stations.*)

PLEADINGS. (*See Crossing Railroad by Street Railway; Employee; Evidence.*)

Passenger, — allegation insufficient as to plaintiff's being. I, 1.

Defective construction of car, — allegations as to, may be disregarded when not the proximate cause. II, 206.

Allegation as to reckless and incompetent motorman, — sufficiency of. II, 206.

Averments held sufficient as to manner of injury, duty to plaintiff not to injure him, and relation of carrier and passenger. IV, 21.

Sufficiency, — allegations held sufficient. IV, 165.

— declaration as to person injured by contact with live wire hanging over rear platform, held sufficient. IV, 521.

Injury to free passenger, — complaint charging company with liability as a common carrier held to state a cause of action. IV, 270.

Acts of servants within scope of employment, — allegations concerning, held sufficient. III, 193, 231.

Proximate cause, — allegations concerning, held sufficient. III, 193.

(For Index to Notes, see *ante*, p. ix.)**PLEADINGS** — (*Continued*).

- Defective air brake, — allegation as to, held to show breach of duty. III, 202.
- Sufficiency under Employers' Liability Act. III, 232.
- Permanent injury, — allegations as to held sufficient to admit evidence of impairment of earning capacity. III, 233.
- Passenger alighting from car injured by sudden start, — petition sufficient. III, 561.
- Ejection of passenger where transfer made from one car to another because of a blockade, — complaint held insufficient. III, 567.
- Assault on passenger, — complaint held insufficient. III, 715.
- Complaint alleging motorman and conductor assaulted boy and in attempting to prevent him from leaving car caused him to fall under wheels. VIII, 844.
- Insufficiency of complaint where person thrown from wagon when team frightened by car. V, 277.
- Complaint alleging accident in avoiding collision held sufficient; matter stricken out. VI, 130.
- Sufficiency of complaint in action against railroad for malpractice of surgeon. VII, 210.
- Complaint alleging killing of horse by falling of rotten post held not demurrable. VIII, 38.
- Complaint as to defendant's negligence where passenger on step was injured by car on opposite track, held to state cause of action. VIII, 62.
- Petition in action by occupant of automobile against railway and automobile companies held sufficient. VIII, 535.
- Complaint in action for failure to let passenger off at proper destination. VIII, 697.
- Complaint in action for injuries to cab driver from collision with street car. VIII, 707.
- Negligence, — sufficient allegations as to defendant's. I, 128, 157.
- in colliding with vehicle drawn by frightened horse, — nature of complaint. III, 11.
- of motorman in failing to sand tracks, — complaint held sufficient. III, 220.
- of conductor in prematurely starting car, — held sufficiently charged in complaint. III, 230.
- Answer alleging contributory negligence. VIII, 803.
- Allegations held sufficient to charge defendant's negligence proximate cause of injury. IV, 108.
- Wanton negligence in running over child, — averment in petition held insufficient. IV, 323.
- Sufficiency, — complaint held not to sufficiently charge negligence. VI, 799.
- of allegations of negligence and of relation of passenger and carrier. V, 260.
- of complaint alleging negligence in collision of team and car. VI, 750.

(For Index to Notes, see *ante*, p. ix.)

PLEADINGS — (*Continued*).

Complaint alleging negligence in running car into vehicle held sufficient. VIII, 619.

Wanton negligence of motorman in starting car before passenger had safely alighted, — averment sufficient. III, 20.

Wanton negligence sufficiently pleaded. III, 20.

Complaint in action for injuries to passenger charging negligence in operation of car and alleging wanton injury. VIII, 697.

Notice to defendant of depression caused negligent failure of defendant to fill, need not be alleged. I, 128.

Wilful injury, — a complaint must aver act was purposely and intentionally committed to wilfully inflict the injury. I, 171.

Use of unnecessary violence in ejecting passenger must be alleged. I, 592.

Employer's knowledge of defects must be alleged. II, 206.

Permanent injury must be pleaded to recover therefor. III, 772.

Noninsulation need not be pleaded where action was for negligence of wire falling. III, 859.

Separation of races in street cars, — petition in action for negligence of conductor in mistaking white passenger for a colored one must allege plaintiff was a white man. IV, 156.

Allegations as to negligence, — necessity of proving each. V, 249.

Contributory negligence must be pleaded. V, 611.

Failure of company to furnish enough seats for a long period may be pleaded and proved as circumstance of substantive negligence as well as aggravation. VI, 489.

Allegation that employee riding in car was a passenger must be proven. VI, 765.

Master's negligence in not promulgating rules must be pleaded. VII, 899.

Complaint in action to enforce common-law liability of employer, — necessary allegations. VIII, 145.

Complaint need not allege facts constituting negligence in case of derailment. VIII, 272.

Special damages must be specifically averred. IV, 240.

Regulation of carrier as a defense, — must be brought forward by special plea. V, 1.

Contributory negligence is defensive matter to be specially pleaded and is not in issue by a general denial. VII, 487.

Where presumption of negligence arises plaintiff need not specify negligent acts; but when he does he assumes burden of proof. V, 627, 631, 636.

Variance, — material variance between pleading and proof should be objected to on the trial. IV, 165.

— plaintiff can recover only on negligent acts alleged even though negligent acts not averred are proven. IV, 171.

— between pleading and proof, — materiality under the Indiana statute. IV, 270.

— between pleading and proof, — held not fatal. III, 555.

— held not fatal. VI, 653.

(For Index to Notes, see *ante*, p. ix.)

PLEADINGS — (*Continued*).

Variance, — held not reversible error. VI, 750.

— where precise cause of the accident was known to the railroad and not the passenger a variance between pleading and proof will not set aside recovery when not misleading to defendant. II, 800.

— to be material must mislead adverse party to his prejudice. VIII, 32.

Negligence, — necessity of substantiating specific charges of. II, 124.

Non sui juris, — fact that child was *non sui juris* may not be proven when not averred. IV, 259.

Inconsistent petition, — where plaintiff should be required to elect between counts. III, 489, 472.

Inconsistent allegations as to defendant's negligence does not render complaint inconsistent as stating no cause of action. III, 943.

Plaintiff is not entitled to plead one cause of action and recover on another. III, 715.

Allegations in action for injuries to child held not inconsistent. VIII, 396.

Inconsistent allegations, — excessive speed and negligence under humanitarian doctrine are not inconsistent and may be pleaded in same petition. VIII, 457.

Complaint held not bad for averments in the alternative. V, 266.

Disjunctive allegations, — complaint held not demurrable as charging disjunctively two causes of action. IV, 1.

Amendments to original petition stating other acts of negligence, when not cause for reversal. I, 57.

Amendment to petition held not to set up a different cause of action. III, 270.

Person injured by explosion of fuse, — plaintiff should have been allowed to amend so as to have question of defendant's negligence submitted to the jury on the principle of *res ipsa loquitur*. III, 714.

Amendment of complaint held germane and material. IV, 160.

Amendment; new cause of action. VI, 106.

Amended complaint held not to set forth different cause of action. VIII, 32.

Defect in complaint cured by verdict. III, 293.

Allegation as to negligence may be made in general terms. V, 261.

Recovery must be made upon specific acts of negligence alleged. IV, 151.

Where pleaded and evidence offered in proof negligence of defendant may be submitted to jury on different theories. VII, 519.

Contributory negligence, how pleaded. VIII, 609.

State of facts not excluded by the petition, though not specifically mentioned. I, 788.

Violation of speed ordinance admissible though not alleged in declaration. IV, 981.

Violation of ordinance intended for his benefit by plaintiff may be pleaded as a defense. VIII, 269.

Statement of conclusion as to facts held bad on demurrer. III, 608.

Bill of particulars in action for assault on passenger by conductor. VI, 729.

(For Index to Notes, see *ante*, p. ix.)

PLEADINGS — (*Continued*).

Vehicle detained by raised tracks and collided with, — imputation of negligence negatived by allegations of complaint. IV, 108.

Declaration held to permit evidence of uterine trouble resulting from accident. VII, 939.

Misjoinder of causes of action, — actions against railway for damages for personal injuries and for libel cannot be joined. I, 784.

Misjoinder of parties, — president of company improperly joined as party defendant. I, 784.

— railways cannot be sued jointly where no joint relation shown. III, 754.

— under Missouri statute. III, 576.

— or actions, how taken advantage of. I, 784.

Joinder of parties, — defendant cannot have owner of hack in which plaintiff rode at time of collision made a party defendant. IV, 692.

POLICEMAN. (See *Pass; Pedestrian; Transfers.*)

POWER HOUSE. (See *Eminent Domain; Taxation.*)

PRACTICE. (See *Appeals; New Trial; Pleadings; Trial.*)

Trial of wife's action for personal injuries and husband's for loss of her services at the same time should be encouraged. I, 557.

PRESUMPTIONS. (See *Evidences; Negligence; Passenger; Vehicles.*)

Presumptions as to cause of accident may be relied on when not clear from the evidence. I, 330.

PROXIMATE CAUSE. (See *Animals; Child; Passenger; Pedestrian; Streets and Highways; Vehicle.*)

Defined. VIII, 489.

PUBLIC SERVICE COMMISSION. (See *Extension.*)

Powers of investigation and of requiring common carriers to do things required by law given New York Public Service Commissions are supplementary to each other. VII, 566.

Municipality may not pass ordinance inconsistent with order of Public Service Commission of New York. VII, 599.

Enforcement of orders of New York Commission, — proof of order of Commission; excuse for failure to obey. VII, 658.

Relief denied by New York Commission will not be granted by courts. VII, 665.

RAILROAD. (See *Consolidation; Construction of Railway; Crossing Railroad by Street Railway; Extension; Fare; Franchise; Passenger; Removal; Streets and Highways; Tracks.*)

Term includes street railways. V, 343.

(For Index to Notes, see *ante*, p. ix.)

RAILROAD — (Continued).

Street railway under conditions of franchise estopped from denying its lines are street railways. VII, 605.

Definition under Iowa Code applied. III, 240.

May be on surface, elevated or subways. VII, 374.

Street and steam or commercial railroads distinguished. V, 577.

Street railway becoming interurban railway, — status. VI, 780.

Interurban railway, — to constitute railway an interurban railway does not depend alone upon right of eminent domain. VII, 605.

Interurban electric railway deemed trunk railway. II, 294.

Commercial and street railroad, — distinction depends on character of traffic. V, 188.

— distinguished. IV, 185.

— defined. V, 172.

— characteristics compared. V, 531.

Commercial road, — interurban railway is. VIII, 470.

Railroad commissioners having jurisdiction over steam railroads do not by implication have jurisdiction over electric railways. IV, 318.

Corporate existence of *de facto* railway cannot be attacked collaterally. VI, 842.

Property, — rails, poles, etc., remain property of company after expiration of franchise. V, 810.

Validity of organization when both termini in city. VI, 762.

Operation in street, — due care for safety of persons in street must be observed. II, 828.

Obstruction in highway may be removed by railway if interfering with operation. I, 248.

Steam and electric, — principles of law as to management not identical. VI, 265.

Operation, — in spite of unprofitable business railroad bound to furnish adequate service. V, 802.

— right of railway to operate cars on its lines when ownership of cars is in another corporation. VI, 841.

Right of way, — when not forfeited by abandonment or non-user. III, 85.

Ownership, — proof of. V, 666.

Ownership of railroad by defendant must be proved. VII, 906.

Validity, — contracts between railways must be within scope of their powers. VIII, 326.

Contract to procure consent of property owners and municipal franchise for construction of railway held void as against public policy. IV, 693.

Contracts between railroad and city held not abrogated by a subsequent statute. IV, 711.

Contracts to perform and furnish medical service to injured passenger, validity of; liability for malpractice. VII, 210.

Sale of, — liability of purchaser for wages of flagman. I, 850.

RAILWAY AND RAILROAD.

Words are synonymous as used in the statute. I, 717.

(For Index to Notes, see *ante*, p. ix.)

RAILROAD COMMISSIONERS. (See *Public Service Commissions; Railroad; Tracks.*)

REGULATIONS OF COMPANY. (See *Animals; Employee; Evidence; Fare; Passenger; Transfers.*)

Though reasonable it should not be enforced with undue severity. V, 1.

Right to adopt. V, 837.

RELEASE.

Obtained with promise of employment, — if no intention of giving employment release may be set aside for fraud. III, 830.

Set aside for fraud, — question of being unfairly obtained is a question for the jury. III, 140, 249.

Scope of release as to time covered. V, 167.

Husband or father injured by negligence of another cannot by a release deprive his widow or children of their statutory right of recovery. IV, 648.

Bars right of widow and children to recover when given by injured person before decease. VI, 566.

Signed by another person without authority and draft in payment not cashed, — remedy. VII, 829.

Release given to another company not shown to be joint tortfeasor does release defendant from liability. IV, 932.

Release to company not liable no defense in action against company liable. VIII, 188.

REMOVAL.

Removal of tracks, — denial of mandatory injunction to compel. V, 735.

— equity will enjoin when. VI, 638.

Purchaser of railway is not bound to operate same, but may remove rails. V, 452.

Railroad built in highway without authority, — public has right to have it removed. V, 499.

REPAIR OF TRACKS. (See *Tracks.*)

RIGHT OF WAY. (See *Fire Apparatus; Pedestrian; Railroad; Vehicle.*)

ROADBED. (See *Tracks.*)

RUNNING BOARD. (See *Passenger; Pedestrian.*)

SALE.

Sale of street company in Massachusetts prohibited by statute. VII, 456.

SELF-PRESERVATION. (See *Pedestrian.*)

(For Index to Notes, see *ante*, p. ix.)

SEPARATION OF RACES. (See *Damages; Evidence; Passenger; Pleadings.*)

SIGNAL TOWER. (See *Franchise.*)

SPECIFIC PERFORMANCE.

Electric railway company cannot be compelled to perform its duties under its franchise by specific performance. II, 817.

SPEED. (See *Child; Damages; Evidence; Motorman; Passenger; Pedestrian; Vehicle.*)

Care required in running car. VII, 704.

Care required of company as to speed at crossing. VIII, 784.

Negligent rate established when plaintiff overtaken from the rear. I, 759.

Negligent rate of speed, — finding sustained. I, 821.

Prohibited rate is negligence *per se*. II, 611.

Negligence, — not negligence *per se* to run car at certain rates of speed on streets little used. II, 554.

— in operation of car colliding with vehicle on track ahead depends on speed. I, 549.

— for motorman to run car at rate of fifteen miles an hour on dark night in street where vehicles likely to be. III, 410.

— of motorman a question for the jury. IV, 69.

— evidence that car was running at usual speed does not show negligence. II, 520.

— speed as an element of. VI, 826.

How speed may be negligent under critical circumstances. IV, 664.

Evidence of negligence question for jury. I, 394.

High speed in fog, — negligence of motorman question for jury. I, 635.

Slackening speed unexpectedly does not prove negligence. I, 301.

Running of car quite a distance beyond place of accident is not conclusive of motorman's negligence where car became uncontrollable because of the collision. IV, 332.

Running car across public thoroughfare at such high rate of speed that injury cannot be prevented after discovery of peril may constitute wanton negligence. VIII, 699.

Inference of negligence may be drawn from speed of a car. III, 300.

Contributory negligence, — excessive speed does not excuse. I, 260; II, 323.

Miscalculation of speed of approaching car does not make company responsible. I, 260.

Dangerous rate, — what is. V, 674.

Excessive, — whether speed is excessive depends on circumstances. VII, 318.

— is evidence of negligence. VII, 636.

— must be shown to have been the proximate cause. VIII, 309.

— motorman not negligent for excessive speed resulting from defective appliances. VIII, 836.

Reasonableness of rate of, — what constitutes. VI, 826, 830.

— question for jury. VII, 878.

(For Index to Notes, see *ante*, p. ix.)

SPEED — (*Continued*).

- Proper speed of car depends on circumstances. VIII, 301.
- In streets should be consistent with safe use of streets by the public. VII, 636.
- Regulation, — speed should be regulated to avoid collision with vehicle crossing track. II, 619.
- Rounding curve, — company should warn passengers of danger when rounding curve at high speed. II, 793.
- Cars running in open country at night need not be so run that they can be stopped within distance motorman can see with the headlight. III, 795.
- Protection of passenger riding on step, — company not required to reduce speed. II, 794.
- Ordinance limiting speed, — violation negligence *per se*. III, 580, 851.
- Violation of ordinance negligence *per se*. IV, 660; VII, 50, 423.
- Ordinance, — violation of, *prima facie* evidence of negligence. IV, 981.
- violation of, evidence of negligence. IV, 880.
- failure to comply with may constitute negligence *per se*. VIII, 687.
- limiting speed of heavy cars held not unreasonable. IV, 266.
- is not conclusive as to proper speed car may be run at particular place. III, 574.
- existence of does not authorize use of speed limit regardless of the situation. III, 581.
- held error to exclude. I, 475.
- regulating steam cars does not apply to electric cars. III, 82.
- limiting speed of cart or other vehicle carrying passengers does not apply to electric cars. IV, 868.
- Application of statute as to speed in certain cities and compact part of towns or villages. VII, 318.
- Express statutory limitation is not necessary to compel railway to restrain speed so that other vehicles may reasonably use highway. III, 610.
- Evidence as to speed, — technical knowledge not essential to form opinion as to. II, 631.
- Qualification of witness as to. I, 475.
- Conflict in evidence as to, — when court need not instruct for defendant. III, 521.
- Rounding curve, — evidence as to. I, 57.
- Evidence as to speed of cars ten days prior to the accident at the same place admissible as to negligence. II, 231.
- Evidence as to, — answer of witness tending to support contention of excessive speed, held admissible. II, 662.

SPRINKLING. (See *Streets and Highways*.)

STARTING AND STOPPING CAR. (See *Evidence; Passenger; Pedestrian; Speed; Vehicles*.)

- Distance within which car can be stopped, — expert evidence. I, 57, 434.
- Distances, — sufficiency of evidence as to. I, 397.

(For Index to Notes, see *ante*, p. ix.)

STARTING AND STOPPING CAR — (*Continued*).

- Evidence as to stopping car, — not permissible to show by car differently constructed. I, 796.
- Evidence as to negligence of motorman in stopping car considered and held not to support verdict. I, 796.
- Elements to be taken into consideration as to whether car could have been stopped. VIII, 321.
- Stopping cars, — city may regulate by ordinance; ordinance construed. VIII, 85.
- where car stops after signal given it is presumed to have stopped in response to the signal. IV, 656.
- ordinance regulating is enforceable by mandamus; ordinance construed. VIII, 82.
- Ordinance requiring cars to stop at fixed places, — council is vested with power to enact. II, 816.
- Ordinance requiring certain stops and prescribing penalty, — injunction will not issue to restrain enforcement. VI, 220.
- Stopping of cars at street intersections may not be required by municipality under the statute. VI, 777.
- Stopping car at certain points as ordered by corporation commission, — failure not excused because general manager had instructed employees to make such stops. VIII, 438.

STATE OWNERSHIP. (See *Constitutional Law*.)

STATIONS. (See *Eminent Domain; Passenger*.)

- Degree of care in maintenance is the highest in view of the circumstances. III, 891.
- Duty of street railroad in open country and suburban districts as to receiving passengers similar to that of steam railroad. VI, 653.
- Platform, — company must keep lighted and in safe condition. VII, 96.
- Person falling off platform, — negligence of defendant question for jury. III, 540.
- Negligence in not furnishing station platform question for the jury. V, 314.
- Person slipping from platform covered with ice, — negligence of defendant question for jury. IV, 841.
- Broken planks in platform, — company liable for injuries received. I, 253.
- Glass doors, — company not liable for injuries caused by swinging glass doors flying back and hitting and cutting plaintiff. I, 629.
- Defective stile to leave station, — company liable when it knew that it was being used by its passengers only. II, 260.

STEAM RAILROAD. (See *Crossing Railroad by Street Railway; Electricity; Passenger; Railroad; Streets and Highways*.)

STOCKS. (See *Bonds*.)

(For Index to Notes, see *ante*, p. ix.)

STOCKS AND BONDS.

Issue, — provisions as to railroads do not apply to street railways; cancellation of issue. VIII, 117.

STOPPING CAR. (See *Evidence; Passenger; Starting and Stopping Car.*)

STREET RAILWAY. (See *Railroad.*)

STREETS AND HIGHWAYS. (See *Abutting Owners; Additional Servitude; Appliances; Constitutional Law; Construction of Railway; Pedestrian; Vehicles.*)

Use, — right of cars on streets is in common with rights of other vehicles. III, 610.

Occupancy by a railway is in common with that of the general public. I, 368, 544.

Right of way of street railway. VII, 704.

Exclusive use by railway, — municipality may not grant. II, 100.

Use of by railway, — one not having right to use may not enjoin; *quo warranto* only remedy. VI, 837.

Right of way, — city may acquire right of way of railway by dedication and may authorize another railway to cross on the portion so dedicated. IV, 628.

Use of to move building so as to interfere with operation of railway. VI, 253.

Moving buildings in under municipal permit, — injunction prohibiting interference with trolley wires not continued. VII, 537.

Dedication of, — express acceptance by municipality necessary. II, 100.

— granting of franchise to railway an element of acceptance of. III, 647.

Street intersection, — what constitutes. II, 787, 790.

Repair, — duty of company. VI, 171.

— duty of railway under Massachusetts statute. III, 384.

Paving, — liability of street railway for. VIII, 652.

Franchise providing for repair of pavement around tracks by city. I, 368.

Pavement held not to include underground drainage so as to render railway liable for cost thereof. IV, 17.

Pavement by railway, — compelling railway to put in brick between tracks; franchise subject to police power. VIII, 818.

Repavement by railway, — amount required to be paved under an ordinance. II, 832.

— use of suitable old material. III, 452.

Repair between tracks, — company not required to lay new pavement under provisions requiring repairs. I, 689.

Repair of pavement around tracks by city, — agreement not *ultra vires*. I, 368.

Construction by city of concrete foundation for ties of railway, — agreement not *ultra vires*. I, 372.

(For Index to Notes, see *ante*, p. ix.)

STREETS AND HIGHWAYS — (Continued).

Municipality under the statute may not shift responsibility for safe condition to the railway. I, 368.

Repair of, — liability of company under the statute. I, 47.

Repair between tracks by railway, — liability under Massachusetts statute. III, 410.

Pavement by railway, — railway jointly using tracks of another railway not liable. IV, 857.

— money deposited with city by prospective railway to cover cost of paving may be recovered when franchise expires without railway being constructed. VII, 945.

— ordinances requiring held not *ultra vires* and duty not relieved by a franchise tax imposed by the legislature. IV, 772.

— contract between city and railway that city do work and be reimbursed by railway held valid. V, 453.

— contract for, with city may be abrogated by the legislature. IV, 399.

— agreement with abutting owners *ultra vires* under the statute. II, 87.

— mandamus proper remedy to compel. IV, 719.

— action by city; duty of company. V, 817.

— contract between municipality and contractor for repair relieves railway of duty. II, 738; III, 41.

— right of city to recover after doing work itself on failure of railway. IV, 957.

— lien for in favor of city; rights of purchaser of railway at mortgage foreclosure. II, 634.

— ordinance requiring, held to apply to all streets occupied by railway. IV, 937.

— under statute and ordinance. IV, 296.

— construction of ordinance requiring. VI, 782.

— ordinance requiring does not make railway insurer of travelers. VII, 798.

— franchise requiring may be modified by legislature. II, 738.

— application of statute to extension of railroad built under a subsequent statute. VI, 852.

Lighting, — company held compelled to maintain lights along streets. IV, 461.

Sprinkling of by railway to prevent raising of dust by cars, — ordinance requiring valid. VII, 143.

Defect in, — fact that repairs are done under supervision of city engineer does not relieve company from liability. IV, 1.

— part used by railway, — latter, not municipality, liable for injuries caused. I, 47.

— being repaired by railway, — company held liable for injuries caused thereby. I, 121.

— railway required to keep street in safe condition cannot escape liability by committing work to a contractor. IV, 1.

(For Index to Notes, see *ante*, p. ix.)

STREETS AND HIGHWAYS — (Continued).

- Defect in, — liability under an ordinance of company to indemnify city for injuries caused by. III, 456.
- determination of secondary liability of railroad under bond to keep street free from defects. IV, 970.
- town and railway are not jointly liable. II, 836.
- caused by contractor with municipality, — railway not liable for. II, 738.
- company liable for injuries caused by excavation made by it. III, 451.
- fact that ordinance required railway to keep streets in repair does not render it less liable for leaving excavation without safeguards. IV, 1.
- if plaintiff knew or had reason to believe there is a dangerous excavation it was her duty to avoid it. IV, 1.
- rails projecting above ground not a defect. IV, 466.
- near tracks projecting above surface, — held concurring proximate cause of plaintiff's being thrown from vehicle. I, 788.
- Excavation in street dug by contractor of abutting owner, — whether railway agreed to relieve city and contractor from guarding, held a question for jury. VIII, 743.
- Obstructions, — railway may not erect obstructions in, so as to exclude use by public; injunction compelling removal will lie. II, 100.
- unlawful obstruction of street by street railway. VIII, 707.
- Change of grade by railway, — abutting owners are not entitled to compensation therefor. I, 385.
- may be authorized by public authorities. I, 385.
- abutting owners are entitled to damages when raising of grade shuts off access to premises. I, 468.
- Changes made by railway under color of ordinance, — estoppel of city to question legality. VIII, 446.
- Laying tracks, — company has right to lay tracks in without consent of municipality. I, 686 (No. 2).
- Steam railway laid in street is an unlawful appropriation without legislative grant. II, 727.
- Exclusive right to location of route under the New Jersey statute. III, 647.
- Viaduct, — ordinance authorizing on certain conditions authorized. II, 114.
- Trestle, — authority of street railway to erect in public street. VIII, 656.
- Planking crossings, erecting sign-boards to paving by railway, — conditions in franchise held not unreasonable. III, 467.

SUBWAYS. (See *Additional Servitude*.)

SURVIVAL ACT. (See *Administrator*.)

SWITCH. (See *Abutting Owners; Appliances; Assumption of Risk; Eminent Domain; Passenger*.)

(For Index to Notes, see *ante*, p. ix.)

TAXATION. (See *Constitutional Law*.)

- Property of street railway subject to taxation. VII, 605.
- Assessment of property under the statute. I, 192.
- Exemption, — ordinance providing for payment to city of percentage of gross earnings as well as taxes on real property does not exempt from taxation electrical machinery. II, 495.
- does not pass to a lessee. IV, 808.
- of power house under statute relating to taxation for municipal purposes. II, 862.
- of leased property on payment of license fee under the statute. I, 844.
- Local assessments, — revision by State Tax Commissioners not prevented by provisions of city charter. II, 495.
- Percentage of gross receipts to be paid to township, — circumstances not requiring reduction. VI, 638.
- Percentage of gross receipts per mile, how ascertained. III, 356.
- Earning tax on capital invested, franchise conditioned on payment of, — complaint in suit to recover tax. VIII, 830.
- Tax on each lineal foot of track is a property, not a license tax. IV, 919.
- Franchise is a subject of taxation. IV, 790.
- Corporate franchise tax. I, 565.
- Franchise tax does not relieve railroad of duty to pave streets. IV, 772.
- Franchise tax, — covenant by lessee to pay. VIII, 711.
- Special franchise tax deductions under New York law. III, 684.
- License fee does not exempt railway from special franchise tax. IV, 805.
- Taxation for street pavement, — revocation of immunity from, not a deprivation of contract right. IV, 808.
- Surface and subsurface street railroads may be subjected to diversity of taxation. IV, 790.
- Interurban railway, — taxation under Iowa statute. III, 241.
- not subject to local taxation. VII, 605.
- Statute authorizing taxation of property of railway by city includes traction motor company leasing and operating street railways. I, 717.
- Under statute providing for taxation of railway occupying public place a turnpike is a public place; a street dedicated but not accepted is not. VII, 337.
- Payment of taxes by person without authority from mortgagees, — rights. I, 37.

TICKETS. (See *Fare; Passenger; Transfers*.)

- Purchase of tickets may be required, but proper facilities for purchasing must be furnished. I, 5.
- Strip tickets, — ordinance granting permission to build loop held not to abrogate former requirement to issue six strip tickets for five cents. VIII, 755.
- Company issuing tickets on two other independent railways liable for injuries to passenger who purchased ticket from one of the independent railways. VIII, 760.

(For Index to Notes, see *ante*, p. ix.)

TOILETS. (See *Appliances*.)

TRACKS. (See *Constitutional Law; Construction of Railway; Eminent Domain; Employee; Removal; Streets and Highways; Vehicle*.)

Repair of,—instruction to jury as to plaintiff's duty, as to barriers, and as to others crossing at same place. I, 375.

—contributory negligence of plaintiff injured by defendant's servants repaving a track held to bar recovery. I, 375.

Duty of defendant in construction of roadbed and tracks. II, 805.

Municipality may require railway to relay with material of good quality. VII, 642.

Construction and maintenance,—supports under tracks required. VIII, 244.

Turnouts and tracks,—difference defined. IV, 942.

TRAILERS. (See *Appliances; Employees*.)

TRAIN SERVICE. (See *Public Service Commission*.)

Ordinance regulating frequency of train service valid if reasonable; reasonableness. VII, 723.

TRANSFERS. (See *Constitutional Law; Damages*.)

Enforcement of law,—an individual may recover the penalty and has ample remedy for refusal to issue transfers. I, 616.

—mandamus at instance of an individual will not lie to compel issue of transfers; compliance must be enforced by State Railroad Commission. I, 616.

—mandamus will not lie to compel issue. II, 751.

—mandamus at instance of municipality will not issue to compel. IV, 736.

—penalties are not cumulative. III, 668, 716.

Public Service Commissions of New York may enforce obligation to issue. VII, 566.

Penalty,—but one penalty for refusal to issue can be recovered in a single action. IV, 866.

—liability for. V, 775, 778, 780, 781, 783.

—action for,—want of transfer slips by conductor no defense. II, 807.

Statute authorizing railway to make regulations as to issue and use of transfers is constitutional. VII, 615.

Regulation of company requiring transfer be requested on payment of fare held reasonable. V, 754.

Regulation as to time of demanding,—notice of. V, 775, 778, 781.

Rule requiring production by passenger is reasonable. II, 453.

Rule requiring held reasonable. V, 33.

Rules of company not known to passenger. VI, 727.

Order of corporation commission of Oklahoma held not unreasonable. VIII, 428.

Ordinance requiring issue by existing railway held invalid. VI, 781.

(For Index to Notes, see *ante*, p. ix.)

TRANSFERS — (*Continued*).

Municipality may not compel issue. VII, 620.

Annexation of territory to city, — effect of on contract with city to issue transfers. VII, 120.

— does not affect duty of company to issue transfers to all parts of the city. II, 198.

Franchise accepted on condition of giving transfers imposes a contractual obligation. III, 856.

Lessee is liable for penalty for refusing. III, 668.

Lessee of intersecting lines must issue to any portion of leased lines. III, 676.

Lessee prior to 1891 not compelled to issue transfers. III, 717.

Assignee of franchise, again assigning, cannot be compelled to issue transfers to other lines operated by it. III, 31.

Consolidated lines, — a company required to give transfers on its lines is not required to issue transfers to lines consolidated with it. II, 911.

Ownership of majority of stock of another railway is not such control as would compel issue of transfers to such other railway. IV, 867.

Issue to road running to another city may not be compelled under New York Railroad Law. VII, 650.

Application of transfer law to corporation assuming operation of two railway systems. I, 569.

Rule requiring use of transfer at intersection of lines held reasonable. IV, 866.

Ejection of passenger justifiable when presenting transfer at other than transfer point. V, 118.

Time of use may be reasonably limited provided a car pass transfer point within time limited. III, 85.

Time of use, — action will lie for ejection when conductor punches wrong time, but failure to ascertain mistake, if he could, would bar recovery. I, 525.

— may be limited though company does not run its cars frequently enough to permit use within such time. I, 267.

— passenger may be ejected on presenting transfer after time limit has expired. VII, 650.

— where passenger was ejected because time had expired because of lateness of first car verdict for actual damages was upheld, but not for exemplary damages. IV, 42.

Defective transfer, — a passenger is not bound to look for mistakes. I, 760.

— furnishing is negligence on part of the company. I, 760.

— passenger refused ride because given defective transfer may sue for breach of contract, but his remedy is not to refuse to pay fare, and he may be ejected. IV, 114.

— passenger ejected because of issuance of defective transfer may sue, not for wrongful ejection, but has an action for breach of contract of carriage or for negligence in issuance of transfer. V, 18, 33.

(For Index to Notes, see *ante*, p. ix.)

TRANSFERS — (*Continued*).

Defective transfer, — duty of railroad to correctly punch transfer; rights of passenger. VI, 594.

— recovery for refusal to take defective transfer may be had from company to which issued. VII, 650.

— consideration due passenger ejected after presentation of defective transfer. VI, 248.

Assault on passenger presenting defective transfer issued to him, — company held liable. V, 33.

Gratuitous transfer entitles passenger to ride on second car and company is liable for his expulsion from second car because of issuance of defective transfer. V, 120.

Ejection of passenger to whom wrong transfer was issued, — rights. V, 792.

Passenger given wrong transfer may resist ejection; remedies. VI, 123.

Condition on transfer that holder will pay fare and call at company's office to rectify mistake held unreasonable. V, 120.

Wrong transfer, — when issued passenger entitled on proper explanation to be carried on line to which he had requested transfer. III, 232.

Refusal to accept folded transfer, — no justification for ejection of passenger. III, 853.

Passenger not entitled to transfer by round-about route. V, 742, 782.

Circuitous route may not be taken. VI, 863.

Direction of transfer under the New York statute. VI, 246.

Persons holding are passengers. III, 731.

Person riding on platform in violation of rule of company not entitled to transfer. VII, 840.

Passenger entitled to transfer though fare paid by escort. IV, 866.

Fare may not be withheld until transfer given. VII, 195.

Transfer issued by conductor is presumed to be a proper token of transfer. III, 566.

Duty of company to carry passenger to destination after issue of transfer, stated. V, 536.

TRESPASSER. (*See Children; Passenger; Pedestrian; Trestle.*)

Street railway owes no duty to wilful trespasser on its cars except to refrain from wilfully or wantonly and recklessly exposing him to danger. VIII, 645.

TRESTLE. (*See Bridge; Constitutional Law; Evidence; Streets and Highways; Vehicle.*)

Injury to trespasser, — warning to others not binding on deceased. I, 57.

— railway owes no duty except after it knew of her peril. I, 796.

TRIAL. (*See New Trial.*)

Continuance should be granted where one of defendant's witnesses, an employee, is prevented from testifying because of a strike. V, 317.

(For Index to Notes, see *ante*, p. ix.)

TRIAL — (*Continued*).

Consolidation of suits proper under U. S. Comp. St. where brought by separate plaintiff against same defendants for injuries sustained in same accident. IV, 83.

Remarks of counsel, — improper and proper. III, 290, 452, 776.

— not founded on testimony reversible error. VI, 734.

TROLLEY WIRE. (*See Appliances; Electricity; Employee.*)

TURNOUT. (*See Tracks.*)

TURNTABLE. (*See Appliances.*)

VEHICLE. (*See Animals; Appliances; Bicyclist; Child; Employee; Fire Apparatus; Passenger; Speed; Streets and Highways.*)

Struck by car, — due care and negligence are questions for the jury. I, 101, 307, 322.

Turning off track, delayed by fall of horse and struck by car, — defendant not negligent. IV, 680.

Struck by car rounding corner, — contributory negligence. V, 773.

Backing off track, struck by car, — contributory negligence. V, 817.

Driver jumping or falling from vehicle turned from tracks and struck by car, — motorman held not guilty of negligence. IV, 13.

Overtaken by ridge of snow between tracks piled by defendant, — plaintiff not negligent as a matter of law. IV, 451.

Struck by car while driver turned toward rear adjusting load, — judgment for defendant. IV, 518.

Street intersection, collision at, — evidence sufficient to submit question of decedent's negligence to the jury. II, 170.

— duty of motorman to have car under control. II, 706.

Collision, — instruction as to collision with wagon. I, 434.

Cab struck by car and driver injured, — instructions to jury considered. VIII, 707.

Last clear chance, — where in spite of incompetency of driver defendant could have avoided accident, failure to do so is the proximate cause. IV, 685.

— held doctrine could not be invoked by defendant under the evidence. IV, 108.

Negligence of conductor in failing to obtain license under the statute held to have no connection with the accident. IV, 445.

Inferences, — it is proper to charge that jury may find facts that may be inferred from evidence. I, 101.

Misjoinder of causes of action charging wilfulness and negligence. III, 576.

Heavily laden, struck by car, — negligence and contributory negligence; humanitarian doctrine. V, 678.

Collision of car with heavy dray, — verdict for plaintiff sustained. III, 299.

Struck by car, — latter not a "locomotive" within provisions of Alabama Code requiring giving of warning at crossings. VIII, 797.

(For Index to Notes, see *ante*, p. ix.)

VEHICLE — (Continued).

Care.

Degree of care to be used by driver and operator of car is reciprocal. III, 23.

Motorman must keep lookout and driver may assume that he will use ordinary care. III, 273, 410, 579.

— instruction as to exercise of care by. I, 475; II, 936.

— degree of care to avoid collision. III, 226.

Struck by car, — care of motorman to prevent collision with vehicle. VIII, 729.

Motorman required to use ordinary care to see that tracks are clear. IV, 1048.

Duty of motorman at crossing; failure to sound gong. VIII, 784.

Due care by motorman, — evidence to establish. I, 516.

Motorman should have car under control. III, 300.

— duty to avoid vehicle he sees in danger on or near track. III, 263.

Duty of motorman seeing vehicle on track stated. IV, 1045.

Degree of care to avoid collision, — company in the exercise of ordinary care must stop its car if impossible. IV, 288, 290.

Duties of company as to persons likely to be on track at a certain point. II, 936.

Required of company in operating cars is only ordinary care. IV, 458.

— to avoid collision with. IV, 880.

Degree of care to be used by driver while using right of way of railway, stated. IV, 199.

Driven in same direction ahead of car, struck by car, — plaintiff's due care question for jury. VIII, 653.

Due care by driver, — sufficiency of instructions. III, 143.

Required of driver driving heavily loaded wagon on track. II, 190.

Due care by plaintiff, — unprejudicial instruction as to. I, 459.

Conduct in face of danger, — rule not applicable when created by person in question. III, 933.

Negligence.

Automobile struck by car, — whether negligence of plaintiff's intestate or of defendant was proximate, held question for jury. VIII, 687.

Presumption of negligence, — error not to charge that defendant could relieve itself of statutory presumption. I, 68.

— there is none as to either party. III, 23.

Motorman, — negligence of inferred from the circumstances. II, 237.

Where negligence of motorman is proximate cause of collision, contributory negligence will not defeat recovery. III, 853.

Subsequent negligence of defendant's motorman. I, 657.

Struck by car, — charge as to negligence and failure to ring gong held erroneous. VII, 917.

Stopping car, — negligence of motorman in failing to stop car before striking vehicle. VIII, 731.

(For Index to Notes, see *ante*, p. ix.)

VEHICLE — (Continued).

Negligence — (Continued).

Driven in same direction ahead of car, struck by car, — defendant's negligence question for jury. VIII, 653.

Where specific acts of negligence are alleged, it is error to instruct that plaintiff may recover for any act of negligence. III, 577.

Struck by car, — humanitarian doctrine applied. VIII, 731.

Wanton negligence, — proper instruction as to want of. III, 111.

Burden of proof of negligence on part of deceased was on the defendant, held proper in view of the facts. I, 475.

Contributory negligence of driver should be judged from whole testimony. IV, 458.

Struck by car, — negligence of driver of motorcycle. VIII, 744.

— contributory negligence for jury. VII, 924.

Contributory negligence, — charge as to properly refused under the evidence. III, 1.

Concurrent negligence, — where negligence of driver and motorman is contemporaneous there can be no recovery. III, 327.

Struck by car, — driver guilty of contributory negligence as a matter of law. VIII, 665.

Concurrent negligence by vehicles and street cars. VIII, 647.

— where proximate cause was the concurrent negligence of plaintiff and defendant, the contributory negligence of the latter precludes recovery. II, 936.

Of motorman and contributory negligence of driver questions for the jury. III, 135.

Automobile struck by car, — contributory negligence; last clear chance. VIII, 392.

Imputed Negligence.

Negligence of driver when not imputed to occupant; when such negligence will be imputed. VIII, 515.

Injury to occupant, not the driver. V, 684.

Negligence of chauffeur not imputed to guest in automobile. VIII, 784.

Automobile negligently allowed to collide with car, — when passenger chargeable with driver's negligence. VIII, 615.

Negligence of driver will be imputed to employer riding with him. III, 482.

Passenger in hack is guilty of contributory negligence when he has knowledge of the incompetency of the driver. I, 657.

Person, not the driver, riding in a vehicle must exercise ordinary care; knowledge of carelessness of driver may be shown. IV, 69.

Incompetent driver, — when occupant of a vehicle selects an incompetent driver he is negligent. IV, 685.

Negligence of driver is imputable to person who intrusted himself to his care. III, 375.

— is imputable to his companion. III, 933.

(For Index to Notes, see *ante*, p. ix.)

VEHICLE — (Continued).

Imputed Negligence — (Continued).

- Occupant of vehicle injured by car when driver too near tracks, — held guilty of contributory negligence. V, 446.
- Person riding with driver is entitled to have question of due care of driver submitted to jury. III, 390.
- Decedent having no control over driver, contributory negligence of latter will not bar recovery. I, 581.
- Contributory negligence is not imputable to a person with him, but having no control over him. III, 23.
- Negligence of driver is not imputed to occupant having no control over movements of vehicle. IV, 581.
- cannot be imputed to occupant having no control over driver. VIII, 760.
- Passenger in vehicle having no control over driver held not guilty of contributory negligence under the circumstances. IV, 83.
- Negligence of driver of vehicle is not to be imputed to gratuitous guest of driver. V, 393.
- Company liable for its negligence in injuring occupant of a vehicle, not the driver, in spite of the contributory negligence of the driver. IV, 183.
- Negligence of experienced driver will not be imputed to a person riding with him. II, 573, 612.
- Negligence of chauffeur, when not imputable to occupant. VI, 625.
- Automobile struck by car, — duty of motorman; use of streets by cars and automobiles; negligence of chauffeur not imputed to passenger; last clear chance. VIII, 535.
- Negligence of operator of taxicab will not be imputed to occupant. VIII, 135.
- Negligence of husband, who was driving, is not to be imputed to his wife riding with him. III, 173.

Look and Listen.

- Failure to, contributory negligence. III, 382.
- When failure of driver to, contributory negligence as a matter of law. VI, 457.
- Failure of driver to, before crossing track, contributory negligence. VIII, 542.
- Failure of driver approaching track at a gallop to look and listen, held to preclude recovery. IV, 77.
- Failure of driver, before crossing tracks, contributory negligence. IV, 968.
- Failure to as contributory negligence. IV, 1013.
- Failure of driver to, contributory negligence; duty of motorman. VI, 484.
- Contributory negligence; negligence; right of way. VI, 605.
- Negligence of deceased in not looking and listening before crossing track question for jury. I, 475.
- Driver's negligence question for jury. V, 445.

(For Index to Notes, see *ante*, p. ix.)

VEHICLE — (Continued).

Look and Listen — (Continued).

When vehicle is struck crossing tracks after driver has looked, negligence and contributory negligence are questions for jury. VII, 314.

What particular means or measures were appropriate should be left to the jury. III, 70.

Failure to, excused as an act in emergency. IV, 871.

— excused in an emergency. V, 772.

Driver required to immediately before crossing tracks. IV, 935, 947.

Look, — failure of driver to look on crossing tracks is negligence *per se*; driver must continue to look until track is reached. I, 706.

It is driver's duty to see car as much as to look for it. III, 933.

Driver need look only as far as an ordinarily prudent man would. III, 300.

Refusal of instruction equivalent to instruction that driver was under no obligation to look and listen. I, 624.

Charge as to deceased's duty. I, 475.

Erroneous instruction as to plaintiff's duty. I, 509.

Driver not bound, as in case of steam railroad crossing, to stop, look and listen on approaching street railway track. IV, 436.

Duty to is not affected by a rule of the company that cars be run a certain distance apart. IV, 345.

Failure to by driver; last clear chance. V, 684.

Failure of driver crossing track; last clear chance; duty of conductor to keep vigilant watch. V, 689.

Presumption that deceased stopped, looked and listened arises only in the absence of all evidence on that point. IV, 77.

The court need not instruct for verdict for defendant if plaintiff did not prove he looked and listened when uncontradicted evidence showed plaintiff did look and listen. I, 434.

Facts not showing contributory negligence as a matter of law. II, 910.

Plaintiff held to have listened and shown due care. IV, 466.

Evidence of plaintiff that he looked and listened held in conflict with physical facts. II, 617.

Failure to prove that plaintiff looked and listened is immaterial when car is at such a distance as to warrant assumption of safety. I, 586.

Not contributory negligence as a matter of law to fail to look a second time. II, 478.

Contributory negligence not to look just before crossing tracks. III, 955.

Where driver fails to look and listen immediately before crossing tracks his contributory negligence is a question for the jury. IV, 521.

Failure of driver of automobile to look immediately before crossing tracks; contributory negligence. VI, 735.

Failure of driver driving along track to look behind held contributory negligence. IV, 870.

Driving along track at night without looking back is contributory negligence. II, 783.

(For Index to Notes, see *ante*, p. ix.)

VEHICLE — (Continued).

Look and Listen — (Continued).

Inclosed top, — it is contributory negligence to drive along tracks in wagon with inclosed top without looking back for cars. I, 516.

Application of doctrine of last chance when driver fails to look back. III, 578.

Driven along track, — it is not contributory negligence for driver to fail to look back continually. II, 237.

Vehicle with top closed so that driver unable to look back, struck while crossing tracks diagonally, driver held to have exercised due care. IV, 448.

Driver of automobile driven along track not bound to look back; negligence of motorman; right of way. VI, 713.

Negligence in driving along tracks without looking back is a question for the jury. II, 182, 615.

Driving along track at night without looking back is not negligence as a matter of law; driver must exercise senses to discover in some way approach of car. I, 624.

Negligence for driver of covered wagon to drive on tracks without looking and listening. III, 327.

Not contributory negligence to drive wagon along track with curtains down. III, 877.

Loaded with brush so that driver could not see behind or on side, struck by car, — driver guilty of contributory negligence. VII, 927.

Contributory negligence *per se* for one walking behind team without looking around after first starting to cross. III, 881.

Duty of gratuitous passenger in automobile to. VII, 323.

Proper refusal to instruct as requested. I, 769.

Crossing Track.

In front of car, — what driver may assume as to appliances, motorman and speed. III, 619.

— reliance that car would stop at customary place; negligence; contributory negligence. VI, 741.

— contributory negligence of driver a question for the jury. II, 429, 607; III, 390, 407, 770; IV, 332; V, 519, 690; VII, 927.

— contributory negligence; wanton injury; violation of speed ordinance. VI, 748.

— contributory negligence; motorman's negligence. VII, 519.

— on dark night, — contributory negligence; last clear chance. V, 806.

— discovered peril; contributory negligence. VI, 745.

— some distance away, — not contributory negligence as a matter of law. III, 223, 575, 619, 653.

Struck by car, — care required of driver; use of streets. VI, 464.

Care not same as required at steam railway crossing. IV, 535.

Country crossing, — degree of care required of driver at. III, 329.

(For Index to Notes, see *ante*, p. ix.)

VEHICLE — (Continued).

Crossing Track — (Continued).

Struck by car, — rights of railway in use of streets; care to be used by driver. VI, 754.

Under the circumstances driver held guilty of contributory negligence. I, 260, 492; II, 254, 256, 562, 780, 979.

Driven down street at a trot and crossing tracks on intersecting street, — driver held contributory negligence. III, 771.

Notwithstanding sounding of gong of car, — driver guilty of contributory negligence. IV, 880.

Driven across track in front of car, — driver guilty of contributory negligence. VII, 917.

Struck by car when automatic bell did not act regularly, — guilty of contributory negligence. VIII, 236.

Ahead of approaching car approaching up steep grade at distance of 150 feet, — driver not guilty of contributory negligence as a matter of law. IV, 106.

Struck by electric car at grade crossing, — contributory negligence. V, 774.
Heavily loaded, crossing in front of moving car, — contributory negligence. VII, 920.

Automobile crossing tracks struck by car, — contributory negligence. VII, 770.

Run into by extra car following regular car, — defendant held not negligent. V, 373.

Struck by car, — motorman not guilty of gross negligence in view of the evidence. VIII, 762.

Defendant's negligence and plaintiff's exercise of care questions for the jury. IV, 466.

Struck by car, — negligence and contributory negligence questions for jury. VII, 529.

In front of approaching, — negligence and contributory negligence questions for the jury. IV, 397.

Where view obstructed, — due care on part of driver and motorman questions for the jury. V, 449.

Struck by car, — instructions not erroneous as to wilful negligence and failure to sound gong; plaintiff not guilty of contributory negligence as a matter of law. IV, 540.

Crossing in front of car, — reciprocal duties of driver and motorman. VI, 434.

At street intersection, — respective rights; duty of motorman; contributory negligence. VII, 535.

By car going at excessive speed, — rights of driver; duty of motorman. VI, 470.

Struck by car, — contributory negligence; last clear chance. VIII, 203.

In front of approaching car, — contributory negligence; humanitarian doctrine. VIII, 375.

(For Index to Notes, see *ante*, p. ix.)

VEHICLE — (Continued).

Crossing Track — (Continued).

Struck by car, — application of Missouri statute; absence of light on car; excessive speed; contributory negligence. V, 671.

— after both had slowed up and then started forward, — verdict for plaintiff justified. IV, 81.

— each party held at fault. IV, 127.

— driver thought would go in opposite direction, — driver not guilty of contributory negligence as a matter of law. VI, 460.

— doctrine of last clear chance applicable. V, 192.

— last clear chance doctrine. VIII, 619.

— last clear chance; reasonableness of speed; right of way. VI, 830.

— “humanitarian rule.” VII, 291, 923.

— going at excessive speed, — contributory negligence. VI, 750.

— excessive speed in populated district; contributory negligence. VI, 827.

Erroneous charge eliminating possibility of plaintiff's negligence. II, 781.

Crossing in front of approaching car, — duty of motorman. VIII, 559.

Without a driver, — negligence of motorman. VI, 751.

Erroneous charge as to motorman's duty to foresee. III, 604.

Motorman, — duty to avoid collision at crossing. III, 603.

Electric coupé crossing tracks struck by car, — motorman negligent in not seeing peril and stopping car. VIII, 98.

Struck by vehicle, — wilful negligence question for jury. VIII, 414.

Covered wagon crossing tracks, — last clear chance; care required of motorman. V, 672.

Error in judgment as to distance of approaching car precludes recovery. II, 78.

Contributory negligence when driver must have known there was only a bare chance. III, 771.

When driver believed he could cross in safety, his contributory negligence is a question for the jury. IV, 681.

Driver must be reasonably careful and not cross too near a fast approaching car. IV, 332.

Driven across tracks between street intersections, driver knowing car would strike vehicle unless car was slowed down, is negligence *per se*. IV, 192.

Crossing after seeing car is contributory negligence; motorman may assume driver will not cross. III, 330.

In front of stationary car, which suddenly started, — contributory negligence of driver is a question for the jury. III, 576.

In front of stopped car, struck by car suddenly started, — defendant's negligence and due care of plaintiff questions for the jury. VIII, 754.

Driven across tracks in front of standing car, — not contributory negligence as a matter of law. VII, 919, 924.

In front of approaching car, — not negligence as a matter of law when car 500 feet away, whatever its speed. I, 434.

(For Index to Notes, see *ante*, p. ix.)**VEHICLE — (Continued).****Crossing Track — (Continued).**

When car 300 feet away, — case for jury made out. IV, 521.

With view obstructed by another car is contributory negligence. III, 408, 575.

Driven across track with view partly obstructed, — contributory negligence question for jury. VII, 918.

When view obstructed by car on other track, — driver guilty of contributory negligence. VIII, 309.

Obstruction held not to have been sufficient to obstruct view so that driver was guilty of contributory negligence. III, 933.

Driven diagonally across tracks, — negligence and contributory negligence questions for jury. V, 447.

Diagonally and struck from behind, — nonsuit properly refused. IV, 163.

Diagonally, struck by car, — duty of driver to look behind not continuous; duty of railroad; negligence; contributory negligence. VIII, 113.

Driven on tracks from street running into but not across tracks, — negligence and contributory negligence held questions for the jury. III, 770.

Automobile crossing tracks struck by car, — violation of speed ordinance; proximate cause. V, 685.

On dark night, struck by car, motorman giving no warning, — negligence of motorman established; no negligence on part of plaintiff. VIII, 765.

While heavily loaded, struck by car, — negligence; contributory negligence. VIII, 782.

Turned onto Track.

Reciprocal duty to exercise care. IV, 535.

At street crossing, — negligence and contributory negligence questions for the jury. IV, 535.

Struck by car from rear, — negligence of motorman. VII, 921.

Driven along street, turned to cross track, struck by car, — wilful negligence or last clear chance. VII, 496.

Suddenly driven on track, — company not liable. II, 138.

Unexpectedly, rendering it impossible for motorman to stop, — plaintiff precluded from recovery because of contributory negligence. IV, 330.

Turning suddenly on track, — rights of railways and vehicles; negligence of motorman. VII, 176.

To avoid obstruction, — contributory negligence of driver as question of fact. IV, 289, 290.

Obstructions, — turning on track to avoid obstruction when car 200 feet away, held a *prima facie* case made out. III, 577.

In front of car at approach to bridge, — negligence of motorman question for jury. V, 510.

To avoid obstruction, struck by car, — humanitarian doctrine, to whom applied; proximate cause. VIII, 457.

Driven on track to avoid car, — failure to look and listen excused in emergency. V, 772.

(For Index to Notes, see *ante*, p. ix.)

VEHICLE — (Continued).

Turned onto Track — (Continued).

Turning from one track to avoid car approaching from the rear, — negligence of driver a question for the jury. II, 782.

Turning upon another track not negligence *per se*. I, 544.

Turning onto the other track to allow a car behind to pass, struck by car on the other track, — contributory negligence question for jury. VII, 329.

Driven Along Track.

Struck from rear by car, — driver's contributory negligence question for jury. V, 446.

— contributory negligence; duty of motorman. VIII, 791.

Contributory negligence for jury to determine. II, 616.

Driven on or near track, — contributory negligence a question for the jury. III, 809.

Struck from rear about to leave tracks, — question of contributory negligence left to the jury. III, 577.

And struck by approaching car, — contributory negligence of driver held to bar recovery. III, 225.

At night, struck headon by car equipped with lights, — driver guilty of contributory negligence. VII, 466.

Loaded with hay, driven along tracks, — contributory negligence as a matter of law. VI, 747.

Where contributory negligence pleaded as affirmative defense, burden of proving it is on defendant. III, 577.

Driver must keep lookout, but not continuously to the rear. III, 23.

Struck by car from the rear, motorman giving no signal, — verdict for plaintiff justified. III, 717.

Motorman may assume driver will use due care to avoid dangerous position. III, 482.

Struck by car from the rear, driver failing to heed motorman's signal with gong, — motorman held guilty of reckless conduct. IV, 648.

In narrow street, struck by car, — motorman negligent. VI, 472.

On stormy night, struck by car from rear, — last clear chance. VI, 738.

Driven on track on down grade on sleety evening, struck by car from rear, — humanitarian doctrine. V, 688.

Wagon overtaken by car and run into, — care of both parties and negligence of defendant are questions for the jury. I, 101.

At night, struck by car from behind, — negligence and contributory negligence questions for jury. VIII, 89.

Struck headon by car on foggy day, — negligence and contributory negligence questions for jury. VII, 918.

Because of snow thrown up by plaintiff, struck by car, — negligence and contributory negligence questions of fact. VI, 541.

Because of snow thrown in highway by defendant, struck by car, — duty of operator of car to have regard for conditions of highway; negligence; contributory negligence. VIII, 774.

(For Index to Notes, see *ante*, p. ix.)

VEHICLE — (Continued).

Driven Along Track — (Continued).

Head-on collision between car and vehicle forced to travel on tracks because of snow piled on each side by defendant, — motorman negligent. VIII, 760.

In dark, driver having cap pulled over ears, — contributory negligence; humanitarian doctrine. V, 675.

Without room to turn out, — duty to look; reckless injury; humanitarian doctrine. V, 683.

Struck by car from rear, — last clear chance; care required of driver; contributory negligence. VII, 499.

Struck by car from rear, — relative rights in use of streets; warning of approach of cars; noisy wagon drowning sound of gong. VIII, 162.

Rights and duties of driver; humanitarian rule. VIII, 477.

Running ahead, struck by car, — violation of traffic ordinance no defense, as ordinance not intended for benefit of street railway. VIII, 269.

Driving along street, struck in the rear, — verdict for defendant held not in accordance with evidence. IV, 80.

Driving along track, — motorman must use ordinary care to avoid collision in spite of plaintiff's contributory negligence. I, 459.

— at night time not contributory negligence. III, 410, 579.

— struck by car going contrary to custom on wrong track, — plaintiff's contributory negligence question for jury. IV, 966.

Near Track.

Driving near track, — not contributory negligence as a matter of law. IV, 474.

— in passing another vehicle, — negligence of driver held proximate cause. III, 579.

Driven along by side of track, — motorman may rely on driver not attempting to cross track in front of car. IV, 43.

Driven near track, struck by car, — excessive speed; failure of motorman to sound gong or check speed; contributory negligence. V, 669.

Drawn near track by horses frightened by car, — duty of motorman; contributory negligence of occupant of vehicle jumping out in apprehension of collision. VII, 681.

Forced near track by automobile, struck by car, — care required of motorman; last clear chance. VIII, 521.

Hemmed in close to track by banks, — reciprocal use of streets; duty of motorman. VI, 479.

Stopped in narrow space between curb and track, struck by car, — no negligence on part of defendant shown. VII, 590.

Struck from Rear.

Run into from behind at street crossing, — verdict for plaintiff justified. IV, 435.

Struck by car from rear at night, — what is dangerous rate of speed. V, 674.

(For Index to Notes, see *ante*, p. ix.)

VEHICLE — (Continued).

Struck from Rear — (Continued).

Struck by car approaching from rear, — defendant's negligence; humanitarian doctrine. V, 676, 681.

On Bridge.

Collision on narrow bridge, — motorman only bound to use ordinary care under the circumstances. II, 784.

Struck by car on narrow bridge, — duty of motorman; violation of rule of company prohibiting two cars using bridge at same time. VI, 625.

Crossing bridge, collided with by car because of defective condition of bridge, — it must be shown that railroad was required to keep bridge in repair. IV, 960.

Backed on Track.

Driver of automobile guilty of contributory negligence. VI, 736.

Held collision unavoidable by motorman. III, 718, 771.

Right of Way.

Of vehicles and cars stated. IV, 288; VI, 309; VII, 499.

Neither car nor vehicle has exclusive right to use streets. IV, 13.

Rights of individuals and railways are co-extensive. IV, 397.

Vehicles and cars must use streets with just regard for rights of others. V, 192.

Street intersection, — rights of company and driver equal; duty of motorman and driver. I, 657.

Duty of motorman to keep car under control; contributory negligence. VI, 354.

Struck by car, — use of track by public; care required of motormen. VI, 749.

Duties of driver of vehicle and of motorman stated. IV, 880.

Automobile crossing track struck by car, — relative rights to use of streets. VIII, 352.

Of automobile and car at crossing. VIII, 770, 784.

Private vehicle must yield right of way to street car. II, 18.

Vehicle has not same right to have car slacken as motorman has to require driver to give way. III, 933.

Railway has superior or preferential right at street crossings. IV, 83.

Street car having right of way because of nearness to street intersection need not stop to allow vehicle to cross. II, 120.

Where street enters another but does not cross, — car has paramount right. IV, 869.

Of street car does not warrant failure to use care to prevent collision with vehicle. I, 434.

Keep to the right, — motorman bound to take notice of the duty of a driver to. I, 544.

Defendant is bound only to use reasonable care in the use of its superior right of way over its tracks. II, 784.

Car has not paramount right of way at street crossing. VIII, 561.

(For Index to Notes, see *ante*, p. ix.)

VEHICLE — (Continued).

Right of Way — (Continued).

One on track to avoid obstruction has right of way until obstruction is cleared. III, 390.

Where necessary for car to slacken speed to allow vehicle to cross tracks any right of way in favor of vehicle ceases. III, 955.

Street intersection, — rule that car and vehicle have equal rights at, does not apply to vehicle driving along same street with car and turning near intersection. I, 575.

Latter defined. III, 718.

Negligence. V, 711.

Speed.

Negligence for motorman to drive car at excessive speed on dark night where vehicles were likely to be driven on tracks. III, 410.

Proper instruction as to motorman's duty to slacken speed. I, 506.

Of car should be regulated so as to avoid collision. II, 619.

When car is running at excessive speed, company is liable even though team drawing vehicle becomes unmanageable. II, 979.

Collision at street intersection caused by excessive speed of car. III, 227, 573, 574.

Where plaintiff had a right to assume speed of car would be reduced his contributory negligence is a question for the jury. I, 586.

Ordinance, — negligence in violating speed ordinance. III, 572.

— driver has right to rely on observance of. IV, 981.

Stopping Car.

Stopping on track in front of approaching car is contributory negligence. II, 614.

Stopping within a few feet of the track is not contributory negligence as a matter of law. II, 1.

Standing on track, — motorman's failure to keep diligent lookout held proximate cause. III, 1.

Stop, — failure to not contributory negligence considering distance and speed of car. II, 231.

It is proper to refuse to instruct that even if brake was in proper condition, if plaintiff crossed so close in front of the car that it could not have been stopped in time he cannot recover. I, 307.

Evidence sufficient to justify finding motorman should have stopped the car. II, 231.

Failure to look and listen does not excuse failure to stop car after discovery of perilous situation. II, 611, 620, 654.

Caught and Stalled.

Caught in track, — negligence of driver question for the jury. III, 575.

Wheels caught in track, — *res ipsa loquitur* does not apply. VII, 798.

(For Index to Notes, see *ante*, p. ix.)

VEHICLE — (Continued).

Caught and Stalled — (Continued).

Horse having foot caught in cable slot, plaintiff was unable to get out of way of approaching car, — held properly submitted to jury on question of contributory negligence. IV, 647.

Caught in switch, — company not liable when switch not a nuisance. VI, 1.

Stalled on tracks, struck by car at night in sparsely settled district, — negligence of defendant not shown; duty of motorman to keep car under control. VIII, 292.

Caught in rut and overturned on temporary highway maintained by railway during construction work, — defendant bound to keep such highway reasonably safe. VIII, 184.

Horses, Frightened, Etc.

Standing on track because of balky horse, — contributory negligence held a question for the jury. IV, 38.

Backened on track by frightened horse, — care required of motorman stated. V, 338.

Backed onto tracks by horse frightened by car and struck by car, — care required of motorman. VII, 853.

In country district, — duty of motorman as to frightened horses. VII, 943.

Frightened horse, — negligence of motorman in approaching. VI, 139.

Drawn on track by frightened horse, — negligence of motorman failing to check speed. V, 687.

Horse running away, — error to instruct defendant negligent if car could have been stopped in time. II, 308.

Horse Unfastened.

Leaving horse unfastened held contributory negligence. IV, 479.

Horse left unfastened at night and wandering on track, wagon struck by car, driver having warned conductor, — plaintiff not negligent as a matter of law, conductor's negligence in not warning motorman question for jury. V, 448.

Appliances.

Tracks are not necessarily places of danger. III, 450.

Injury to driver by defective track, — driver guilty of contributory negligence if defect obvious. III, 854.

Defective track, — fact that railroad commissioners allowed cars to be run before tracks were in perfect condition does not relieve railway from liability. IV, 374.

Injury to driver by rail projecting above ground, — verdict for plaintiff sustained. III, 855.

Colliding with car when latter was derailed, — derailment not negligence *per se*. VII, 868.

Derailement of car, collision caused by, — evidence as to former derailments at other places and under different circumstances not admissible. II, 784.

(For Index to Notes, see *ante*, p. ix.)

VEHICLE — (*Continued*).

Appliances — (*Continued*).

Gong, — driver of vehicle may assume that motorman will sound gong before changing course of the car and attempting to cross path of his team. VIII, 653.

— failure to sound, — negligence question for the jury. III, 572.

— when plaintiff saw car coming, question of sounding gong should not be submitted to jury. I, 509.

— evidence sufficient as to not sounding of gong. I, 509.

Lights, — motorman may assume that plaintiff could see light on car. II, 554.

Headlight, — if deceased saw no headlight he was not as a matter of law guilty of contributory negligence. I, 475.

Collision with trolley pole in street, — negligence of city in permitting obstructions. VI, 163.

Carriage struck by reel of wire rolled by boys, — leaving reel in street while evidence of negligence was not the proximate cause. II, 457.

Ordinances.

Violation of by railway is negligence *per se*. III, 809.

As to required number of employees on car is for protection of vehicles as well as passengers. VII, 770.

Violation of, — violation of an ordinance requiring horses to be hitched while standing does not preclude recovery. II, 59.

Requiring keeping lookout for teams construed. III, 809.

VERDICT. (See *Appeal*; *Trial*.)

General verdict after finding of certain facts held to compel assumption that jury found plaintiff guilty of contributory negligence. III, 173.

Special verdict, — answers expected from jury; specific questions to be submitted in discretion of court. I, 838.

Special verdict establishing negligence of plaintiff will defeat inconsistent general verdict. VIII, 199.

Conflict of general verdict and special findings, — when general verdict will yield. IV, 240.

Court may direct verdict where it would be compelled to set one aside if in opposition to weight of evidence. IV, 306.

Motion for direction is addressed to discretion of court and is not open to exception. IV, 981.

Supported by evidence upon any theory of law, it is not to be reversed. I, 228.

Where evidence was conflicting verdict will not be disturbed on appeal. IV, 567.

Discretion of trial judge in setting aside will not be interfered with by appellate court. IV, 849.

Verdict will be set aside only where no evidence or evidence against it is overwhelming. IV, 1072.

(For Index to Notes, see *ante*, p. ix.)

VERDICT — (*Continued*).

Court not justified in setting aside because jury may have drawn wrong inference. IV, 850.

Findings of jury in case of ejection of passenger held not inconsistent. VIII, 387.

Remarks of court as to closeness of case not presumed to have improperly influenced the jury. I, 375.

Joint defendants, — jury may not bring in verdict against each separately; recovery of one defendant from the other. VII, 176.

VESTIBULE. (*See Appliances; Constitutional Law.*)

VIADUCT. (*See Abutting Owners.*)

VIGILANT WATCH ORDINANCE. (*See Constitutional Law.*)

Duty of motorman under. IV, 654, 660.

Rule as to duty of defendant to keep watch under, — error for court to fail to submit to jury. V, 549.

Motorman must stop at first appearance of danger. IV, 655.

Failure of motorman to comply with, held not negligence on part of the corporation. IV, 445.

Violation is negligence *per se*; acceptance by company not necessary to make binding. IV, 581.

Not applicable when night is dark and foggy and the car without a headlight. I, 475.

Erroneous construction deemed harmless. I, 459.

WANTON NEGLIGENCE. (*See Animals; Child; Damages; Employee; Evidence; Passenger; Pedestrian; Pleading; Speed; Vehicle.*)

WATER TANKS. (*See Appliances.*)

WITNESS. (*See Eminent Domain; Evidence.*)

Bringing action for injuries sustained in same action, — relevancy of questions as to his suit. I, 242.

Physician, witness for plaintiff, may be asked as to amount paid by plaintiff. I, 246.

Impeachment of his own witness by a party when not permitted. I, 394.

Failure to call. VIII, 727.

This book should be returned to
the Library on or before the last date
stamped below.

A fine of five cents a day is incurred
by retaining it beyond the specified
time.

Please return promptly.

HB 3EWO 2



HBI

v.8 .

Street railway reports
annotated

